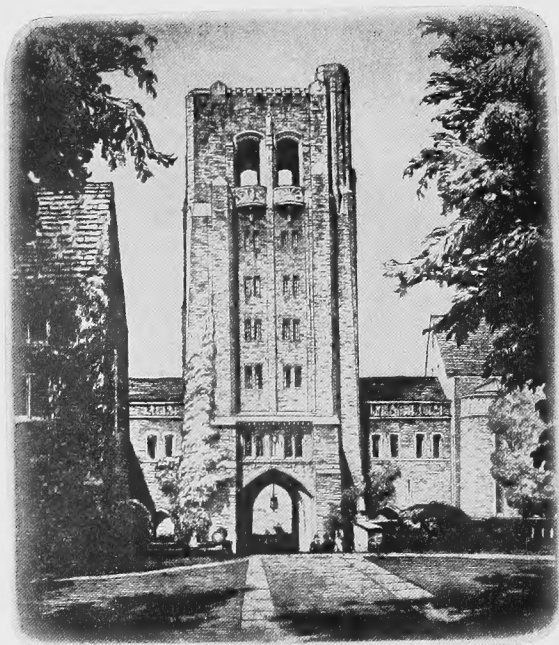




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A BRIEF
FOR
THE TRIAL OF CIVIL ISSUES
BEFORE A JURY

BY AUSTIN ABBOTT

THIRD EDITION BY
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Annotated Constitution of New York

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PREFACE TO THE THIRD EDITION

THE lapse of twelve years since the last preceding edition of this work has made a new edition desirable. The authorities cited in the former edition have in most, though not in all, cases continued controlling, but on a great number of matters later authorities have been added, and these have in many instances extended to new phases or applications of the subjects.

The extent of this expansion is shown by the schemes or analyses at the head of the chapters. Great pains has also been taken to work out more perfectly in these headings a full index of the topics in each chapter. Some chapters have been more than doubled; others, such as chapters 18 and 19, are more than three times as large as they were before. Some portions of the work have also been rearranged to secure a more perfectly logical arrangement of the materials. A new chapter on Special Verdict and Special Questions has been added, though some of the matter had been previously included in other chapters, while the chapters on Control of Trials, on Province of Court and Jury, and on Recording the Verdict and Entering Judgment, are entirely new. In nearly, if not quite, every chapter, much value has been added, covering in the total a very large number of new questions which would make too long a list to particularize here.

The popularity of the former editions of this book was extraordinary, and it is certain that its value in this edition has been very greatly increased.

February, 1912.

PREFACE TO THE FIRST EDITION

While the merits of every case may be a fair field for the contest of opposing opinion, the main rules of practice according to which that contest is to be carried on ought to be well understood and applied with as little difference of opinion as may be. The chief burden under which the business of the profession and the labors of the bench now suffer is the great number of mistrials, and consequent new trials, which result from the imperfect manner in which these rules are understood and applied.

In these pages, which are the outgrowth of briefs I have had occasion to prepare in practice, I have endeavored to state fairly the rules of forensic contest, on points that are frequently so disputed as to make it desirable to be prepared to cite authority at the trial.

I mention, however, only a small proportion of the authorities examined, believing that for the purpose of a brief a few well chosen are more useful than a mass. On questions of chief importance I have, however, given one or more recent authorities from each of a number of states.

Space has not allowed a full statement of the statutes and rules of court of other jurisdictions than New York; but I trust that I have indicated the existence of such statutes in such a way that the intelligent practitioner in any jurisdiction cannot be misled.

In making up a list of Useful Authorities on Evidence (Division XV.), I have not confined myself to stating what I deem to be settled law, deeming it there more useful to index concisely the best authorities, including some debatable points, rather than to take space to state each rule at length.

In these days more good verdicts are set aside, or hopes of verdict frustrated, by errors in regard to whether the case should go to the jury or not, than from any other cause. On the subject of Taking the Case from the Jury (Division XIX.), I have stated the rules which, if I rightly understand the existing law as to New Trials and Appeal, ought to govern our trial courts in disposing of motions for a nonsuit, or to direct a verdict, and demurrers to evidence. I am not aware that these rules are anywhere else shortly and systematically stated, nor have I found it practicable to state them concisely and correctly by following the language of the reports. But they may be seen constantly applied in practice by the ablest judges, and their application is now habitually sustained and enforced with remarkable consistency by the leading appellate courts. They are both reasonable and useful; and, indeed, all that is modern in them is the necessary result of modern changes in the law of evidence and review; and in those states where, as shown by notes appended to the rules, they are not yet fully adopted, a general progress toward their adoption is clearly traceable in the current of decision.

If this little volume serves to facilitate the prompt and correct disposal of business at the circuit, its principal object will be accomplished.

AUSTIN ABBOTT.

71 Broadway, New York,

Aug. 15, 1885.

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BRIEF

—ON—

Jury Trial in Civil Actions.

I.—CONTROL AND REGULATION OF TRIAL; PRESERVATION OF ORDER.

1. General discretion of trial court.
2. Publicity and place of trial.
3. Expedition of trial.
4. Presence of parties or counsel.
5. Presence or exclusion of third persons.

1. General discretion of trial court.

To administer and further justice in the conduct of trials generally, much must be left to the discretion of the trial judge.¹ It is the duty of the judge so to exercise his discretion as that violation of law or grave abuses of justice shall not be accomplished under the forms of law.² Misconduct should be reprobated, but not in a way to prevent a fair presentation and trial of the case.³

¹ *Dictum* in *Wilson v. Johnson*, 51 Fla. 370, 41 So. 395, citing *Abbott*, Trial Brief, Civil Jury Trials, 2d ed. 123; *Chesapeake & O. R. Co. v. Rowsey*, 108 Va. 632, 62 S. E. 363.

² Misconduct of court, see post, chap. XVIII. *Dictum* that causes ought to be heard on their merits where some rule of procedure or practice is not violated. *Pacific Window Glass Co. v. Smith*, 8 Cal. App. 762, 97 Pac. 898; *Goldsmith v. Solomons*, 2 Strobb. L. 296. He should not when the case is *in limine* and the pleadings not in a stage when their sufficiency can be conclusively determined, or when the sufficiency of them has passed unchallenged, direct a verdict which cannot be sustained on the record. *Kelly v. Strouse*, 116 Ga. 872, 43 S. E. 280.

Abbott, Civ. Jur. T.—1.

³ Should reprove wanton attack on witness. *Heffernan v. O'Neill*, 1 Neb. (Unof.) 363, 96 N. W. 244. As where counsel repeatedly and impertinently asked witness if he had not formerly testified untruly. *Scott v. Dow*, 162 Mich. 636, 127 N. W. 712.

If immoderate it might become in itself such judicial misconduct as to vitiate the trial. See post, chap. XVIII., Improper Conduct of Judge. Remark evoked by an impertinent suggestion to court held not error. *Trimmier v. Thomson*, 41 S. C. 125, 19 S. E. 291. Disparaging truthfulness of witness, and immoderately reprimanding him and counsel. *Wheeler v. Wallace*, 53 Mich. 355, 19 N. W. 33. To "use harsh or censorious language to [counsel], in relation to what he may have done in other cases," is improper, but under circumstances of the case it was held harmless. *Friemark v. Rosenkrans*, 81 Wis. 359, 51 N. W. 557. To reprove counsel in an insolent way, disparaging him in the eyes of the jury and embarrassing him in the presentation of the case, is error. *Bennett v. Harris*, 68 Misc. 503, 124 N. Y. Supp. 797.

2. Publicity and place of trial.

The trial must be public and in court.¹

¹ Publicity is not denied by requiring the offering of evidence in a tone not audible to bystanders, it not appearing that any occasion for a bystanders' bill to exceptions existed. *Northrop v. Diggs*, 146 Mo. App. 145, 123 S. W. 954. No error in going to judge's room to exhibit plaintiff's leg to jury in presence of counsel, where the judge treated his room as part of the court room, and remained on the bench, though the door was momentarily closed; but the supreme court, while recognizing the trial court's discretion in such situations, alludes to this as an undesirable practice. *Sheldon v. Wright*, 80 Vt. 298, 67 Atl. 807.

3. Expedition of trial.

The court ought to interfere after full reasonable time has been given to present evidence, arguments, and requests, and deny the right to prolong the trial unduly by repetitions and unnecessary further presentations of the matter.¹

¹ *O'Neil v. Dry Dock, E. B. & B. R. Co.* 129 N. Y. 130, 26 Am. St. Rep. 512, 29 N. E. 84; *Astruc v. Star Co.* 182 Fed. 705. Within the limits of discretion, the court may limit the number of witnesses (see post, chap. VIII., 6), or requests (see post, chap. XXIII., 7). To call a case "trivial," and say that so much time "ought not to have been spent" on it, was error where there was no procrastination. *Zube v. Weber*, 67 Mich. 52, 34 N. W. 264. It was not error to characterize

conduct of counsel as "trifling." *Knapp v. Hauer*, 38 Kan. 430, 16 Pac. 702. But it was held that the mere repetition of motions in a criminal case, supposedly for delay, was not a contempt. *Johnson v. State*, 87 Ark. 45, 18 L.R.A.(N.S.) 619, 112 S. W. 143, 15 A. & E. Ann. Cas. 531.

4. Presence of parties or counsel.

It is not essential that the parties or their counsel be at all times present at the trial, but the right cannot be denied them.¹

¹ Absence of party or counsel as ground for postponement, see post, chap. III., Applications to Postpone. Discretionary to proceed in defendant's absence. *Gaskell v. Cowan*, 14 Misc. 254, 35 N. Y. Supp. 711. Not error for judge to question witness, in absence of counsel, who had opportunity to examine witness later. *Chicago City R. Co. v. Anderson*, 193 Ill. 9, 61 N. E. 999. Not error to refuse to permit party to testify in absence of counsel, who was late, and to proceed without waiting. *Brewer v. National Union Bldg. Asso.* 166 Ill. 221, 46 N. E. 752. But, as against one of several codefendants, submission of evidence taken during his absence, and when as to him the case did not stand for trial, was error. *New York & T. S. S. Co. v. Wright*, — Tex. Civ. App. —, 26 S. W. 106.

Cannot exclude witness who is a party, during time of examination of another witness in his behalf. *McIntosh v. McIntosh*, 79 Mich. 198, 44 N. W. 592. A guardian of a party may not be excluded as an ordinary witness under a rule. *Cottrell v. Cottrell*, 81 Ind. 87. *Seemable* that it is error to conduct a physical examination by the jury out of the presence of the objecting party. *Garvik v. Burlington, C. R. & N. R. Co.* 124 Iowa, 691, 100 N. W. 498.

Absence of plaintiff.—It is not necessary to dismiss when plaintiff fails to appear; defendant may proceed to trial and judgment. *Comstock Castle Stove Co. v. Galland*, 6 Kan. App. 831, 49 Pac. 690. But dismissal is the only proper judgment where the action was for money and there was no counterclaim. *Diment v. Bloom*, 67 Minn. 111, 69 N. W. 700. Nonsuit proper. *Vail v. Wright*, 3 N. J. L. 681.

It is the duty of counsel to be present and in readiness for the trial, and it is only by courtesy that the court sometimes notifies counsel of the actual taking up of the hearing.¹

¹ *Dictum*, that it is optional to call defendant before trial. *Home Protection of North Alabama v. Caldwell*, 85 Ala. 607, 5 So. 338. Not necessary to notify defendant that case would be taken upon pleadings as they then stood (demurrer). *Davis v. Peck*, 12 Colo. App. 259, 55 Pac. 192; *Flournoy v. Munson Bros. Co.* 51 Fla. 198, 41 So. 398. Counsel may be required to impanel a jury, in absence of his

client. *Culley v. Walkeen*, 80 Mich. 443, 45 N. W. 368. Not error to go on to trial in absence of counsel, who relied on the fact that several other cases were ahead of his on the calendar. *Linderman v. Nolan*, 16 Okla. 352, 83 Pac. 796. To a similar effect, see *Lincoln v. Staley*, 32 Neb. 63, 48 N. W. 887; *Kyle v. Chase*, 14 Neb. 528, 16 N. W. 821. The mere refusal of counsel to act further is not within a statute requiring notice to substitute before proceeding with the trial, "when the attorney dies, is removed or suspended, or ceases to act." *McInnes v. Sutton*, 35 Wash. 384, 77 Pac. 736.

Where, however, the order for findings and decree contained a direction to notify parties' counsel, the entry of decree without such notice would be error. *Linville v. Scheeline*, 30 Nev. 106, 93 Pac. 225. Error to take up without notice a cause that has been "passed" for the term, according to usage. *Maloney v. Hunt*, 29 Mo. App. 379.

The case must be at issue on all pleas. *Gunning v. Heron*, 25 Fla. 849, 6 So. 856. It was error to go to trial on an affidavit of defense, in absence of defendant and without formal plea, or order that affidavit stand as a plea. *Ensly v. Wright*, 3 Pa. St. 501.

The right to confront witnesses does not exist as in criminal trials.¹

¹There is no right to confront witnesses as in criminal trials, nor is it a denial of due process to refuse a continuance upon the adverse party's admission of what it is stated an absent witness would testify. *Geary v. Kansas City, O. & S. R. Co.* 138 Mo. 251, 60 Am. St. Rep. 555, 39 S. W. 775.

5. Presence or exclusion of third persons.

Persons other than witnesses under the rule, or those likely to be disorderly or to prevent a fair trial, or those excluded on moral considerations, have a right to be present in court.¹

¹Absence of witness as ground for postponement, see post, chap. II., Applications to Postpone. The court could not exclude the wife and children of plaintiff. *Louisville & N. R. Co. v. Foard*, 104 Ky. 456, 47 S. W. 342. So, the presence of a child with plaintiff, which jury did not know was plaintiff's and which was not referred to in presence of jury, was no cause for new trial. *Merrill v. Tinkler*, 160 Mich. 575, 125 N. W. 717. It is no objection that another judge of the same circuit was present at the trial and consulted with counsel for one of the parties, the jury not being influenced thereby. *Exchange Nat. Bank v. Darrow*, 154 Ill. 107, 39 N. E. 974. It cannot, as an incident to the exclusion of spectators, prohibit the publication of the evidence, although the same may be indecent and prurient. *Re Shortridge*, 99 Cal. 526, 21 L.R.A. 755, 37 Am. St. Rep. 78, 34 Pac. 227.

II.—APPLICATIONS TO POSTPONE.

1. General statement.
2. Necessity for application and order.
3. Discretion of court.
4. Time for application.
5. Notice of application.
6. Who may make application.
7. For matters affecting the cause of action.
 - a. Another suit pending.
 - (1) In general.
 - (2) Proceedings on appeal.
 - b. Settlement pending.
 - c. Garnishment proceedings.
8. For matters of process or bringing in parties.
 - a. Service too recent before term.
 - b. Perfecting or serving process; amendment.
 - c. Serving or bringing in parties.
9. Public excitement or prejudice.
10. For purpose of obtaining jury.
11. For matters pertaining to pleadings or issues.
 - a. Amendment of pleadings.
 - (1) In general.
 - (2) By statute.
 - (3) Effect of previous notice.
 - (4) Failure to ask for postponement.
 - b. Giving defendant time to rejoin.
 - c. Time to make up issues on appearance of new party.
12. For want of preparation.
 - a. By the party.
 - b. Unpreparedness of counsel.
13. For surprise at trial.
 - a. Failure of evidence.
 - b. Misled by witness.
 - c. Surprise by admission of evidence.
 - d. Surprise by exclusion of evidence.
 - e. Waiver of surprise.
14. Mistake of counsel or party.
15. For absence of party.
 - a. General rule.
 - b. Providential or unavoidable causes.
 - c. Illness of party.
 - d. Illness in party's family.

- e. Physical inability of party.
- f. Death of party.
- 16. Absence of party's agent or representative.
- 17. Absence of counsel.
 - a. In general.
 - b. Absence of chief counsel.
 - c. Illness of counsel or member of his family.
 - d. Death of counsel or member of family.
 - e. Other engagements of counsel.
 - f. Attendance on session of legislature.
- 18. Absence of witness.
 - a. In general; neglect to subpoena.
 - b. Opportunity to take deposition.
 - c. Absence of foreign witness.
 - d. Opportunity to procure witness.
- 19. For absence of documentary evidence.
- 20. Seeking discovery and production of papers.
- 21. Diligence in procuring evidence.
 - a. Generally.
 - b. Under statutes.
- 22. Materiality, competency, relevancy, etc., of evidence sought.
- 23. Probability of securing desired evidence.
- 24. Affidavit required to support application.
 - a. Necessity of.
 - b. Sufficiency of.
 - c. Who to make.
 - d. Contents of affidavit.
 - e. Sufficiency of general allegations as to materiality of evidence.
- 25. Opposing the motion.
 - a. Presumptions.
 - b. Counter affidavits.
 - c. Admitting desired facts.
- 26. Imposing conditions.
 - a. Costs.
 - b. Stipulations against abatement.
 - c. Staying another suit.
- 27. Remedy for refusal of application.
 - a. Exception and review of ruling.
 - b. Necessity of exception.
 - c. Preservation of exception.
 - d. Specification of error; sufficiency.
 - e. Necessity that judgment be final.
- 28. Postponement by agreement or consent.
- 29. Postponement by operation of law.
 - a. To next term.
 - b. Extension by legal holiday.

30. Postponements by justices of the peace.

- a. In general.
- b. Failure to specify time and place.
- c. Holding cause open.

1. General statement.

The diversity in laxity and strictness in different courts in applying these rules makes it important to notice that they ought to be administered in view of the consideration that the right of trial by jury involves on the one hand the right to a reasonably prompt trial, and on the other hand the right to reasonable opportunity to get one's evidence in court and to have his witnesses examined there under oath. Hence has arisen the modern rule that, at least after a first postponement, an application for further postponement involves a question of right; and although the grounds are necessarily to some extent discretionary, the exercise of the discretion is generally reviewable, at least by the full bench in the same court, and usually, in case of the inferior state courts, by the appellate court.

2. Necessity for application and order.

A party desiring a postponement should make formal application therefor;¹ but a statement by the court, in response to a request for leave to prepare and file a formal application, that any application will be unavailing, dispenses with the necessity of a written application.²

¹ *Camp v. Morgan*, 81 Ga. 740, 8 S. E. 422; *Dueber Watch Case Mfg. Co. v. Lapp*, 35 Ill. App. 372; *Lester v. Thompson*, 91 Mich. 245, 51 N. W. 893; *Dillard v. Dillard*, 2 Va. Dec. 28, 21 S. E. 669; *Taylor v. Cox*, 32 W. Va. 158, 9 S. E. 70.

² *Nichols v. Headley Grocer Co.* 66 Mo. App. 321.

On court's own motion.—The court may of its own motion continue a cause indefinitely on failure of the parties to appear on the day set for trial.¹

¹ *Kiefer v. Clark County*, 4 Ohio N. P. 282, 7 Ohio S. & C. P. Dec. 24.

3. Discretion of court.

As a general rule the continuance of an action is in the dis-

cretion of the court.¹ The power of the court, however, is not to be exercised arbitrarily, but in such a manner that justice shall not be denied to any litigant.² And where it plainly appears that the court below, in refusing a continuance, acted upon an erroneous notion of the law, and that in consequence of the refusal the party has suffered a serious disadvantage, the decision may be reviewed on appeal.³

¹ *Sims v. Hundley*, 6 How. 1, 12 L. ed. 319; *Barrow v. Hill*, 13 How. 54, 14 L. ed. 48; *Evans v. Bolling*, 5 Ala. 550; *Planters' & M. Bank v. Willis*, 5 Ala. 770; *Watts v. Cohn*, 40 Ark. 114; *Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 161; *Brown v. Nachtrieb*, 6 Colo. 517; *Merrill v. Whitaker*, 42 Ga. 403; *Brooks v. McKinney*, 5 Ill. 309; *Moulder v. Kempff*, 115 Ind. 459, 17 N. E. 906; *Harrison v. Charlton*, 37 Iowa, 134; *Hottenstein v. Conrad*, 9 Kan. 435; *Lillard v. Whittaker*, 3 Bibb, 92; *Casco Nat. Bank v. Shaw*, 79 Me. 376. 1 Am. St. Rep. 319, 10 Atl. 67; *Adams Exp. Co. v. Trego*, 35 Md. 47; *Nebraska Loan & T. Co. v. Hamer*, 40 Neb. 281, 58 N. W. 695; *Riddle v. Gage*, 37 N. H. 519, 75 Am. Dec. 151; *Armstrong v. Wright*, 8 N. C. (1 Hawks) 93; *De Grote v. De Grote*, 175 Pa. 50, 34 Atl. 312; *Becker v. Lebanon & M. Street R. Co.* 9 Pa. Super. Ct. 102; *Wardlaw v. Hammond*, 9 Rich. L. 454; *Hill v. Hill*, 51 S. C. 134, 28 S. E. 309; *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780. In the following cases the denial of a continuance was sustained: *Hartford F. Ins. Co. v. Hammond*, 41 Colo. 323, 92 Pac. 686 (attorney too ill to try case); *Abrook v. Ellis*, 6 Cal. App. 440, 92 Pac. 396 (nonreturn of deposition); *Southern R. Co. v. Miller*, 3 Ga. App. 410, 59 S. E. 1115 (general counsel present, local counsel absent); *Haines v. Thompson*, 129 Ill. App. 436 (proposed testimony incompetent and immaterial); *Cannon v. Dean*, 80 S. C. 557, 61 S. E. 1012 (sick witness, certificate presented while judge was charging jury).

² *Hensley v. Tucker*, 10 Ark. 527; *Harrod v. Hutchinson*, 32 Ky. L. Rep. 3, 105 S. W. 365.

³ *Maynard v. Cleveland*, 76 Ga. 52.

4. Time for application.

An application to postpone, made after the applicant has announced ready for trial¹ or during trial,² will not be entertained, unless for causes arising at trial.³ And an application not filed within the time specified by rule of court, without good cause shown for the delay, is properly refused.⁴

¹ *Hinkle v. Story*, 96 Ga. 776, 22 S. E. 334.

- ² Leavitt v. Kennicott, 54 Ill. App. 633; Knauber v. Watson, 50 Kan. 702, 32 Pac. 349.
- ³ A continuance on the ground of surprise must be asked for at the time of the alleged surprise. Hughes v. Richter, 161 Ill. 409, 43 N. E. 1066. If not, the court in its discretion may refuse it. Winn v. Reed, 61 Mo. App. 621. See also Garrett v. Wood, 24 App. Div. 620, 48 N. Y. Supp. 1002. For postponement for causes arising at trial, see post, § 13.
- ⁴ Under Michigan court rule 22, prohibiting hearing of applications to postpone made after the first day of the term, an application made the second week of the term will be denied in the absence of excuse shown for the delay. Schurtz v. Kelley, 119 Mich. 383, 78 N. W. 332.

In Illinois, if plaintiff fails to file a statement of account sued on ten days before the term, defendant is entitled to either continuance or rule on plaintiff to file the statement; but after pleading, defendant cannot raise the objection at trial and also demand a continuance.¹ And a continuance asked because plaintiff failed to file a copy of the account sued on ten days before term was held to be properly refused, where an account was filed, though not so detailed and itemized as defendant was entitled to, after which defendant obtained an order for a bill of particulars, under which a detailed statement was filed.²

- ¹ Dunker v. Schlotfeldt, 49 Ill. App. 652 (after plea in bar). See also Teeter v. Poe, 48 Ill. App. 158.
- ² Coffeen Coal & C. Co. v. Barry, 56 Ill. App. 587.

5. Notice of application.

A party intending to apply for postponement must notify his adversary of such intention at the earliest opportunity.¹

- ¹ Gaynor v. Crandall, 44 Ill. App. 511.

6. Who may make application.

An application by a party as to whom the case has been dismissed will not be entertained.¹

- ¹ Thus, in replevin against an attaching creditor and constable, an application to postpone by the attaching creditor after dismissal of the case as to him will be denied. Burgwald v. Donelson, 2 Kan. App. 301, 43 Pac. 100.

7. For matters affecting the cause of action.

a. Another suit pending. (1) *In general.*—A continuance is proper where the facts show that justice requires that the case shall await the result of another suit between the parties.¹ But not where the parties are not the same,² and the result of the other suit can in no way affect the suit sought to be postponed;³ nor where the court in which the other suit is pending expressly refuses to assume jurisdiction thereof, and the jurisdiction of the court over the cause sought to be postponed is unquestioned.⁴ The application is, however, addressed to the discretion of the court.⁵

¹ *Clark v. Clough*, 62 N. H. 693; *E. F. Kirwan Mfg. Co. v. Truxton*, 1 Penn. (Del.) 409, 42 Atl. 988. As, where the judgment in the other suit would operate as a bar or estoppel to the action sought to be continued. *Standard Implement Co. v. Stevens*, 51 Kan. 530, 33 Pac. 366. Or the other suit is pleadable in abatement. *Becker v. Lebanon & M. Street R. Co.* 9 Pa. Super. Ct. 102. And in *Latimer v. Latimer*, 42 S. C. 205, 20 S. E. 159, it was held that the trial court might, on motion for continuance, hear and consider, as ground for the motion, an order previously granted in another proceeding not yet finally determined, which might materially affect the judgment in the pending action, though it was not set up in the pleadings.

The contrary rule, however, was announced in *Peters v. Banta*, 120 Ind. 416, 22 N. E. 95; but the court suggested that on a proper application for stay of proceedings, a different question would be presented.

² *Cates v. Mayes*, — Tex. —, 12 S. W. 51.

³ *Ft. Dodge v. Minneapolis & St. L. R. Co.* 87 Iowa, 389, 54 N. W. 243.

⁴ *Caledonia Ins. Co. v. Wenar*, — Tex. Civ. App. —, 34 S. W. 385. And refusal to postpone for this reason is not a refusal to give full faith and credit to judicial proceedings of another state, within the prohibition of U. S. Const. art. 4, §§ 1, 2.

⁵ See *supra*, § 3.

(2) *Proceedings on appeal.*—It is no ground for a continuance of a case that an appeal has been taken in another case between the parties, which is still pending.¹ And the institution of proceedings in error to review order for new trial in the supreme court does not, of itself, operate to suspend further proceedings in the case in the lower court, or entitle plaintiff in

error, as matter of right, to continuance, until the proceedings in error are disposed of.² So, it is not error to deny plaintiff's general request to continue the action to await the result of an intended appeal from an order sustaining exceptions to interrogatories which he sought to attach to his answer to his petition, even conceding that an appeal would lie from such an order.³ The pendency of an attempt to review by error proceedings an order which is not final furnishes no reason for any delay in the trial of the cause on its merits.⁴ And an allegation that another action was pending on appeal between one of the parties and third persons, which involved questions the decision of which, it was claimed, would be decisive of the questions raised in the case in which the continuance was asked, was held no sufficient ground for a continuance.⁵

The trial courts, however, have ample power to grant a continuance where it is apparent that injustice may be done by proceeding with a case pending an appeal in another case between the same parties, judgment in which is sought to be proved as a bar or estoppel.⁶

¹ *Peters v. Banta*, 120 Ind. 416, 22 N. E. 95. The court in this case said that, had a proper application been made for a stay of proceedings, a different question would have been before it.

² *Topeka v. Smelser*, 5 Kan. App. 95, 48 Pac. 874.

³ *Theis v. Chicago & N. W. R. Co.* 107 Iowa, 522, 78 N. W. 199.

⁴ *Doolittle v. American Nat. Bank*, 58 Neb. 454, 78 N. W. 926.

⁵ *Coates v. Mayes*, — Tex. —, 12 S. W. 51.

Contra, *E. F. Kirwan Mfg. Co. v. Truxton*, 1 Penn. (Del.) 409, 42 Atl. 988.

⁶ *Willard v. Ostrander*, 51 Kan. 481, 37 Am. St. Rep. 294, 32 Pac. 1092. The court in this case said: "It would seem to us where an appeal . . . has been taken in good faith and a sufficient bond to stay execution has been given, that, if the introduction of a judgment in another case would have the effect, as in the case now before us, to permit the party holding the judgment, through the medium of another action, to collect that judgment, the trial court should always . . . continue the trial until after the case pending here is determined. Only in this way can full justice be done." This case was followed in *Standard Implement Co. v. Stevens*, 51 Kan. 530, 33 Pac. 366.

b. Settlement pending.—Postponement of a cause, because

of a pending proposition of settlement, after two previous postponements for the same reason, is properly refused where the court stated at the last preceding postponement that the case would not be again postponed on that ground, and no other ground is assigned.¹

¹ Woodward v. Burch, 105 Ga. 484, 30 S. E. 730.

c. Garnishment proceedings.—Proceedings in garnishment may be postponed for final disposition until the termination of a contract under which rights and interest will accrue to the judgment debtor.¹

And in an action of assumpsit where the defendant pleaded that, before the service of the writ upon him, he had been summoned as trustee of the plaintiff, and that the trustee process was still pending, this was held good ground for a continuance.² But where plaintiff in a debt action recovered judgment and defendant appealed, it was held that the case would not be continued, on defendant's motion, for the reason that the debt, if any was due, had been attached by trustee process; the court saying that the case should at all events proceed until the rights of the parties were finally ascertained, and that it would then be time to consider whether any delay was necessary on account of the pendency of the other proceeding.³

¹ J. A. Fay & E. Co. v. Ouachita Excelsior Saw & P. Mills, 50 La. Ann. 205, 23 So. 312.

² Winthrop v. Carlton, 8 Mass. 456.

³ Wilson v. Rutland & A. F. Ins. Co. 19 Vt. 177.

But in Drake v. Catlin, 18 Wash. 316, 51 Pac. 396, the right to continue garnishment proceedings until the expiration of a lease to the garnishee of household furniture was denied; but under the statute there was no right to garnish such chattels.

8. For matters of process or bringing in parties.

a. Service too recent before term.—Some statutes provide that a cause must be continued where service of summons is not perfected a sufficient length of time before the return day or term for the cause to be ripe for trial.¹

¹ Thus, a Colorado statute provides that on notice by publication, if the

first publication is not sixty days before the day named in the summons the cause must be continued to the next term. *Sloan v. Strickler*, 12 Colo. 179, 20 Pac. 611. But this does not require a continuance to a third term because there were less than sixty days intervening between the issuance of the summons and the first day of the second term. *Ibid*.

b. Perfecting or serving process; amendment.—Defendant is not entitled to a postponement because of an amendment of the return to show valid service of process, allowed on the same day on which the cause had been by consent previously set for trial.¹

¹ *Atlantic & D. R. Co. v. Peake*, 87 Va. 130, 12 S. E. 348.

c. Serving or bringing in parties.—The trial court may in its discretion permit such continuances as may appear to be reasonably necessary to bring in defendants not served,¹ or to bring in as necessary parties persons not previously named as such;² but not to allow disinterested persons to be made parties.³

¹ Thus, in a case where judgment must be against all the defendants or none. *Simpson v. Watson*, 15 Mo. App. 425. This was a case on *scire facias* to revive a judgment, and it was held that because the writ must pursue the nature of the judgment, which was joint, the *scire facias* must also be joint, and that therefore a continuance to serve one of the defendants was proper, notwithstanding the statutes provide that, where there are several defendants, some of whom do not appear or are not summoned, plaintiff may dismiss as to those not served, and proceed against the others, or continue the cause to bring in the others. But in *Julius v. Callahan*, 63 Minn. 154, 65 N. W. 267, an action by a subcontractor to enforce a mechanic's lien, the original contractors, who were jointly liable, were impleaded as defendants, but only one of them served; and it was held not error to deny a continuance to serve the other because, under the statute, judgment could be rendered against both of them, enforceable against their joint property and the separate property of the one served.

And in *Paine v. Aldrich*, 133 N. Y. 544, 30 N. E. 725, it is held that the postponement of the trial of issues between plaintiff and one defendant until the other defendants have been served and their time to plead has expired rests in the discretion of the trial court, and will not be reviewed on appeal.

² Thus, a sheriff sued for damages for an official act for which he has taken an indemnifying bond is entitled to a continuance for one term to bring in as parties the makers of the bond. *Rains v. Herring*.

68 Tex. 468, 5 S. W. 369, holding refusal error after applicant has brought himself strictly within the statute providing for such a continuance.

But error, if any, in refusing the application of defendant in an action to foreclose a vendor's lien, to enable him to bring in the sheriff and his sureties, to recover damages against them for the wrongful levy of a writ of sequestration, was waived where he afterward withdrew his claim for such damages, and announced that he would press that claim in a separate suit, and did so. *Robertson v. Parish*, — Tex. Civ. App. —, 39 S. W. 646.

³ *Chicago, St. L. & W. R. Co. v. Gates*, 120 Ill. 86, 11 N. E. 527.

9. Public excitement or prejudice.

Ordinarily, public excitement or prejudice is not deemed sufficient ground for postponement, where the statute authorizes a party to ascertain the state of mind of the juror by examining him preliminary to challenge,¹ or allows the party a change of venue.²

¹ *Courier-Journal Co. v. Sallee*, 20 Ky. L. Rep. 634, 47 S. W. 226.

² *State v. Hawkins*, 18 Or. 477, 23 Pac. 475; *Joyce v. Com.* 78 Va. 287.

10. For purpose of obtaining jury.

The right of trial by a jury is good ground for postponing the trial of a cause, if the applicant has fully complied with the law entitling him to a jury, and a jury is not available when the trial is called.¹

¹ Thus in *Burrows v. Rust*, — Tex. Civ. App. —, 44 S. W. 1019, where the parties had not announced ready when the jury were in attendance, and the court had not then required trial, it was held that upon the discharge of the jury the cause was continued by operation of law, and that denial of a party's demand for continuance in order to preserve his right of jury trial after he had paid the required jury fee, and forcing him to a trial at that term without a jury, was reversible error. But where the cause had been set for trial by the parties themselves for a day after the discharge of the jury for the term, this ground was not available. *Cole v. Terrell*, 71 Tex. 549, 9 S. W. 668.

And the trial court may, on disability of a juror, order an adjournment and continuance of a case which in any event cannot be concluded at the present term, until a day certain of the next term, under an Indiana statute providing for continuance of the court's sitting where a case is progressing at the expiration of a term fixed by law. *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545, 38 N. E. 208.

To fill the panel.—Adjourning a trial over one day to permit completion of the jury from the regular panel, rather than from talesmen, is neither an abuse of discretion nor a violation of law.¹

¹ *Cook v. Fogarty*, 103 Iowa, 500, 39 L.R.A. 488, 72 N. W. 677.

11. For matters pertaining to pleadings or issues.

a. Amendment of pleadings. (1) *In general.*—Amendment of a pleading or filing a substituted or supplemental pleading at trial is not sufficient ground for postponement unless it becomes necessary in order to promote the ends of justice and secure a fair trial of the issues.¹ So, an amendment which merely supplies formal parts of the pleading, without in any manner affecting the issues, or which conforms it to the proofs or to the facts,² or one which raises immaterial issues,³ will not demand a postponement. Nor will an amendment justify postponement if in fact there is no surprise and the application is for delay only.⁴ Otherwise, however, of an amendment which materially changes the issues or raises entirely new ones.⁵

And amendment may require continuance if adverse party shows surprise and absence of material testimony.⁶ And the plaintiff cannot be forced to trial on the day a supplemental answer is filed.⁷

¹ *Beshoar v. Robards*, 8 Colo. App. 173, 45 Pac. 280; *Atlanta Land & Loan Co. v. Haile*, 106 Ga. 498, 32 S. E. 606; *Barnes v. Hekla F. Ins. Co.* 75 Iowa, 11, 9 Am. St. Rep. 450, 39 N. W. 122; *Colhoun v. Crawford*, 50 Mo. 458; *Pifer v. Stanley*, 57 Mo. App. 516; *Rosenberg v. Third Ave. R. Co.* 47 App. Div. 323, 61 N. Y. Supp. 1052.

As a trial amendment praying for the recovery of interest on the interest-bearing notes sued on and offered in evidence, but which was not asked in the original petition. *Morrison v. Morrison*, 102 Ga. 170, 29 S. E. 125.

Or additional reply filed at the trial, where the material facts pleaded therein were in issue under the original. *Magnuson v. Billings*, 152 Ind. 177, 52 N. E. 803.

The application, however, is addressed to the discretion of the trial court. *Sparks Improv. Co. v. Jones*, 4 Ga. App. 61, 60 S. E. 810; *Central Bkg. & T. Co. v. Pusey*, 22 S. D. 223, 116 N. W. 1126; *Alamo F. Ins. Co. v. Schacklett*, — Tex. Civ. App. —, 26 S. W. 630; *International & G. N. R. Co. v. Howell*, 101 Tex. 603, 111 S. W. 142.

See also *Georgia. F. & A. R. Co. v. Sasser*, 4 Ga. App. 276, 61 S. E. 505.

And a refusal of time to meet averments in an amended statement and holding counsel to a choice between a general continuance and an immediate trial, after the cause had already been manipulated on the list to suit counsel's convenience, are not reversible error. *Clow v. Pittsburgh Traction Co.* 158 Pa. 410, 27 Atl. 1004.

² *Barnes v. Scott*, 29 Fla. 285, 11 So. 48; *State ex rel. Rogers v. Gage*, 52 Mo. App. 464; *Western Brewery Co. v. Meredith*, 166 Ill. 306, 46 N. E. 720; *Calumet Land Co. v. Perry*, 86 Ill. App. 378; *Union P. R. Co. v. Motzner*, 8 Kan. App. 431, 55 Pac. 670; *Milliken v. St. Clair*, 136 Mich. 250, 99 N. W. 7. Especially where issues were joined without asking a postponement at the time, and the affidavit on the subsequent motion shows merely affiant's opinion that he has a just defense to part of the cause of action which he can, if given time, present and sustain, but the extent of which is not disclosed. *Bank of Ravenswood v. Hamilton*, 43 W. Va. 75, 27 S. E. 296.

Thus, an amendment of a declaration merely to conform to proofs will not justify a postponement, where there is no surprise and all the witnesses who could testify to the matters alleged were before the court and had already been examined in relation thereto. *Mack v. Porter*, 25 U. S. App. 595, 72 Fed. Rep. 236, 18 C. C. A. 527. See also *Crane Lumber Co. v. Bellows*, 116 Mich. 304, 74 N. W. 481. But it simply leaves the application discretionary with the trial court. *Harvey v. Parkersburg Ins. Co.* 37 W. Va. 272, 16 S. E. 580. And refusal in such case is not reversible error where the record shows that the cause was in fact tried on the theory disclosed by the amendment. *George v. Swafford*, 75 Iowa, 491, 39 N. W. 804. See also *San Antonio & A. P. R. Co. v. Liitke*, — Tex. Civ. App. —, 26 S. W. 248.

So, also, of an amendment of a petition showing that the amount originally declared on as due upon a promissory note is due on settlement, where no new evidence in chief is introduced by plaintiff and defendant is evidently not surprised. *Parsons Water Co. v. Hill*, 46 Kan. 145, 26 Pac. 412. Or an amendment whose purpose is merely to clarify ambiguous language of the pleading, so as to remove an objection to the introduction of evidence under it. *Ellen v. Lewison*, 88 Cal. 253, 26 Pac. 109.

Or an amendment correcting a mistake in defendant's name, where service was acknowledged in defendant's proper name. *Chattanooga, R. & C. R. Co. v. Jackson*, 86 Ga. 676, 13 S. E. 109.

So, also, of a substituted petition, though it changes the issues, where the count therein pleading a new cause of action is withdrawn, leaving substantially the same cause of action as that set out in the original petition. *Skrable v. Pryne*, 93 Iowa, 691, 62 N. W. 21.

- ³ *Lamb v. Beaumont Temperance Hall Co.* 2 Tex. Civ. App. 289, 21 S. W. 713; *Lindsley v. Parks*, 17 Tex. Civ. App. 527, 43 S. W. 277.
- ⁴ *Beham v. Ghio*, 75 Tex. 87, 12 S. W. 996; *Atlanta Cotton-Seed Oil Mills v. Coffey*, 80 Ga. 145, 4 S. E. 759; *Rosenberg v. Third Ave. R. Co.* 47 App. Div. 323, 61 N. Y. Supp. 1052.
- ⁵ *Wheaton v. Ansley*, 71 Ga. 35; *Downey v. O'Donnell*, 92 Ill. 559; *Danley v. Scanlon*, 116 Ind. 8, 17 N. E. 158; *Tourtlot v. Tourtelot*, 4 Mass. 506; *Lester v. Thompson*, 91 Mich. 245, 51 N. W. 893; *Vicksburg, S. & P. R. Co. v. Stocking*, — Miss. —, 10 So. 480; *Deshong v. Deshong*, 186 Pa. 227, 65 Am. St. Rep. 855, 40 Atl. 402; *Galveston, H. & S. A. R. Co. v. Smith*, 9 Tex. Civ. App. 450, 29 S. W. 186.
- As where defendant, in an action to restrain the enforcement of a void judgment, a few minutes before the case is called for trial pleads in reconvention the original cause of action. *Gulf, C. & S. F. R. Co. v. Schneider*, — Tex. Civ. App. —, 28 S. W. 260.
- And refusal of postponement asked by defendant because of a material amendment to plaintiff's declaration, after all evidence was in and final arguments made, is error. *Chicago & N. W. R. Co. v. Davis*, 78 Ill. App. 58. Or because of an alteration of a declaration claiming damages to one lot of land, the number of which is not given, so as to make it apply to four designated lots of land, of which defendant had no knowledge previous to the calling of the case for trial. *Central R. & Bkg. Co. v. Jackson*, 94 Ga. 640, 21 S. E. 845.
- ⁶ *Marr v. Rhodes*, 131 Cal. 267, 63 Pac. 364; *Denver & R. G. R. Co. v. Loveland*, 16 Colo. App. 146, 64 Pac. 381; *Eldridge v. Young America & C. Consol. Min. Co.* 27 Wash. 297, 67 Pac. 703.
- ⁷ *Sparks v. Green*, 69 S. C. 198, 48 S. E. 61.

(2) *By statute*.—In some states amendment of a pleading is good ground for postponement if the trial court is satisfied, by affidavit or otherwise, as required, that the opposite party is taken by surprise and cannot be ready for trial in consequence thereof,¹ and that the purpose of the application is not delay.² But a strict compliance with those statutes is a prerequisite.³

¹ *Pifer v. Stanley*, 57 Mo. App. 516; Mo. Rev. Stat. 1889, § 2128.

So in Illinois by the present statute, although prior to its passage it was conclusively presumed, under the common-law rule then prevailing, that defendant was surprised and unprepared for trial whenever the declaration was amended in any material particular, and if defendant desired he was entitled to continuance as matter of right at plaintiff's costs. *Chicago & E. I. R. Co. v. Goyette*, 32 Ill. App. 574.

A dismissal by amendment at a previous term as to one defendant, be
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tween whom and the others there is no interest, is not an amendment, within the meaning of an Alabama statute allowing a continuance as matter of right for an amendment at hearing to bill or answer, to the party against whom it is allowed. *Elyton Land Co. v. Denny*, 108 Ala. 553, 18 So. 561.

So, an amendment describing defendant as "surviving" executor, the original complaint designating him as "executor" simply, is as to form only, and does not entitle defendant to a continuance under a Florida statute allowing a continuance for an amendment in matter of substance. *Barnes v. Scott*, 29 Fla. 285, 11 So. 48. And see note 2, preceding section.

² *Atlanta Cotton-Seed Oil Mills v. Coffey*, 80 Ga. 145, 4 S. E. 759; Ga. Code, § 3521. And see note 4, preceding section.

³ *Clause v. Bullock Printing Press Co.* 20 Ill. App. 113, affirmed in 118 Ill. 612, 9 N. E. 201. And a dismissal of certain counts of the declaration, even though it be treated as an amendment, is insufficient without the required statutory showing. *Ibid.*

So, in Georgia, defendant's application, based on surprise at an amendment to the declaration, is properly refused where he does not state that he is less prepared for trial than he would have been if the amendment had not been made, and how, and that such surprise was not claimed for the purpose of delay, as required by the Georgia Code. *Atlanta Cotton-Seed Oil Mills v. Coffey*, 80 Ga. 145, 4 S. E. 759.

But an amendment to a pleading does not alone authorize a continuance; the applicant must show some good reason why he cannot safely proceed to trial.¹

¹ *Foote v. Burlington Gaslight Co.* 103 Iowa, 576, 72 N. W. 755; *Clark v. Ellithorpe*, 7 Kan. App. 337, 51 Pac. 940; *Wolfe v. Johnson*, 152 Ill. 280, 38 N. E. 886.

He must show that he is rendered less ready for trial thereby. *Atlanta Land & Loan Co. v. Haile*, 106 Ga. 498, 32 S. E. 606. And merely stating a feeling of surprise, and that he can make a complete and absolute defense to the cause of action if given reasonable opportunity to prepare, will not entitle defendant to a postponement for an amendment by plaintiff,—especially where the amendment consisted merely of striking out one of the grounds of damages alleged and changing the gross amount claimed. *Franklin v. Krum*, 171 Ill. 378.

(3) *Effect of previous notice.*—Surprise cannot be claimed because of an amendment, where the applicant has had sufficient

previous notice of it and the issue raised by it to put him on inquiry and prepare to meet it.¹

¹ **As**, where a cause of action set forth with particularity in an amended pleading was mentioned in such manner in the original as to call his attention thereto and give him notice that plaintiff relied on it. *Texas & P. R. Co. v. Neal*, — Tex. Civ. App. —, 33 S. W. 693. Or where the same parties had been parties to another action tried but a few months before, in which practically the same issues as those raised by the amendment were involved, and at which much of the evidence adduced had relation thereto. *Jordan v. Schuerman*, 6 Ariz. 79, 53 Pac. 579.

And defendant cannot claim surprise at a trial amendment claiming damages for injuries not alleged in the original pleadings, where plaintiff's depositions, filed in court over three months, showed that damages would be claimed for those injuries. *Gulf, C. & S. F. R. Co. v. Brown*, 16 Tex. Civ. App. 93, 40 S. W. 80. So of an amendment filed two days before trial, changing the date of the injuries for which damages are sought, where the date fixed by the amendment, which was the correct one, was fixed in depositions taken long before trial, in the taking of which defendant participated. *Texas & P. R. Co. v. Cornelius*, 10 Tex. Civ. App. 125, 30 S. W. 720.

So, service of a copy of an amendment on him ten months previous to the trial will overcome a claim of surprise, although the original was not filed until three days before trial. *Southern Bell Teleph. & Teleg. Co. v. Jordan*, 87 Ga. 69, 13 S. E. 202.

But plaintiff in certiorari should be granted a continuance where, after admitting the truth of the answer, it has been amended without notice to him. *Phillips v. Atlanta*, 79 Ga. 510, 3 S. E. 431. And in *Sapp v. Aiken*, 68 Iowa, 699, 28 N. W. 24, refusal on the ground that the party filing the amendment had notified his adversary of the substance thereof in time to prepare to meet it was held error, because it was necessary to prepare to meet only those issues raised by the pleadings.

For a discussion of other matter arising at trial operating to surprise a party, entitling him to a continuance, see *infra*, § 13.

(4) *Failure to ask for postponement*.—Failure to ask for a postponement on the court's allowing an amendment to be filed *instantly*, and proceeding with the trial, will prevent the subsequent assignment of such action as error.¹

¹ *Manners v. Fraser*, 6 Colo. App. 21, 39 Pac. 889; *Knefel v. Flanner*, 166 Ill. 147, 46 N. E. 762; *Taylor v. Cox*, 32 W. Va. 148, 9 S. E. 70.

And a defendant who, instead of asking a postponement because he was

not given notice of the filing of an amendment, excepts to the introduction of any evidence thereunder, and then withdraws from the case and refuses to file an answer on the ground that he is not ready for trial, cannot appeal for errors alleged to have been committed at trial. *Baker v. Kansas City, St. J. & C. B. R. Co.* 107 Mo. 230, 17 S. W. 816.

b. Giving defendant time to rejoin.—A defendant whose motion to require plaintiff to make his reply more specific is overruled on the next to the last day of the term is entitled to time to rejoin and to take proof in support of his defense.¹

¹ *Moreland v. Citizens' Sav. Bank*, 16 Ky. L. Rep. 860, 30 S. W. 19.

c. Time to make up issues on appearance of new party.—A defendant as to whom the issues are joined and the cause set for trial cannot demand a continuance to make up issues as to another defendant not served, who voluntarily appears.¹

¹ *National Bank of Commerce v. Galland*, 14 Wash. 502, 45 Pac. 35.

Especially where the claims of the new parties, who are brought in while the trial is in progress, are undisputed. *Burns v. Beck & G. Hardware Co.* 83 Ga. 471, 10 S. E. 121.

12. For want of preparation.

a. By the party.—A party who has been diligent in his efforts to be ready for trial but is defeated by circumstances beyond his control is, if no unreasonable delay has occurred, entitled to a reasonable opportunity for presenting his case, and postponement should be granted if necessary for that purpose;¹ and if he is not ready for trial when his case is called he should, in order to save his rights, move to postpone, stating fully his grounds therefor.² But in a case of long pendency, an applicant, though it is his first application, is held to the most rigid requirement of the statutes.³

¹ *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817; *E. F. Kirwan Mfg. Co. v. Truxton*, 1 Penn. (Del.) 409, 42 Atl. 988. As, when his failure to be ready is due to the unexpected continuance of another cause set for trial the same day, the outcome of which, it was anticipated, would determine his own cause, although he is to some extent negligent. *Re Davis*, 15 Mont. 347, 39 Pac. 292. But plaintiff's application for time to file an amended complaint, and to procure evidence

rendered necessary by the amendment, is properly denied, where the cause has already been twice tried and the court is not informed of the nature of the desired amendments or that plaintiff is unable to establish those averments without additional evidence. *Schultz v. McLean*, 109 Cal. 437, 42 Pac. 557.

² *Lincoln v. Staley*, 32 Neb. 63, 48 N. W. 887.

³ *Watson v. Blymer Mfg. Co.* 66 Tex. 558, 2 S. W. 353.

b. Unpreparedness of counsel.—A party whose counsel, though diligent, is, for reasons beyond his control, unprepared for trial, is entitled to postponement.¹ Otherwise, however, of a simple case requiring but inconsiderable time for preparation.²

¹ *Jaffe v. Lilienthal*, 101 Cal. 175, 35 Pac. 636 (sudden illness of client).

² *Glaeser v. St. Paul*, 67 Minn. 368, 69 N. W. 1101.

But unpreparedness of counsel because of his being recently retained will not authorize postponement if the client, though having sufficient time and reasonable opportunity, has not been diligent in securing counsel;¹ or where counsel could, by reasonable diligence, have prepared for trial.²

¹ Denial of the application is not an abuse of discretion in such a case. *Gunn v. Gunn*, 95 Ga. 439, 22 S. E. 552; *Texas, S. F. & N. R. Co. v. Saxton*, 7 N. M. 302, 34 Pac. 532. And especially where the hour of trial has been already reset to an hour fixed by the applicant himself. *Barton v. Mabaska County Dist. Ct.* 90 Iowa, 742, 57 N. W. 611. Or there is no showing why former counsel does not appear. *Maloney v. Traverse*, 87 Iowa, 306, 54 N. W. 155.

But a party whose counsel informs him on the day of the application that he cannot try the case, and who immediately employs new counsel, is entitled to postponement,—especially where it appears that he has a meritorious case which would be materially prejudiced by being forced to immediate trial. *Allen v. Pollad*, 15 Ky. L. Rep. 52, 22 S. W. 436.

² *Pennsylvania Co. v. Rudel*, 100 Ill. 603.

13. For surprise at trial.

a. Failure of evidence.—Failure of evidence, due to the absence of plaintiff's only witness by whom he could defeat a defense set up the day before the application to postpone was

made, and which took him by surprise, is ground for postponement.¹

¹ *Alt v. Groschlose*, 61 Mo. App. 409 (error to refuse).

b. Misled by witness.—So, too, where the applicant has been, honestly and without indiscretion on his part, misled by a witness to rely on his testimony and is surprised by the witness's testifying contrary to what was expected; ¹ but the testimony must be material.²

¹ *Maynard v. Cleveland*, 76 Ga. 52. And it is error of law to hold that the applicant's showing for a continuance, though otherwise satisfactory, is met and answered by the mere fact that the witness is called by his adversary, and not by himself. *Ibid.*

But a claim that the adverse party testified to a state of facts different from that which it was supposed he would testify to is insufficient. *Butt v. Carson*, 5 Okla. 160, 48 Pac. 182.

² *Dempsey v. Taylor*, 4 Tex. Civ. App. 126, 23 S. W. 220.

c. Surprise by admission of evidence.—Surprise predicated on the admission of evidence is good ground for postponement when it is irrelevant to any issue of law or fact joined or tendered by the party offering it; ¹ or contrary to the other party's understanding of a ruling on a former motion, by which he understood it was to be excluded.² But not when the applicant is fairly apprised by his adversary's pleadings of the character of the evidence which he may expect will be offered, and shows no reason for being unprepared to meet it; ³ nor where the evidence admitted requires no new evidence to meet it; ⁴ and nothing but delay would be accomplished by the postponement.

¹ *Garrett v. Carlton*, 65 Miss. 188, 3 So. 376; *Jourdan v. Healey*, 46 N. Y. S. R. 198, 19 N. Y. Supp. 240.

² *Colorado Midland R. Co. v. Bowles*, 14 Colo. 85, 23 Pac. 467.

³ *Dueber Watch Case Mfg. Co. v. Lapp*, 35 Ill. App. 372; *Violet v. Rose*, 39 Neb. 660, 58 N. W. 216. Especially where there is no showing that the testimony is false or can be rebutted. *Gidionsen v. Union Depot R. Co.* 129 Mo. 392, 31 S. W. 800.

"It is a condition precedent to the relief sought, however, that the applicant should himself be blameless." *Gidionsen v. Union Depot R. Co.* 129 Mo. 392, 31 S. W. 800.

* Thus, a supplemental account filed by executors in a proceeding for distribution, before the jury is impaneled, the items of which are merely a continuation of those in the original account. *Shiner v. Shiner*, 14 Tex. Civ. App. 489, 40 S. W. 439.

The admission of incompetent evidence and its subsequent withdrawal before argument furnishes in itself no ground for postponement.¹

¹ Especially where the party asking its withdrawal, who is also the applicant for the postponement, is not prejudiced by it. *Rathgebe v. Pennsylvania R. Co.* 179 Pa. 31, 36 Atl. 160.

d. Surprise by exclusion of evidence.—The exclusion of evidence because incompetent does not entitle to a postponement on the ground of surprise.¹ Otherwise, however, where it is excluded on objection contrary to agreement of counsel.² But the application is discretionary with the trial court.³

¹ *French v. Groesbeck*, 8 Tex. Civ. App. 19, 27 S. W. 43.

Otherwise, when the incompetency results from a defect which can be cured without materially delaying the trial. *Mattfeld v. Huntington*, 17 Tex. Civ. App. 716, 43 S. W. 53. Though granting the application is not sufficient to require a reversal of a judgment rendered at a subsequent term, on full trial on the merits. *Daniels v. Creekmore*, 7 Tex. Civ. App. 573, 27 S. W. 148.

² *Cherokee & P. Coal & Min. Co. v. Wilson*, 47 Kan. 460, 28 Pac. 178. See also *Texas & P. R. Co. v. Boggs*, — Tex. Civ. App. —, 30 S. W. 1089.

³ *French v. Groesbeck*, 8 Tex. Civ. App. 19, 27 S. W. 43; *Wadsworth Poor School v. Orr*, 33 S. C. 273, 11 S. E. 830 (refusing to review the exercise of that discretion).

e. Waiver of surprise.—A party claiming to be surprised must move for a continuance¹ at the earliest practicable moment; ² and failure to do so is to waive the surprise.³

¹ *Collins v. Valleau*, 79 Iowa, 626, 43 N. W. 284, 44 N. W. 904.

² *McLear v. Hapgood*, 85 Cal. 557, 24 Pac. 788.

³ *Dueber Watch-Case Mfg. Co. v. Lapp*, 35 Ill. App. 372.

14. Mistake of counsel or party.

Where, in the progress of the trial, the cause suffers injus-

tice from the honest mistake of the party or his counsel, a continuance will be allowed.¹ But a mistake of law is no ground for a continuance.²

¹ Earnest v. Napier, 15 Ga. 306; Whitaker v. Whitaker, 19 Ky. L. Rep. 1476, 43 S. W. 464; Schamberg v. Leslie, 19 Ky. L. Rep. 599, 41 S. W. 265; Myers v. Trice, 86 Va. 835, 11 S. E. 428.

² Musgrove v. Perkins, 9 Cal. 212; Long v. Huggins, 72 Ga. 776; Hall v. Mount, 3 Coldw. 73.

15. For absence of party.

a. General rule.—Absence of the party himself from the trial, without good cause shown, is not ground for postponement as matter of right;¹ and it is not enough that he remains away in reliance upon his attorney's advice that the case would not be reached,² though he may do so upon such a statement by the court.³

¹ Tucker v. Garner, 25 Kan. 454; Pardridge v. Wing, 75 Ill. 236; Culley v. Walkeen, 80 Mich. 443, 45 N. W. 368; Allis v. Meadow Spring Distilling Co. 67 Wis. 16, 29 N. W. 543, 30 N. W. 300; Camp v. Morgan, 81 Ga. 740, 8 S. E. 422; Lehman v. Hudmon, 85 Ala. 135, 4 So. 741; National Exch. Bank v. Walker, 80 Ga. 281, 4 S. E. 763; Evans v. Marden, 154 Ill. 443, 40 N. E. 446; West v. Hennessey, 63 Minn. 378, 65 N. W. 639; Hutcherson v. Ladson, 130 Ga. 427, 60 S. E. 1000.

But an action before a justice in which defendant has been arrested on civil process should be postponed on showing that defendant is in attendance on the circuit court as juror. Brower v. Tatro, 115 Mich. 368, 73 N. W. 421.

But the motion must be supported at least by proof that he is unable to attend, and that his presence is necessary to a fair trial, either as an interested party (Telford v. Brinkerhoff, 45 Ill. App. 586; Paulucci v. Verity, 1 Kan. App. 121, 40 Pac. 927), or as an indispensable witness for himself, and that it has been impossible to secure his deposition; Hurek v. St. Louis Exposition & Music Hall Asso. 28 Mo. App. 629; Daly v. Minke, 86 N. Y. Supp. 92. An adjournment for this reason is within the discretion of the court. American Standard Jewelry Co. v. Hill, 90 Ark. 78, 117 S. W. 781.

A mere allegation that the party's presence was necessary for conference with his counsel during the trial,—*held*, not enough to make it error to refuse. Pate v. Tait, 72 Ind. 450. Or that his testimony is necessary to create a preponderance in his favor, one postponement for the same reason having already been had. Cochrane v. Parker, 12 Colo. App. 169, 54 Pac. 1027.

But *Mathews v. Willoughby*, 85 Ga. 289, 11 S. E. 620, holds it unnecessary to state the reason why the party's presence is desired.

² *Brock v. South & North Ala. R. Co.* 65 Ala. 79; *Miller v. Brown*, 18 Idaho, 200, 109 Pac. 139; *Brandt v. McDowell*, 52 Iowa, 230, 2 N. W. 1100.

² As, a statement by the court on the day set for trial that the case would not be reached, but if it was, it would be continued because of the illness of defendant's counsel. *Light v. Richardson*, — Cal. —, 31 Pac. 1123.

Otherwise, of a statement by a justice made out of court that a case will be continued to a term subsequent to that to which it is returnable, and of which the adverse party has no knowledge until he comes to the trial. *Watkins v. Ellis*, 105 Ga. 796, 32 S. E. 131. And in *Holden v. McCabe*, 21 Pa. Co. Ct. 41, a continuance granted by a justice, who met the parties on the street and told them he could not hear the case till 9 o'clock the next morning, is held invalid, and does not bind defendant to appear at that time.

b. Providential or unavoidable causes.—Providential or unavoidable causes, or causes to which neither the absentee nor his counsel have contributed, may, however, entitle the applicant to a postponement.¹

¹ As, where plaintiff's failure to attend was due to the miscarriage of a letter written by her attorney. *Helm v. Voils*, 58 Kan. 816, 49 Pac. 662.

And counsel should be allowed time to prepare a formal application where he states that he has written his client, who lives at a distance, of the time of trial, and that his absence is undoubtedly due to failure to receive the letter. *Mayton v. Guild*, — Tex. Civ. App. —, 29 S. W. 218.

Otherwise, however, when the only evidence to support the application is a telegram from the absent party that he is "detained providentially by sickness." *McElveen Commission Co. v. Jackson*, 94 Ga. 549, 20 S. E. 428. Or a telegram from his copartners that he was at a place from which he could not reach the place of trial until after the time at which it was to be called, and diligence demanded that his deposition should have been taken. *Mayer v. Duke*, 72 Tex. 445, 10 S. W. 565.

c. Illness of party.—Illness of a party, necessitating his absence from the trial, may be ground for a postponement;¹ but a refusal on an insufficient showing that it exists is not error.²

¹ *Post v. Cecil*, 11 Ind. App. 362, 39 N. E. 222; *Elliott v. Field*, 21 Colo.

378, 41 Pac. 504; Jaffe v. Lilienthal, 101 Cal. 175, 35 Pac. 636; Mathews v. Willoughby, 85 Ga. 289, 11 S. E. 620; Garfield Nat. Bank v. Colwell, 28 N. Y. S. R. 723, 8 N. Y. Supp. 380; Morse v. Lowe, 111 Ga. 274, 36 S. E. 688; J. H. Rottman Distilling Co. v. Van Frank, 88 Mo. App. 59. Absence on account of sudden illness has been held to make it error to refuse. Douglass v. Blakemore, 12 Heisk. 564.

Otherwise, where both parties announce "ready" when the case is called in its order, two days before that set for trial, and the party is no worse on the day of trial than she was on the day set for the trial. Hinkle v. Story, 96 Ga. 776, 22 S. E. 333. Or where, further than his desire to attend, there is no showing that attendance of the party who is a nonresident is necessary, either as a party or a witness. Paulucci v. Verity, 1 Kan. App. 121, 40 Pac. 927.

For other illustrations of refusal held proper, see Schlesinger v. Nunan, 26 Ill. App. 525; Duggar v. Lackey, 85 Ga. 631, 11 S. E. 1025; Worshman v. McLeod, — Miss. —, 11 So. 107; Rubens v. Mead, — Cal. —, 53 Pac. 432.

² Smith v. Smith, 132 Mo. 681, 34 S. W. 471; McGrath v. Tallent, 7 Utah, 256, 26 Pac. 574.

Thus, where illness was shown only by physician's certificate, without affidavit. Schnell v. Rothbath, 71 Ill. 83; Waarich v. Winter, 33 Ill. App. 36; Harlow v. Warren, 38 Kan. 480, 17 Pac. 159. Or where the certificate does not state that the one certifying is a physician, and no evidence is offered that he is such, and no other evidence of the illness is offered, though there is a subsequent offer to show that the one certifying is a physician. Gainsley v. Gainsley, — Cal. —, 44 Pac. 456.

d. Illness in party's family.—Illness in party's family may be ground for postponement.¹

¹ As, where the applicant's child is dangerously ill. Peebles v. Ralls, 1 Litt. (Ky.) 25; Rose v. Stuyvesant, 8 Johns. 426.

But not where the illness is not satisfactorily shown to be such at the time of the application as to necessitate his remaining at home. Mathews v. Bates, 93 Ga. 317, 20 S. E. 320.

e. Physical inability of party.—Physical inability of a party to attend court, due to personal injuries, etc., is not ground for postponement unless his presence is indispensable to a fair trial.¹

¹ Townsend v. Rhea, 18 Ky. L. Rep. 901, 38 S. W. 865; Beard v. Mackey, 51 Kan. 131, 32 Pac. 921.

f. Death of party.—Death of a party, necessitating a revivor, is good ground for postponement.¹

¹ *Grove v. Grove*, 13 Ky. L. Rep. 807, 18 S. W. 456.

And *delay of executor in applying*, under the New York Code of Civil Procedure, for continuance of an action in which testator was sole plaintiff, and which survived, does not prevent granting the motion, —especially in the absence of any proof by defendant that his defense has been prejudiced thereby. *Van Brocklin v. Van Brocklin*, 17 App. Div. 226, 45 N. Y. Supp. 541.

The North Carolina supreme court will not review an order directing a postponement, upon suggestion of the death of a party, although not a necessary party. *Jaffray v. Bear*, 98 N. C. 58, 3 S. E. 914.

The Maryland statute providing that an action to recover land in which an infant is substituted for a deceased party shall be continued until the infant arrives at age is in force, and is consistent with the Maryland Code. *Tise v. Shaw*, 68 Md. 1, 11 Atl. 363, and 582.

16. Absence of party's agent or representative.

Absence of defendant's law agent, who prepares cases for trial, secures the attendance of witnesses, and assists counsel at trial, and has all the evidence connected with the case, will not authorize postponement, where it does not appear how or why counsel cannot safely go to trial in his absence.¹ Especially where another such agent is present who is well acquainted with the facts.²

¹ *East Tennessee, V. & G. R. Co. v. Fleetwood*, 90 Ga. 23, 15 S. E. 778.

² *Gulf, C. & S. F. R. Co. v. Jagoe*, — Tex. Civ. App. —, 32 S. W. 717.

17. Absence of counsel.

a. In general.—Absence of attorney or counsel, without good cause shown, is not ground of postponement as matter of right,¹ —especially if the case presents no unusual or extraordinary features and the party is represented at the trial by other competent counsel.²

¹ *Whitehall v. Lane*, 61 Ind. 93; *Kern Valley Bank v. Chester*, 55 Cal. 49.

Even though he be new counsel called in for the first time. *Darley v. Thomas*, 41 Ga. 524.

The motion is one to be disposed of in the sound discretion of the court, and in view of the circumstances then made to appear. *Baumberger*

v. Arff, 96 Cal. 261. See also Corbett v. National Bank of Commerce, 44 Neb. 230, 62 N. W. 445; Boyd v. Leith, — Tex. Civ. App. —, 50 S. W. 618; Ostrom v. McCloskey, — Tex. Civ. App. —, 50 S. W. 1068.

² Adamek v. Plano Mfg. Co. 64 Minn. 304, 66 N. W. 981; Gould v. Elgin City Bkg. Co. 136 Ill. 60, 26 N. E. 497, reversing on other grounds, 36 Ill. App. 390.

And the cause has been regularly set for trial on the calendar some days previously. Zelinsky v. Price, 8 Wash. 256, 36 Pac. 28. And it is not shown that counsel present needs the assistance of his absent associate. Stringam v. Parker, 159 Ill. 304, 42 N. E. 794.

b. Absence of chief counsel.—Absence of chief counsel may make it matter of right if the dependent circumstances and his peculiar relation to the cause demand it.¹ Otherwise, however, if able associate counsel are present, and no real injustice or prejudice will result from a refusal.² And local counsel is not justified in waiting until the first day of the term at which the case is to be tried before trying to obtain leading counsel.³

¹ So expressly provided by statute in Georgia.

And Green v. Culver, 19 Ky. L. Rep. 186, 39 S. W. 426, holds a mere showing of absence of chief counsel sufficient. But St. Louis, C. G. & Ft. S. R. Co. v. Holladay, 131 Mo. 440, 33 S. W. 49, holds that absence of senior counsel, who are said to be familiar with the facts and in possession of most of the evidence, which is documentary, will not support an application where no excuse for their absence is given.

² Moulder v. Kempff, 115 Ind. 459, 17 N. E. 906; Johnson v. Dean, 48 La. Ann. 100, 18 So. 902.

³ Perea v. State L. Ins. Co. 15 N. M. 399, 110 Pac. 559.

c. Illness of counsel or member of his family.—Illness may make it matter of right, where it is impracticable, with due diligence, to secure other counsel in time.¹ So also where counsel was kept away by illness in his family.² But an application is properly refused on an insufficient showing of the illness.³

¹ Rice v. Melendy, 36 Iowa, 166; Thompson v. Hays, 119 Ga. 167, 45 S. E. 970.

“If there is no sufficient reason to induce the belief that the alleged ground of the motion is feigned, a continuance should be granted, rather than to seriously imperil the just determination of the cause by refusing it.” Myers v. Trice, 86 Va. 835, 11 S. W. 428.

And refusal is reversible error, where the court allowed his discretion to be controlled by his custom to require litigants to employ other counsel, when their counsel engaged are too ill to attend, and the case has been long on the docket. *Varn v. Green*, 50 S. C. 403, 27 S. E. 862.

But not where it does not appear that his client's case is prejudiced thereby. *Tipton County Comrs. v. Brown*, 4 Ind. App. 288, 30 N. E. 925. Nor where the case is a simple case which anyone can try without preparation, and the applicant is himself a lawyer. *Jarvis v. Shacklock*, 60 Ill. 378; *Keegan v. Donnelly*, 11 Colo. App. 31, 52 Pac. 292. And it does not appear when, if ever, counsel employed would be able to try the case, and there had been ample time in which to have engaged other counsel,—another well-known and able attorney presenting the motion. *Condon v. Brockway*, 50 Ill. App. 625.

Nor is it error to refuse a postponement, asked because of the inflamed condition of counsel's eyes, where immediately after the refusal he proceeded to participate and conduct the trial in person. *Hawes v. Clark*, 84 Cal. 272, 24 Pac. 118. Or because of the illness of leading counsel, where his associate was present and participated in the trial. *Waxelbaum v. Matthews*, 96 Ga. 774, 22 S. E. 380; *Wilson v. Thorn*, 11 Ky. L. Rep. 945, 13 S. W. 365; *McCreedy v. Lindenberg*, 37 App. Div. 425, 56 N. Y. Supp. 54.

And there is no abuse of discretion in refusing a second continuance because of counsel's illness where there has been no diligence to procure other counsel or to prepare for trial since the first continuance. *Hittle v. Zeimer*, 62 Ill. App. 170.

² *Thompson v. Thornton*, 41 Cal. 626.

Setting aside a continuance granted for illness in counsel's family is not prejudicial error where ample time was afterwards given to prepare for the trial, and the counsel appears and assists therein. *Barner v. Bayless*, 134 Ind. 600, 33 N. E. 907; 134 Ind. 606, 34 N. E. 502.

³ Thus, where no evidence of illness is presented other than the mere oral statement of the party. *Hunt v. O'Brien*, 59 Ill. App. 321. Or the unverified certificate of a physician. *Randall v. United Life & Acci. Ins. Asso.* 39 N. Y. S. R. 155, 14 N. Y. Supp. 631. Or simply telegram. *Cabell v. Holloway*, 10 Tex. Civ. App. 307, 31 S. W. 201.

d. Death of counsel or member of family.—Death of counsel may be ground for a continuance.¹ But death resulting from sickness of such a nature and duration that reliance should not have been placed upon his ability to attend the trial will

not demand a continuance.² Continuance was granted where counsel was absent to attend mother's funeral.³

¹ Hunter v. Fairfax, 3 Dall. 305, 1 L. ed. 613.

² Geiger v. Payne, 102 Iowa, 581, 69 N. W. 554, 71 N. W. 571.

³ American Soda Fountain Co. v. Dean Drug Co. 136 Iowa, 312, 111 N. W. 534.

e. Other engagements of counsel.—In the absence of any regulation to the contrary, actual engagement of counsel in the trial or argument of a cause in another court at the same time is good ground for claiming a postponement,¹ but an engagement in a trial in an inferior court is not;² and, after other previous postponements allowed on this ground,³ or where the applicant is represented by other apparently competent counsel,⁴ the application is addressed to the discretion of the court. But absence on other engagements is not a sufficient ground.⁵

¹ Hill v. Clark, 51 Ga. 122, holding it error to refuse; Gerlach v. Engel-hoffer, 7 Phila. 241; Watkins v. Ahrens & O. Mfg. Co. 18 Ky. L. Rep. 926, 38 S. W. 868; Waxelbaum Co. v. Atlantic Coast Line R. Co. 3 Ga. App. 394, 59 S. E. 1129; American Soda Fountain Co. v. Dean Drug Co. 136 Iowa, 312, 111 N. W. 534. An engagement in another court does not confer an absolute right to continuance. The whole subject is in the discretion of the court. Southern R. Co. v. Beach, 117 Ga. 31, 43 S. E. 413; Douglass v. Douglass, 24 Ky. L. Rep. 2398, 74 S. W. 233 (associate counsel present). Crouch v. Dakota, W. & M. R. Co. 18 S. D. 540, 101 N. W. 722.

In the New York city circuit the rule is that "in a case upon the day calendar for trial, where it shall appear to the court by affidavit that counsel who is to try the case is to argue a cause upon the day calendar of the Supreme Court of the United States, or upon the day calendar of the court of appeals of the state of New York, or upon the day calendar of any appellate division of the supreme court, or is actually engaged in the trial of a case in a court of record in the city of New York, or in the city of Brooklyn, the case shall be passed for the day, or until such argument or trial is concluded, unless the trial in which counsel is engaged is a protracted one." N. Y. Court Rules 1896, App. Div. Rules, Rule V., Hun's ed. 325.

By § 1377 of the Greater New York charter this rule is made applicable to municipal courts, and it is reversible error to refuse to postpone a cause pending in the municipal court where the affidavit is in the form contemplated by this rule and shows that counsel is actually

engaged in the trial of a designated case, in a specified court. *Marsh v. Nassau Show-Case Co.* 56 N. Y. Supp. 1083. And the error is not cured by opening the default upon a motion made and heard upon conflicting affidavits, with the imposition of terms upon the defendant. *Ibid.*

So, also, under the Pennsylvania supreme court rule 41, refusing to recognize counsel's engagements in lower courts is ground for postponing a cause in the supreme court, except when the trial was actually begun the week before the supreme court case was set for argument. *Peterson v. Atlantic City R. Co.* 177 Pa. 335, 34 L.R.A. 593, 35 Atl. 638.

And the judgment of the lower court against the party whose counsel is, to the court's knowledge, at the time present in the supreme court, pursuant to this rule, will not be permitted to stand. *Ibid.*

An inferior court should suspend proceedings in a case, though then on trial, to allow counsel therein to try cases called in a superior court, after the adoption by both courts of mutual rules establishing such comity between them as to enable counsel to represent their clients in cases pending in each, and the superior court has refused to postpone because of counsel's attendance upon the inferior court. *Bibb Land-Lumber Co. v. Lima Mach. Works*, 98 Ga. 279, 25 S. E. 445.

See, however, *Cotton States L. Ins. Co. v. Edwards*, 74 Ga. 220, holding that counsel's absence without leave, one attending the supreme court in a case from another circuit, and the other attending a Federal court, was not a legal showing; and *Evansville & I. R. Co. v. Hawkins*, 111 Ind. 549, 13 N. E. 63, holding that only in cases presenting unusual features can postponement because counsel are professionally engaged be claimed as a matter of right.

² Engagement before a justice of the peace. *Packer v. Wetherell*, 44 Ill. App. 95.

³ *Brock v. South & North Ala. R. Co.* 65 Ala. 79; *Northwestern Ben. Mut. Aid Asso. v. Primm*, 124 Ill. 100, 16 N. E. 98.

⁴ *Reynolds v. Campling*, 23 Colo. 105, 46 Pac. 639. And it is not shown that the counsel present were not conversant with the facts, nor any other reason given showing a necessity for the presence of the absent counsel. *Watkins v. Atwell*, — Tex. Civ. App. —, 45 S. W. 404, citing *Western U. Teleg. Co. v. Brooks*, 78 Tex. 332, 14 S. W. 699; *District Court Rule 49*, 84 Tex. 715.

⁵ *Jackson v. Wakeman*, 2 Cow. 578.

f. Attendance on session of legislature.—Actual attendance upon a session of the legislature, of which counsel is a member,

at the time a cause is called for trial, demands its postponement as matter of right, upon a proper showing thereof.¹

¹ So by statute, in Illinois. *Harrigan v. Turner*, 53 Ill. App. 292; *Ware v. Jerseyville*, 158 Ill. 234, 41 N. E. 736. And in Cal. Code Civ. Proc. § 595.

But it must be shown that he was actually employed before the commencement of the session. *Chicago Public Stock Exchange v. McClaughry*, 50 Ill. App. 358, 148 Ill. 372, 36 N. E. 88. And the applicant must show that he expects to have the absent counsel present at the next term. *Lamar v. McDaniel*, 78 Ga. 547.

18. Absence of witness.

a. In general; neglect to subpœna.—Absence of a witness who, although a resident within the jurisdiction of the court, has not been subpœnaed, without good cause shown for the failure to subpœna, is no ground for postponement.¹ Nor does absence of a witness whom the applicant omitted to subpœna, though in reliance on his promise to attend, entitle to a postponement.² But the application is discretionary with the trial court,³ and its refusal is not error unless that discretion is abused.⁴ If a witness absents himself from court without consent of the party who subpœnaed him, it is ground for continuance.⁵

¹ *Bates v. Messer*, 76 Ga. 696; *People ex rel. Cacheaux v. Hanson*, 150 Ill. 122, 127, 36 N. E. 998; *Bailey v. Kerr*, 180 Ill. 412, 54 N. E. 165; *Rose v. Hall*, 19 Ky. L. Rep. 163, 39 S. W. 413; *Blair v. Chicago & A. R. Co.* 89 Mo. 334, 1 S. W. 367; *Keller v. Feldman*, 2 Misc. 179, 49 N. Y. S. R. 718, 23 N. Y. Civ. Proc. Rep. 37, 29 Abb. N. C. 426, 21 N. Y. Supp. 581; *Poole v. Jackson*, 66 Tex. 380, 1 S. W. 75; *House v. Cessna*, 6 Tex. Civ. App. 7, 24 S. W. 962; *Texas & P. R. Co. v. Turner*, — Tex. Civ. App. —, 37 S. W. 643; *Mullinax v. Waybright*, 33 W. Va. 84, 10 S. E. 25; *Kearney Stone Works v. McPherson*, 5 Wyo. 178, 38 Pac. 920.

So, even though the applicant did not know his case would be for trial until the day before its commencement, where there is no claim that his counsel were absent during the previous days of the term. *Outcalt v. Johnston*, 9 Colo. App. 519, 49 Pac. 1058.

So, also, of omission to notify witnesses of the day of trial as required by a rule of court, although they have been duly subpœnaed. *Wilson v. Burr*, 97 Ga. 256, 22 S. E. 991.

So, where the failure to procure the attendance of an employee of the

applicant is due to his absence from duty on leave. *East Line & R. River R. Co. v. Scott*, 71 Tex. 703, 10 S. W. 298. Or his attendance is promised by the applicant, but the failure is unexplained, though counsel is not lacking in diligence. *Toledo, St. L. & K. C. R. Co. v. Stephenson*, 131 Ind. 203, 30 N. E. 1082. Or the witness was not subpoenaed because he was the applicant's attorney and was expected to be present, if needed. *Zabel v. Nyenhuis*, 83 Iowa, 756, 49 N. W. 999.

And so, even though the witness has left the country, where he ought to have been subpoenaed before his departure. *San Antonio & A. P. R. Co. v. Bowles*, — Tex. Civ. App. —, 30 S. W. 89.

² Common practice. *Freeland v. Howell*, Anthon, N. P. 272; *Blount v. Beall*, 95 Ga. 182, 22 S. E. 52; *Kozlowski v. Chicago*, 113 Ill. App. 513; *Foster v. Hinson*, 76 Iowa, 714, 39 N. W. 682; *Life Ins. Clearing Co. v. Altschuler*, 55 Neb. 341, 75 N. W. 862, affirming 53 Neb. 481, 73 N. W. 942; *Campbell v. McCoy*, 3 Tex. Civ. App. 298; *Texas & P. R. Co. v. Hall*, 83 Tex. 675, 19 S. W. 121.

Otherwise of a foreign witness who could not be subpoenaed because beyond the jurisdiction, but whose promise was properly relied upon. *Cahill v. Hilton*, 31 Hun, 114. Even though he be a coparty, and it is shown that he is the only witness to the facts desired to be proved. *Johnson v. Mills*, 31 Neb. 524, 48 N. W. 266; *Johnson v. Peter*, 48 N. W. 267, sub. nom. *McCall v. Peter*, 31 Neb. 528.

But *Clouston v. Gray*, 48 Kan. 31, 28 Pac. 983, upholds a refusal where witness left the jurisdiction, promising to return for the trial, when the case had been ready for trial nearly a year, and he did not appear to be the sole witness. Where expert witnesses had had promised to attend the trial on short notice, but were not present owing to the unexpected termination of a previous case, the party desiring them was held entitled to adjournment on payment of costs of trial. *Smith v. Lidgerwood Mfg. Co.* 60 App. Div. 467, 69 N. Y. Supp. 975; *Heyman v. Singer*, 51 Misc. 18, 99 N. Y. Supp. 942.

³ *Farmers' & Drovers' Bank v. Williamson*, 61 Mo. 259; *Missouri P. R. Co. v. Haynes*, 1 Kan. App. 586; *Clark v. Dekker*, 43 Kan. 692, 23 Pac. 956; *Atkins v. Field*, 89 Me. 281, 36 Atl. 375; *Wait v. Krewson*, 59 N. J. L. 71, 35 Atl. 742; *State v. Howe*, 27 Or. 138, 44 Pac. 672; *Foertsch v. Germuiller*, 9 App. D. C. 351.

So in a Federal court, though sitting in a state under the statutes of which it is not discretionary, since the mode of summoning witnesses and taking testimony in Federal courts is regulated by United States statutes, and the act conforming the practice in Federal courts to that of the state courts does not apply. *Texas & P. R. Co. v. Nelson*, 2 U. S. App. 213, 50 Fed. Rep. 814, 1 C. C. A. 688.

⁴ *Norfolk & W. R. Co. v. Shott*, 92 Va. 34, 22 S. E. 811; *Hamilton v. Moore*, 94 Ga. 707, 19 S. E. 993.

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Thus, refusal is no abuse of discretion, where the witness is present and testifies at the trial. *Imhoff v. Richards*, 48 Neb. 590, 67 N. W. 483; *Hartford F. Ins. Co. v. Corey*, 53 Neb. 209, 73 N. W. 674; *Life Ins. Clearing Co. v. Altschuler*, 55 Neb. 341, 75 N. W. 862, 53 Neb. 481, 73 N. W. 942. Or where the witness, who had been served with a *sub-pœna duces tecum*, subsequently appears in court and testifies, and all the papers and records he is required to bring appear in the records of the case and are treated as though duly offered in evidence. *Aldridge v. Elcrick*, 1 Kan. App. 306, 41 Pac. 199. Or where his deposition had been taken in anticipation of his removal from the State. *Goodell v. Gibbons*, 91 Va. 608, 22 S. E. 504.

And an application to procure a witness discovered pending the trial may be refused where neither party nor counsel knows, except by hearsay, that he can testify to any material fact. *Central R. Co. v. Curtis*, 87 Ga. 416, 13 S. E. 757.

Otherwise where absent and material witnesses were in necessary attendance upon a United States court, and sufficient diligence is shown. *Adams v. Grand Island & W. C. R. Co.* 10 S. Dak. 239, 72 N. W. 577.

Or where the refusal of a sufficient application was based on an erroneous conception of the law, in consequence of which the party suffered serious disadvantage. *Maynard v. Cleveland*, 76 Ga. 52.

But withdrawing an answer and demurring to the petition after a refusal to postpone on the ground of absent witnesses waives any error in the refusal. *Day v. Mooney*, 3 Okla. 608, 41 Pac. 142.

⁵ *Bedford v. Gartrell*, — Miss. —, 36 So. 529.

b. Opportunity to take deposition.—Nor does absence of a transient witness whom the applicant had adequate opportunity to examine before the trial.¹

¹ *Ide v. Gilbert*, 62 Ill. App. 524; *McKinsey v. McKee*, 109 Ind. 209, 9 N. E. 771; *Campbell v. Blanke*, 13 Kan. 62; *Holmes v. Corbin*, 50 Minn. 209, 52 N. W. 531; *Harris v. Powell*, 56 Mo. App. 24; *Kansas City, W. & N. R. Co. v. Conlee*, 43 Neb. 121, 61 N. W. 111; *McKay v. Marine Ins. Co.* 2 Cal. 384; *Swope v. Burnham*, 6 Okla. 736, 52 Pac. 924; *Smith v. Cunningham*, 9 Phila. 96; *Western U. Teleg. Co. v. Rosentreter*, 80 Tex. 406, 16 S. W. 25; *Galveston, H. & S. A. R. Co. v. Henning*, — Tex. Civ. App. —, 39 S. W. 302, affirmed in 90 Tex. 656, 40 S. W. 392; *Wytheville Ins. & Bkg. Co. v. Teiger*, 90 Va. 277, 18 S. E. 195; *Juch v. Hanna*, 11 Wash. 676, 40 Pac. 341.

Inconvenience and embarrassment to a railroad company caused by being compelled to bring to the trial as witnesses its train masters and train despatchers will not justify a continuance where their testimony might have been taken by deposition. *Hogan v. Missouri, K. & T. R. Co.* 88 Tex. 679, 32 S. W. 1035.

And a third application is properly refused when made on account of the absence of a witness who was also absent at the preceding term, and in the meantime no diligence was used to secure his evidence. *Ft. Worth & D. C. R. Co. v. Kennedy*, 12 Tex. Civ. App. 654, 35 S. W. 335.

The sufficiency of the excuse for failure to obtain the deposition of a nonresident witness before the trial, and the degree of diligence exercised in that respect, are questions for the trial court.¹

¹ *Allen v. Brown*, 72 Minn. 459, 75 N. W. 385. A party requesting a continuance for the purpose of taking a deposition should show diligence, and is not entitled to a continuance, if opportunities to procure evidence have been neglected. *Nickell v. Citizens' Bank*, 22 Ky. L. Rep. 1552, 60 S. W. 925.

But where, after plaintiff had introduced his evidence, the defendant asked an adjournment until the arrival of a deposition, it appearing that he was not negligent, it was held error to refuse his request for a temporary adjournment. *Sun Ins. Office v. Steger*, 129 Ky. 808, 112 S. W. 922.

c. Absence of foreign witness.—Absence of a foreign witness is ground for postponement if there were circumstances justifying the reliance of the applicant on his voluntary attendance.¹ Otherwise not.²

¹ *Cahill v. Hilton*, 31 Hun, 114 (error to refuse); *Mowat v. Brown*, 17 Fed. Rep. 718; *Brown v. State*, 65 Ga. 332.

² *Campbell v. Blanke*, 13 Kan. 62, and *Gill v. Buckingham*, 7 Kan. App. 227, 52 Pac. 897 (witness residing in another county). See also *Drumh-Flato Commission Co. v. Byers*, 7 Kan. App. 812, 53 Pac. 1131; *Rome R. Co. v. Barnett*, 94 Ga. 446, 20 S. E. 355.

As where the witness is applicant's servant and the court has no power to compel his attendance because of his nonresidence. *Fire Asso. of Phila. v. Hogwood*, 82 Va. 342.

The mere fact of *nonresidence* of an absent witness, however, will not justify the assumption that ordinary diligence could not have secured the testimony, but the applicant must show that, in the exercise of due diligence, he was unable to do so.¹

¹ *Benoit v. Revoir*, 8 N. Dak. 226, 77 N. W. 605.

And that the applicant was induced (it not being stated by whom) to believe that the witness would return to the county in which the ac-

tion was pending in time to finish a deposition already begun will not excuse the applicant's failure to take his deposition in the county in which the witness lived,—especially where he knew that a speedy trial would be insisted upon: *Leiper v. Earthman*, — Tenn. Ch. —. 46 S. W. 321.

Otherwise, where the witness is sick at the time of trial and there has been no laches in taking her deposition. *Crittenden v. Coleman*, 74 Ga. 803.

Or where the importance of the witness was ascertained too recently before trial to have taken his deposition, and the postponement asked was so short as not to work injury to the adverse party. *Perkins v. Whitney*, 34 N. Y. S. R. 951, 12 N. Y. Supp. 184.

d. Opportunity to procure witness.—Absence of witness who unexpectedly went abroad, so that there was no opportunity to subpoena him, is ground for postponement.¹ So of the unexpected death of a subpoenaed witness too shortly before the trial to allow of getting other evidence.²

¹ *Nixen v. Hallett*, 2 Johns. Cas. 218.

Or where he left the state after the case was placed on the calendar, but before the calendar was published, a rule of court requiring subpoenaing of witnesses as soon as the calendar is published and announced by the court. *Miller v. Hickman*, 1 Penn. (Del.) 263, 40 Atl. 192.

Otherwise, where witness, before leaving, told applicant of his intention to leave, and that another could give the desired evidence, although the latter fails to testify as expected. *San Antonio Street R. Co. v. Renken*, 15 Tex. Civ. App. 229, 38 S. W. 829.

² *Long v. McDonald*, 39 Ga. 186 (judgment reversed for refusing postponement).

19. For absence of documentary evidence.

Nor does absence of documentary evidence which the applicant has omitted to procure, though he has had ample time and opportunity,¹ or which in substance is supplied by other evidence admitted,² entitle to a postponement. Otherwise, of the absence of documentary evidence, the existence of which was too recently discovered to enable the party to have produced it.³

¹ *Emmons v. Pidcock*, 93 Va. 146, 24 S. E. 905; *Huttig Sash & Door Co. v. Montgomery*, 57 Mo. App. 91; *Pierie v. Berg*, 7 S. D. 578, 64 N. W. 1130; *Brackett v. Carrico*, 18 Ky. L. Rep. 874, 38 S. W. 694; *Morrison v. Morrison*, 102 Ga. 170, 29 S. E. 125; *Stewart v. Sutherland*, 93 Cal. 270, 28 Pac. 947.

Otherwise, of necessary evidence whose nonproduction is due wholly to causes not chargeable to the applicant; as, failure of a surveyor to report his survey of the land in suit, as ordered by the court, though at the adverse party's request. *Green v. Culver*, 19 Ky. L. Rep. 186, 39 S. W. 426. So, even though the failure is due to the applicant's refusal to advance money to pay for the survey, where he expresses his willingness to pay if so ordered by the court. *Schamberg v. Leslie*, 19 Ky. L. Rep. 599, 41 S. W. 265.

² *Prior v. North Texas Nat. Bank*, — Tex. Civ. App. —, 29 S. W. 84.

³ *Cahill v. Dawson*, 1 Fost. & F. 291; *Higginson v. Bank of England*, 1 Fost. & F. 450.

Otherwise, where with the slightest diligence the evidence might have been procured. *Morrison v. Morrison*, 102 Ga. 170, 29 S. E. 125.

20. Seeking discovery and production of papers.

A party who, by interrogatories filed and commission attached, on proper notice, seeks discovery from an adversary, which is material and within the terms of the statute, is entitled to a postponement on failure of his adversary to answer the interrogatories.¹ So, too, on notice to produce papers, the court may, on holding it bad in part as being too vague in description, give time to answer the part held good.² But a trial should not be delayed for a party demanding the production of papers who has been negligent in making the demand, and offers no satisfactory excuse therefor, though it could lawfully have been made earlier.³

¹ *Brown v. Mercer*, 82 Ga. 550, 9 S. E. 471.

² *Parish v. Weed Sewing Mach. Co.* 79 Ga. 682, 7 S. E. 138.

³ *Barth v. Green*, 78 Tex. 678, 15 S. W. 112.

21. Diligence in procuring evidence.

a. Generally.—There is no fixed standard of diligence. It depends upon the usual course of procedure and course of business, the situation or location of the absent witness and the facilities which may be employed to procure his attendance, and all the facts and circumstances of the case.¹ Generally, however, whether at common law or under the statutes, the applicant must show that, although diligent, he has been unable to learn of the witness and his materiality,² or his whereabouts,³ but that if given time they can be discovered;⁴ that he has been unable to

secure the attendance of the witness;⁵ that the witness's absence is not of his procurement, or with his consent or connivance, directly or indirectly;⁶ and that vexation or delay is not the purpose of the application.⁷

¹ *Davis & R. Bldg. & Mfg. Co. v. Riverside Butter & Cheese Co.* 84 Wis. 262, 54 N. W. 108.

The acts constituting the alleged diligence must be proved by one having personal knowledge thereof. *Nix v. Pope*, — Tex. Civ. App. —, 37 S. W. 617.

But the oral statement of counsel that two witnesses, not named, were sick, is insufficient, no claim being made that they were material, and no legal proof of either fact presented on which the court could act. *Spanghel v. Spanghel*, 39 App. Div. 5, 57 N. Y. Supp. 7.

For illustrative cases on the question of diligence, see also: *Chambers v. Modern Woodmen*, 18 S. D. 173, 99 N. W. 1107; *Hart v. Green*, 16 Colo. App. 70, 65 Pac. 344; *Illinois C. R. Co. v. Belt*, 29 Ky. L. Rep. 421, 93 S. W. 601; *Hosman v. Kinneally*, 43 Misc. 76, 86 N. Y. Supp. 263; *Lichliter v. Russell*, 89 Ill. App. 62; *Corporation of Members of Church of Jesus Christ of L. D. S. v. Watson*, 30 Utah, 126, 83 Pac. 731; *Murphy v. Hood*, 12 Okla. 593; *St. Louis Stave & Lumber Co. v. United States*, 100 C. C. A. 640, 177 Fed. 178; *Patton & G. Co. v. Shreve*, 134 Ill. App. 271; *El Dorado & B. R. Co. v. Knox*, 90 Ark. 1, 134 Am. St. Rep. 17, 117 S. W. 779; *Rankin v. Caldwell*, 15 Idaho, 625, 99 Pac. 103; *Spear Min. Co. v. T. J. Shinn & Co.* 93 Ark. 346, 124 S. W. 1045; *Gillman v. Media, M. A. & C. Electric R. Co.* 224 Pa. 267, 73 Atl. 342; *International & G. N. R. Co. v. Biles*, — Tex. Civ. App. —, 120 S. W. 952; *Western U. Teleg. Co. v. Woodard*, 84 Ark. 323, 105 S. W. 579, 13 A. & E. Ann. Cas. 354; *Armour & Co. v. Kollmeyer*, 16 L.R.A.(N.S.) 1110, 88 C. C. A 242, 161 Fed. 78; *Western U. Teleg. Co. v. Johnsey*, 49 Tex. Civ. App. 487, 109 S. W. 251; *Slayden-Kirksey Woolen Mills v. Picker*, 130 Ill. App. 355; *Louisville Cooperage Co. v. Farmer*, 33 Ky. L. Rep. 180, 109 S. W. 893.

² *Simmons v. Louisville & N. R. Co.* 13 Ky. L. Rep. 941, 18 S. W. 1024; *Richmond & M. R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901.

³ *Hogan v. Missouri, K. & T. R. Co.* 88 Tex. 679, 32 S. W. 1035.

And of whom, when, where, and how inquiries in regard to procuring the testimony were made. *Clouston v. Gray*, 48 Kan. 31, 28 Pac. 983. And for illustrations of insufficient showing, see: *Schultz v. Moon*, 33 Mo. App. 329; *East Tennessee, V. & G. R. Co. v. Fleetwood*, 90 Ga. 23, 15 S. E. 778; *Moffitt v. Chicago Chronicle Co.* 107 Iowa, 407, 78 N. W. 45; *Watson v. Blymer Mfg. Co.* 66 Tex. 558, 2 S. W. 353; *Tompkins v. Montgomery*, 123 Cal. 219, 55 Pac. 997.

⁴ *Heitschmidt v. McAlpine*, 59 Ill. App. 231.

- ⁵ *Jones v. Rome Grocery Co.* 99 Ga. 103, 24 S. E. 959; *Cereal Mfg. Co. v. Bickford*, 129 Ind. 236, 28 N. E. 545; *Hunt v. Listenberger*, 14 Ind. App. 320, 326, 42 N. E. 240, 964; *Texas & P. R. Co. v. Snyder*, — Tex. —, 18 S. W. 559; *Ketchum v. Breed*, 66 Wis. 85, 26 N. W. 271.

And the fact that subpoenas were issued at the instance of a coparty who filed no answer will not avail an applicant who is himself negligent. *Willis v. Sanger Bros.* 15 Tex. Civ. App. 655, 40 S. W. 229. For other cases, see *supra*, § 18 and notes thereto.

- ⁶ *Bates v. Messer*, 76 Ga. 696; *Runnals v. Aycock*, 78 Ga. 553, 3 S. E. 657; *Lamar v. McDaniel*, 78 Ga. 547, 3 S. E. 409; *Boggess v. Lowrey*, 78 Ga. 353, 3 S. E. 771; *North Chicago City R. Co. v. Gastka*, 128 Ill. 613, 4 L.R.A. 481, 21 N. E. 522. Compare, *Blasland-Parcels-Jordon Shoe Co. v. Hicks*, 70 Mo. App. 301.

- ⁷ This is generally a statutory provision, and a statement in the affidavit following the language of the statute is generally sufficient. See the various codes and statutes. And see *Lamar v. McDaniels*, 78 Ga. 547, 3 S. E. 409.

b. Under statutes.—In those jurisdictions, however, in which there are statutory provisions or rules of court the sufficiency of diligence shown is to be tested only by strict compliance with those statutes or rules;¹ and ordinarily an applicant who, in good faith, has complied with those statutory requirements, and shows due diligence used, in the manner required by statute, is entitled to continuance as matter of right,² or at least to a temporary suspension of the trial for a sufficient time to bring in a disobedient witness.³ But the application should be made in apt time.⁴ And an application not purporting to state a case of right to continuance under the statute is addressed to the discretion of the court.⁵

- ¹ *Mullaly v. Springer Lithographing Co.* — Tex. Civ. App. —, 29 S. W. 167. And see *Simon v. Sheridan & S. Co.* 21 Misc. 489, 47 N. Y. Supp. 647.

It is not enough under the Texas statute to state that diligence was used to procure the evidence, but it must also be stated that due or sufficient diligence was used. *Crawford v. Saunders*, — Tex. Civ. App. —, 29 S. W. 102, and authorities cited.

But an honest mistake in summoning the wrong person as a witness, which is not discovered until the night before the trial, entitles to a continuance, if the witness is a material one. *Myers v. Trice*, 86 Va. 835, 11 S. E. 428.

As to necessity of tendering witness's fees in order to procure a continuance for absence of the witness, see *Texas & P. R. Co. v. Hall*, 83 Tex.

678, 19 S. W. 121; Dillingham v. Ellis, 86 Tex. 447, 25 S. W. 618. And see Doll v. Mundine, 7 Tex. Civ. App. 96, 26 S. W. 87.

- ² Re White, 45 La. Ann. 632, 12 So. 758; Nichols v. Headley Grocer Co. 66 Mo. App. 321; Kelly v. Weir, 19 Misc. 366, 43 N. Y. Supp. 497; Smyth v. Wilmington City R. Co. 1 Penn. (Del.) 218, 40 Atl. 189; Dillingham v. Chapman, — Tex. Civ. App. —, 30 S. W. 677; Texas & P. R. Co. v. Yates, — Tex. Civ. App. —, 33 S. W. 291; Cleveland v. Colo. 65 Tex. 402; Missouri P. R. Co. v. Haynes, 1 Kan. App. 592; Reid v. Farmers' & Shippers' Tobacco Warehouse, 19 Ky. L. Rep. 1939, 44 S. W. 124; Gulf, C. & S. F. R. Co. v. Mitchell, 18 Tex. Civ. App. 380, 45 S. W. 819; Davis & R. Bldg. & Mfg. Co. v. Riverside Butter & Cheese Co. 84 Wis. 262, 54 N. W. 506; Beatrice Sewer Pipe Co. v. Erwin, 30 Neb. 86, 46 N. W. 279.

So, where a vitally important witness absented himself without the applicant's knowledge or consent and before he could be called, after he had been brought into court by process. Blasland-Parcels-Jordon Shoe Co. v. Hicks, 70 Mo. App. 301. But North Chicago City R. Co. v. Gastka, 128 Ill. 613, 4 L.R.A. 481, 21 N. E. 522, holds otherwise unless there is affirmative proof that the disappearance was not with the applicant's consent.

A postponement granted to one of two joint defendants, whose answers are separate and distinct and are based on grounds not common, is not a second application as against the other, so as to preclude his obtaining a postponement on an application complying in every particular with the Texas statute governing first applications. Ft. Worth & N. O. R. Co. v. Enos, 15 Tex. Civ. App. 673, 39 S. W. 1095.

That a continuance, however, will work a change of venue should not be considered, where the applicant shows reasonable diligence. Gonring v. Chicago, M. & St. P. R. Co. 78 Wis. 16, 47 N. W. 18.

- ³ Thus, where it is shown that the sheriff can and did procure her attendance within the time asked. Blasland-Parcels-Jordon Shoe Co. v. Hicks, 70 Mo. App. 301.

Although the attachments for the witness are not actually issued until the adjournment is decided upon. Fish's Eddy Chemical Co. v. Stevens, 92 Hun, 179, 36 N. Y. Supp. 397.

Otherwise, where the attempt to bring in the witness would be idle, because he is beyond the reach of process. Fidelity & C. Co. v. Johnson, 72 Miss. 333, 30 L.R.A. 206, 17 So. 2. And a continuance will not be granted to enable a party by contempt proceedings in another state to compel a contumacious witness to testify by deposition, as there is no presumption that by refusing to answer he is guilty of contempt of court of that state. Stratton v. Dole, 45 Neb. 472, 63 N. W. 875.

- ⁴ Walbridge v. J. Dewing Publishing Co. 53 N. Y. S. R. 935, 24 N. Y. Supp. 602.

And except, perhaps in cases of surprise, etc., if not so made it is properly denied by the court in the exercise of its sound discretion. Re Becker,

3 Pa. Dist. R. 513, 34 W. N. C. 576. See also *Butler v. Farley*, 99 Ga. 631, 25 S. E. 853.

⁵ *St. Louis & S. F. R. Co. v. Woolum*, 84 Tex. 570, 19 S. W. 782.

So, of a second application not showing diligence as required by statute. *Rubrecht v. Powers*, 1 Tex. Civ. App. 282, 21 S. W. 318.

Or of an application which is neither the first nor second application, or which, if either, fails to show that every means given by the law to procure the attendance of the witness was used. *Texas & P. R. Co. v. Hall*, 83 Tex. 675, 19 S. W. 121.

The foregoing rules are stated, as they generally occur, with reference to witnesses; but they apply with equal force, of course, to documentary evidence.

22. Materiality, competency, relevancy, etc., of evidence sought.

The materiality of the absent evidence must be established by naming the witness who is desired,¹ by stating what the expected testimony will be,² the applicant's belief in its truth,³ and that the same facts cannot be proved by other witnesses within call.⁴ And the materiality of absent documentary evidence, to procure which postponement is sought, must be shown.⁵

¹ *Life Ins. Clearing Co. v. Altschuler*, 53 Neb. 481, 73 N. W. 942. And see the various statutory provisions.

² *People ex rel. Cacheaux v. Hanson*, 150 Ill. 122, 127, 36 N. E. 998; *Life Ins. Clearing Co. v. Altschuler*, 53 Neb. 481, 73 N. W. 942; *Shaver v. Southern Oil Co.* — Tenn. —, 43 S. W. 736; *Leiper v. Earthman*, — Tenn. —, 46 S. W. 321; *Campbell v. McCoy*, 3 Tex. Civ. App. 298, 23 S. W. 34; *Merchant v. Bowyer*, 3 Tex. Civ. App. 367, 22 S. W. 763. So that the adverse party may, if he choose, admit the facts and have the case proceed to trial. *Heise v. Pennsylvania R. Co.* 11 Lanc. L. Rev. 31.

So, where witness is said to be in possession of important papers, applicant must state what the papers are, and what his expected testimony will be. *German Ins. Co. v. Penrod*, 35 Neb. 273, 53 N. W. 74.

But *Belcher v. Skinner*, 28 Neb. 91, 44 N. W. 78, and *Coombs v. Brenklander*, 29 Neb. 586, 45 N. W. 929, hold that he need not state the nature of the testimony which he expects to procure.

³ *Rowland v. Shephard*, 27 Neb. 494, 43 N. W. 344.

⁴ *Outcalt v. Johnson*, 9 Colo. App. 519, 49 Pac. 1058; *Rowland v. Shephard*, 27 Neb. 494, 43 N. W. 344; *Hyde v. Territory*, 8 Okla. 69, 56 Pac. 851; *Taylor v. Nevada-California-Oregon R. Co.* 26 Nev. 415, 69 Pac. 858.

⁵ *Owen v. Cibolo Creek Mill & Min. Co.* — Tex. Civ. App. —, 43 S. W. 297.

But a postponement cannot be had because of the absence of evidence which, if offered, would be excluded as incompetent¹ or as mere hearsay,² or irrelevant,³ or immaterial⁴ or cumulative,⁵ or improbable,⁶ or not the best evidence procurable.⁷ Nor because of the absence of a witness who is incompetent to testify.⁸

¹ *Watkins v. Atwell*, — Tex. Civ. App. —, 45 S. W. 404; *Dayton Spice Mills v. Sloan*, 49 Neb. 622, 68 N. W. 1040. See also *Mattfield v. Cotton*, 19 Tex. Civ. App. 595, 47 S. W. 549; *Threadgill v. Bickerstaff*, 7 Tex. Civ. App. 406, 26 S. W. 739; *Wood v. Farmers' Life Assn.* 121 Iowa, 44, 95 N. W. 226.

So, where the testimony which the absent witness would give would constitute no defense. *Texas & P. R. Co. v. Turner*, — Tex. Civ. App. —, 37 S. W. 643.

² *Longnecker v. Shields*, 1 Colo. App. 264, 28 Pac. 659.

³ *White v. Waco Bldg. Assn.* — Tex. Civ. App. —, 31 S. W. 58; *Biggar v. Lister* — Tex. Civ. App. —, 27 S. W. 707; *Morrison v. Stauffer*, — Tex. Civ. App. —, 32 S. W. 722; *Pacific Exp. Co. v. Lasker Real Estate Assn.* 81 Tex. 81, 16 S. W. 792.

See also *Crouch v. Johnson*, 7 Tex. Civ. App. 435, 27 S. W. 9.

As testimony that defendant, in an action for work and labor, never employed plaintiff at all, and that plaintiff never worked for defendant, where defendant merely denies the indebtedness without denying the services alleged, and pleads a counterclaim. *Cohn v. Brownstone*, 93 Cal. 362, 28 Pac. 953.

So, also, after dismissal of the only issue to which it would relate. *Herd v. Herd*, 71 Iowa, 497, 32 N. W. 469.

Simpson v. Simpson, — Cal. —, 41 Pac. 804; *Life Ins. Clearing Co. v. Altschuler*, 55 Neb. 341, 75 N. W. 862, 53 Neb. 481, 73 N. W. 942; *Shaver v. Southern Oil Co.* — Tenn. —, 43 S. W. 736; *Scurry v. Fromer*, — Tex. Civ. App. —, 26 S. W. 461; *Kennedy v. Yoe*, — Tex. Civ. App. —, 39 S. W. 946; *Herman v. Gunter*, 83 Tex. 66, 18 S. W. 428.

⁴ *Keegan v. Donnelly*, 11 Colo. App. 31, 52 Pac. 292; *Nebraska Land & Live Stock Co. v. Burris*, 10 S. D. 430, 73 N. W. 919; *Stringam v. Parker*, 159 Ill. 304, 42 N. E. 794; *West Chicago Park Comrs. v. Barber*, 62 Ill. App. 108; *Kellyville Coal Co. v. Strine*, 117 Ill. App. 115; *Freehold Bank v. Kennedy & W. Co.* 148 Ill. App. 310; *School Directors v. Hentz*, 57 Ill. App. 648; *Bailey v. Kerr*, 180 Ill. 412, 54 N. E. 165; *Witowski v. Maisner*, 21 Misc. 487, 47 N. Y. Supp. 599; *Smokey v. Johnson*, — Miss. —, 4 So. 787; *Taylor v. Nevada-California-Oregon R. Co.* 26 Nev. 415, 69 Pac. 858.

Or because not essential to a full and fair understanding of the facts in the case. *St. Louis Southwestern R. Co. v. Freedman*, 18 Tex. Civ. App. 553, 46 S. W. 101.

Or because not essentially and materially different from that of the adverse party. *Helfrich Saw & Planing Mill Co. v. Everly*, 17 Ky. L. Rep. 795, 32 S. W. 750.

⁵ *Missouri, K. & T. R. Co. v. Wright*, 19 Tex. Civ. App. 47, 47 S. W. 56; *Outcalt v. Johnson*, 9 Colo. App. 519, 49 Pac. 1058; *Matthews v. Missouri P. R. Co.* 142 Mo. 645, 44 S. W. 802; *Scott v. Boyd*, 101 Va. 28, 42 S. E. 918. And see *Robbins v. Ginnochio*, — Tex. Civ. App. —, 45 S. W. 34.

But evidence is not cumulative within this rule where it consists of facts bearing on the issue to which no other witnesses testified, although they did testify to other facts relating to the same issue. *Dillingham v. Ellis*, 86 Tex. 447, 25 S. W. 618.

Or where the witness present is an interested party contradicted by another. *Maynard v. Cleveland*, 76 Ga. 52.

⁶ *Nix v. Pope*, — Tex. Civ. App. —, 37 S. W. 617.

⁷ *Stewart v. Townsend*, 41 Fed. 121.

⁸ Thus, of a convict. *Tillman v. Fletcher*, 78 Tex. 675, 15 S. W. 161.

23. Probability of securing desired evidence.

And the probable attendance of the absent witness, or procurement of the desired evidence, at the proper time, must be assured with a reasonable degree of certainty.¹

¹ *Smyth v. Wilmington City R. Co.* 1 Penn. (Del.) 218, 40 Atl. 189; *Home F. Ins. Co. v. Galley*, 43 Neb. 71, 61 N. W. 84; *Rowland v. Shepherd*, 27 Neb. 494, 43 N. W. 344; *Kelly v. Weir*, 19 Misc. 366, 43 N. Y. Supp. 497; *Campbell v. McCoy*, 3 Tex. Civ. App. 298, 23 S. W. 34; *Western U. Teleg. Co. v. Berdine*, 2 Tex. Civ. App. 517, 21 S. W. 982; *Dunnington v. Syfers*, 157 Ind. 458, 62 N. E. 29; *Board of Internal Improvement v. Moore*, 25 Ky. L. Rep. 15, 74 S. W. 683; *Purse v. Purcell*, 43 Colo. 50, 95 Pac. 291.

But the court is not bound to grant a continuance where it is conjectural whether the absent witnesses are living, or, if so, where they reside, or when, if at all, their evidence can be procured. *Lowenstein v. Greve*, 50 Minn. 383, 52 N. W. 964.

Or where the witness has no home, relatives, business, or ties in the state, has not been seen for months, nothing is known of his whereabouts, and there is no ground for believing his attendance could be secured at a subsequent time. *Carberry v. Worrell*, 68 Miss. 573, 9 So. 290.

Or where the expected attendance was merely surmised and the desired evidence was in substance supplied by other witnesses. *Hill v. Smith*, 6 Tex. Civ. App. 312, 25 S. W. 1079. See also *Post v. State*, 14 Ind. App. 452, 42 N. E. 1120.

And so of a second adjournment to recall a witness who has left the state, where no time is shown when his attendance can reasonably be ex-

pected. *Borley v. Wheeler & W. Mfg. Co.* 34 N. Y. S. R. 987, 12 N. Y. Supp. 45.

And a postponement asked because of a trial amendment, after an offer to adjourn over two days is declined, is properly refused, in the absence of a showing that the evidence cannot be procured in the time offered. *Clough v. Bennett*, 99 Iowa, 69, 68 N. W. 578.

24. Affidavit required to support application.

a. Necessity of.—Upon an application to postpone a trial the court may require that the facts stated as the ground of the application be presented by affidavit.¹

¹ *Brooklyn Oil Works v. Brown*, 7 Abb. Pr. N. S. 382; (a well-considered case, where it is said that the party may require it); *Tribune Asso. v. Smith*, 8 Jones & S. 251; *Thompson v. Mississippi Ins. Co.* 2 La. 228, 22 Am. Dec. 129. And such affidavit is generally required by the statutes of the various states governing postponements. *Cozzens v. Chicago Hydraulic-Press Brick Co.* 166 Ill. 213, 46 N. E. 788; *McGrath v. Tallent*, 7 Utah, 256, 26 Pac. 574; *Scullen v. George*, 65 Mich. 215, 31 N. W. 841; *Bronson v. Vaughan*, 44 W. Va. 406, 29 S. E. 1022; *Ledbetter v. McWilliams*, 90 Ga. 43, 15 S. E. 634; *Cassem v. Galvin*, 158 Ill. 30, 41 N. E. 1087; *Diebold Safe & Lock Co. v. Holt*, 4 Okla. 479, 46 Pac. 512; *Texas & N. O. R. Co. v. Goldberg*, 68 Tex. 685, 5 S. W. 824. See also statutes of various other states.

But merely offering to file the statutory affidavit without actually doing so is insufficient. *Ryan v. People*, 165 Ill. 143, 46 N. E. 206, affirming 62 Ill. App. 355.

But oral statements, if not objected to, are of equivalent effect. *Tribune Asso. v. Smith*, 8 Jones & S. 251; *Thompson v. Mississippi Ins. Co.* 2 La. 228, 22 Am. Dec. 129.

They must, however, be made under oath. *Mackin v. Cody*, 68 Ill. App. 108.

Although granting a continuance by a justice without affidavit or other legal evidence than counsel's mere oral statement showing the necessity therefore is error, it will not authorize the issuance of mandamus to compel dismissal of the action. *Whaley v. King*, 92 Cal. 431, 28 Pac. 579.

b. Sufficiency of.—A motion for leave to file a supplemental affidavit to supply insufficiency in the original is properly refused in the discretion of the court.¹ But an affidavit good when filed should not be deemed bad because the court has not

acted on it for several days and the conditions may have changed.²

¹ Mackin v. Delles, 68 Ill. App. 101.

² Harrigan v. Turner, 53 Ill. App. 292.

c. Who to make.—An affidavit by the party may be required, unless sufficient reason for accepting the affidavit of another person appears.¹ Refusing to accept the attorney's affidavit when inability of the party to make it is shown is error.²

¹ Thus, an affidavit not sworn to by the applicant or his authorized agent is insufficient under the Illinois practice act. *School Directors v. Hentz*, 57 Ill. App. 648.

The court will not receive the affidavit of the attorney's clerk unless it state that he has the management of the cause and is particularly acquainted with the circumstances. *Sullivan v. Magill*, 1 H. Bl. 637.

² *Lockhart v. Wolf*, 82 Ill. 37 (judgment reversed for this error). See also *Light v. Richardson*, — Cal. —, 31 Pac. 1123; *Garfield Nat. Bank v. Colwell*, 28 N. Y. S. R. 723, 8 N. Y. Supp. 380.

And *Doll v. Mundine*, 84 Tex. 315, 19 S. W. 394, holds it error to refuse to accept counsel's affidavit averring absence of witnesses, materiality of their evidence, and diligence used to procure their attendance, because those facts are of such character that they may be as well known to counsel as to client.

Otherwise, where the inability is not shown, and especially where the party in whose behalf the affidavit was made was a mere nominal party, and it is not shown that affiant had a better knowledge of the desired evidence than either the nominal or real party. *Clouston v. Gray*, 48 Kan. 31, 28 Pac. 983.

d. Contents of affidavit.—An affidavit to support an application to postpone, on account of absence of evidence,¹ must be to: (1) The merits;² (2) the materiality of the desired evidence;³ (3) facts showing due diligence already exercised in the endeavor to procure it;⁴ and (4) assurance of probable presence of the evidence at the time proposed.⁵

¹ This rule is generally stated, as it generally occurs, as relating to witnesses; but it applies to documents also. See *Felton v. Moffett*, 29 Neb. 582, 45 N. W. 930. And see cases cited *infra*, this and next succeeding section.

² *Brooklyn Oil Works v. Brown*, 7 Abb. Pr. N. S. 383; *Hill v. Prosser*, 3 Dowl. P. C. 704. (Oath to merits not required in England).

Thus, an affidavit stating that the applicant has fully and fairly stated the case to his counsel sufficiently states that fact within a rule of court. *Sutton v. Wegner*, 72 Wis. 294, 39 N. W. 775.

³ *Kern Valley Bank v. Chester*, 55 Cal. 49; *Green v. King*, 17 Fla. 452; *Hefling v. Van Zandt*, 162 Ill. 162, 44 N. E. 424; *McClurg v. Igleheart*, 17 Ky. L. Rep. 913, 33 S. W. 80; *Brooklyn Oil Works v. Brown*, 7 Abb. Pr. N. S. 382; *People v. Vermilyea*, 7 Cow. 369, 384; *Farmers & M. Bank v. Berchard*, 32 Neb. 785, 49 N. W. 762; *Stone v. Chicago. M. & St. P. R. Co.* 3 S. D. 330, 53 N. W. 189.

Even though the evidence is to meet issues raised by trial amendment. *Storch v. McCain*, 85 Cal. 304, 24 Pac. 639.

And in causes in which there are no pleadings the affidavit must show the materiality to issues that will arise on trial. *Hewes v. Andrews*, 12 Colo. 161, 20 Pac. 338; *Dawson v. Coston*, 18 Colo. 493, 33 Pac. 189.

The affidavit should state, not mere conclusions, but facts, in the same manner as such facts are usually stated in a deposition. *Willard v. Pettitt*, 54 Ill. App. 257, affirmed, 153 Ill. 663, 39 N. E. 991; *Clouston v. Gray*, 48 Kan. 31, 28 Pac. 983. See also *Willis v. Sanger Bros.* 15 Tex. Civ. App. 655, 40 S. W. 229; *Deemer v. Falkenburg*, 4 N. M. 149, 12 Pac. 717; *Evans v. Marden*, 154 Ill. 443, 40 N. E. 446.

And so definitely and certainly that the adverse party may, if he desire, admit that the witness would so testify if present. *Hagar v. Wikoff*, 2 Okla. 580, 39 Pac. 281.

In Nebraska, the affidavit may be substantially in the words of the statute; and it is unnecessary to state the purport of the testimony which the applicant expects to procure. *Belcher v. Skinner*, 28 Neb. 91, 44 N. W. 78. But an affidavit stating that the deposition, the loss of which is the basis of the application, "was the same as and fully supported the allegations of the answer," without setting out at least the substance of the testimony, is insufficient. *Felton v. Moffett*, 29 Neb. 582, 45 N. W. 930.

Otherwise in California, in a case sought to be postponed for absence of a party claimed to be a material witness. *Jaffe v. Lilienthal*, 101 Cal. 175, 35 Pac. 636.

Omission to name the witness held no objection in *Smith v. Dobson*, 2 Dowl. & R. 420. And see *Brown v. Murray*, 4 Dowl. & R. 832.

The contrary rule, however, prevails in the United States. *Keith v. Knoche*, 43 Ill. App. 161; *McClurg v. Igleheart*, 17 Ky. L. Rep. 913, 33 S. W. 80; *Life Ins. Clearing Co. v. Altschuler*, 53 Neb. 481, 73 N. W. 942, affirmed on rehearing in 55 Neb. 341, 75 N. W. 862.

⁴ *Kern Valley Bank v. Chester*, 55 Cal. 49; *Green v. King*, 17 Fla. 452; *Wolcott v. Mack*, 53 Ind. 269; *Ilett v. Collins*, 102 Ill. 402; *Sprague v. Heaps*, 7 Ill. App. 447; *Anheuser-Busch Brewing Asso. v. Hutmacher*, 127 Ill. 652, 4 L.R.A. 575, 21 N. E. 626; *McClurg v. Iglehart*, 17 Ky. L. Rep. 913, 33 S. W. 80; *Moon v. Helfer*, 25 Kan. 139; *Ingalls*

v. Noble, 14 Neb. 272, 15 N. W. 351; Thomas v. McCormick, 1 N. M. 369; Brooklyn Oil Works v. Brown, 7 Abb. Pr. N. S. 382; People v. Vermilyea, 7 Cow. 369, 384; Labbaite v. State, 6 Tex. App. 257; Handline v. State, 6 Tex. App. 347; Flournoy v. Marx, 33 Tex. 786 (holding a general averment of due diligence not enough); Hogan v. Missouri, K. & T. R. Co. 88 Tex. 679, 32 S. W. 1035; Falls Land & Cattle Co. v. Chisholm, 71 Tex. 523, 9 S. W. 479; Stone v. Chicago, M. & St. P. R. Co. 3 S. D. 330, 53 N. W. 189. See also Rex v. D'Eon, 1 W. Bl. 510, 3 Burr. 1513.

It is not enough to state the mere legal conclusion that diligence had been used. Missouri P. R. Co. v. Aiken, 71 Tex. 373, 9 S. W. 437; Singer Mfg. Co. v. McAllister, 22 Neb. 359, 35 N. W. 181; Leiper v. Earthman, — Tenn. —, 46 S. W. 321; Cohn v. Brownstone, 93 Cal. 362, 28 Pac. 953.

Or that diligent inquiries were made, without either stating how, where, or of whom they were made. Kilmer v. St. Louis, Ft. S. & W. R. Co. 37 Kan. 84, 14 Pac. 465; Struthers v. Fuller, 45 Kan. 735, 26 Pac. 471.

Or when the witness left, and whether any attempt was made to serve a subpoena or to take his deposition, and whether further inquiries were made. Haverstick v. State, 6 Ind. App. 595, 32 N. E. 785, 6 Ind. App. 598, 34 N. E. 589.

It must be shown, under the Texas statute, that by the exercise of due diligence the witness's deposition could not have been taken, nor he have been present in person to testify. Grounds v. Ingram, 75 Tex. 509, 12 S. W. 1118; Hogan v. Missouri, K. & T. R. Co. 88 Tex. 679, 32 S. W. 1035.

And failure to make the statutory oath that due diligence has been used to procure the desired evidence, stating the diligence used, leaves the matter of continuance to the court's sound discretion. St. Louis & S. F. R. Co. v. Woolum, 84 Tex. 570, 19 S. W. 782.

In Kentucky, on an application for continuance to secure the attendance of absent witnesses, the affidavit should show that applicant has the right to require their attendance by showing that they reside within 20 miles of the county seat. Cope v. Deaton, 19 Ky. L. Rep. 1197, 43 S. W. 190.

⁵ Sprague v. Heaps, 7 Ill. App. 447; Mantonya v. Huerter, 35 Ill. App. 27; Lake Erie & W. R. Co. v. Holderman, 56 Ill. App. 144; McClelland v. Scroggin, 48 Neb. 141, 66 N. W. 1123; Brooklyn Oil Works v. Brown, 7 Abb. Pr. N. S. 382; Brown v. Moran, 65 How. Pr. 349; Cabell v. Holloway, 10 Tex. Civ. App. 307, 31 S. W. 201; Stone v. Chicago, M. & St. P. R. Co. 3 S. D. 330, 53 N. W. 189.

And an affidavit to support an application to postpone on account of the absence of party must state definitely and clearly

the cause of the absence;¹ but not the reason why his presence is necessary.²

¹ McBride v. Stradley, 103 Ind. 465, 2 N. E. 358; Cohn v. Brownstone, 93 Cal. 362, 28 Pac. 953; Davis v. Foreman, — Tex. —, 20 S. W. 52.

And see Bergevin v. Barnard, 72 Ill. App. 47.

² Mathews v. Willoughby, 85 Ga. 289, 11 S. E. 620 (holding it error to require).

And to support an application to postpone on account of absence of counsel, the affidavit should show diligence on counsel's part in learning the time of trial.¹ And in Illinois, it must state that counsel, who is a member of the legislature, is in actual attendance upon a session thereof;² that the suit sought to be postponed was begun, and he was actually employed, prior to the commencement of the session,³ and that his attendance is necessary to a fair and proper trial.⁴

¹ Cox v. Allen, 91 Iowa, 462, 59 N. W. 335.

² Mackin v. Cody, 68 Ill. App. 108.

³ Chicago Public Stock Exch. v. McClaughry, 148 Ill. 372, 36 N. W. 88.

The phrase "in such suit," as used in the statute, refers to a suit actually commenced, and not to a mere controversy or threatened or anticipated suit. Weighard v. Fieldon Creamery Co. 65 Ill. App. 202, holding that the use of the words "this cause" in the affidavit meant only that, anticipating a suit, the applicant had retained the counsel in advance,—especially as, in fact, suit was not begun until about four months after the legislature convened.

⁴ McClory v. Crawley, 59 Ill. App. 392.

And an affidavit to support an application grounded on surprise occasioned by amendment to opposite party's pleading allowed by the court must show that the applicant is less ready for trial, why and how,¹ and that surprise is not claimed for the purpose of delay.²

¹ Benepe v. Meier, 75 Ill. App. 561; Texas & N. O. R. Co. v. Goldberg, 68 Tex. 685, 5 S. W. 824; Ledbetter v. McWilliams, 90 Ga. 43, 15 S. E. 634; Lindsey v. Lindsey, 40 Ill. App. 389. It must show in what respect the applicant is prejudiced in his preparation for trial, as required by statute. Diebold Safe & Lock Co. v. Holt, 4 Okla. 479, 46 Pac. 512. And, under the Illinois statute what particular facts he expects to prove. Cassem v. Galvin, 158 Ill. 30, 41 N. E. 1087.

And an affidavit which merely shows that in affiant's opinion he has a just

case which he will be able to present and sustain, if given time, is insufficient. *Bank of Ravenswood v. Hamilton*, 43 W. Va. 75, 27 S. E. 296.

² *Ledbetter v. McWilliams*, 90 Ga. 43, 15 S. E. 634.

An affidavit that defendant's attorney believed that the case could not be tried at that term, and had not prepared for trial, is insufficient.¹

¹ *Mills v. National F. Ins. Co.* 92 Wis. 90, 65 N. W. 730.

Allegations on information must state the names and residences of the informants.¹

¹ *Comstock v. State*, 14 Neb. 205, 15 N. W. 355; *Thompson v. Mississippi Marine & F. Ins. Co.* 2 La. 228, 22 Am. Dec. 129; *Labbaite v. State*, 6 Tex. App. 257. Compare *Lansky v. West End Street R. Co.* 173 Mass. 20, 53 N. E. 129; *Smith v. Roome*, 20 Misc. 8, 44 N. Y. Supp. 784. *McClellan v. Gaston*, 18 Wash. 472, 51 Pac. 1062.

In some cases inability to procure another witness instead is required to be shown. *Jarvis v. Shacklock*, 60 Ill. 378.

e. Sufficiency of general allegations as to materiality of evidence.—In stating the materiality of the desired evidence, a general allegation is usually enough on a first application.¹

¹ *People v. Vermilyea*, 7 Cow. 369, 386; *Hooker v. Rogers*, 6 Cow. 577; *Wicker v. Boynton*, 83 Ill. 545 (*dictum*). Contra, *Kern Valley Bank v. Chester*, 55 Cal. 49. A statement that an absent defendant will testify "materially as stated in the answer," which is merely a general denial and two matters in reconvention, does not sufficiently show the evidence proposed so as to enable its materiality to be determined. *Crawford v. Lozano*, — Tex. Civ. App. —, 48 S. W. 538.

And *Bradshaw v. Stott*, 7 App. D. C. 276, holds that to state merely that the testimony is "material, proper, and competent" is not sufficient.

An application is deemed to be a first application within this rule if the only previous application prove not to have delayed the cause, by reason of its not having been reached. *Pulver v. Hiserodt*, 3 How. Pr. 49.

But if a postponement had already been had,¹ or if circumstances of suspicion or intimation of laches appear,² or if the necessary delay is great,³ the court may require that the affidavit
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state what the desired evidence will prove,⁴ and the names and residences of desired witnesses,⁵ or disclose the nature of the evidence sufficiently to see that upon fair and probable grounds it will be material.⁶

¹ Moon v. Helfer, 25 Kan. 139.

² People v. Vermilyea, 7 Cow. 369, 384; Bush v. Weeks, 24 Hun, 545 (justice's court case).

³ Lord v. Cooke, 1 W. Bl. 436.

⁴ In Ogden v. Payne, 5 Cow. 15, it was held that the mere fact that the desired witness was the attorney of the party, so that it was possible his testimony might be privileged, was not ground for requiring a disclosure.

⁵ Ilett v. Collins, 102 Ill. 402; Thomas v. McCormick, 1 N. M. 369; Lillienthal v. Anderson, 1 Idaho, 673; Vanwey v. State, 41 Tex. 639 (affidavit omitting to state knowledge of residences). And, according to Brown v. Johnson, 14 Kan. 377, and Cody v. Butterfield, 1 Colo. 377, sufficiently to give the adverse party a right to defeat the application by admitting the facts.

⁶ The motion should be denied if the desired evidence is inadmissible under the pleadings. Cartwright v. Culver, 74 Mo. 179; Waldo v. Beckwith, 1 N. M. 182; Thackaray v. Hanson, 1 Colo. 305. And may be denied if the witness is privileged. Lavery v. Crooke, 52 Wis. 612, 9 N. W. 599.

The desired evidence must be stated so definitely in a second application that the jury could find their verdict on it should they believe it if admitted. Galveston, H. & S. A. R. Co. v. Horne, 69 Tex. 643, 9 S. W. 440 (allegation that the absent witnesses will prove the amount of damages much less than plaintiff claims, but not stating the amount which they will prove them, held to be insufficient).

So, an affidavit for a second continuance stating that defendant expects to prove "certain conduct and actions of plaintiff" which contradict his allegations of a previous partition of land, but not stating what those acts were, is too indefinite. Doll v. Mundine, 7 Tex. Civ. App. 96, 26 S. W. 87.

An affidavit in support of a third application, which does not state what is expected to be proved by the absent witnesses, but refers to a former affidavit, is insufficient. Leiper v. Earthman, — Tenn. —, 46 S. W. 321.

And it must *negative ability* to prove the desired evidence by other witnesses. Hodges v. Nash, 141 Ill. 391, 31 N. E. 151; Mutzenburg v. McGowan, 10 Colo. App. 486, 51 Pac. 523; Danielson v. Gude, 11 Colo. 87, 17 Pac. 283; Livingston v. Cooper, 22 Fla. 292.

25. Opposing the motion.

a. Presumptions.—It is presumed that the applicant will state the facts as strongly in his own favor as the nature of the case permits, and therefore the court is not called upon to make presumptions in his favor.¹

¹ Per Ogden, J., in *Van Brown v. State*, 34 Tex. 186; *Dold v. Dold*, 1 N. M. 397.

And a court refusing a continuance for reasons not supported by affidavit of a creditable witness should, at least, have personal knowledge thereof, and not merely draw conclusions from other facts known to him. *Corsicana v. Kerr*, 75 Tex. 207, 12 S. W. 982.

b. Counter affidavits.—On the question of the right to receive counter affidavits to contradict an affidavit for continuance, the practice varies in different states. In some jurisdictions the right is denied.¹ But there is plenty of authority to the contrary,² and even in states where the custom of receiving such affidavit is condemned it has been held that they may be received where the good faith of the party seeking continuance is questioned, or he has already been granted several continuances.³ And the wrongful admission of such affidavits is deemed harmless error where, independently of them, the application for continuance must be denied.⁴

¹ *Manning v. Jameson*, 1 Cranch, C. C. 285, Fed. Cas. No. 9,045; *Waarich v. Winter*, 33 Ill. App. 36; *Quincy Whig Co. v. Tillson*, 67 Ill. 351; *Chicago Public Stock Exch. v. McClaughry*, 148 Ill. 372, 36 N. E. 88; *Linville v. Golding*, 11 Ind. 374; *Shattuck v. Myers*, 13 Ind. 46, 75 Am. Dec. 236; *Eslinger v. East*, 100 Ind. 434; *Barton v. McKay*, 36 Neb. 632, 54 N. W. 963.

This question also arose in *McClurg v. Iglehart*, 17 Ky. L. Rep. 913, 33 S. W. 80, where the court in discussing it distinguished between an application based on the ground of absence of important testimony and one based on the absence of an interested party. After citing and quoting from several authorities they reached the conclusion that in the former case, if the affidavit sets forth fully and certainly what is expected to be proved by them, giving their names and showing diligence, counter-affidavits could not be received to controvert it because the statute governing continuances on that ground makes the continuance a matter of right, and not of discretion; but held that in the latter case, which was the case at bar, and in reference to which there was no specific statute, the sufficiency of the affidavit was to be determined by the trial court in its sound dis-

cretion, and that in the absence of such statutory regulation it might permit the evidence to be controverted.

There are many criminal cases on both sides of the question, and the rule seems to be the same in civil and criminal cases.

² *Kneebone v. Kneebone*, 83 Cal. 645, 23 Pac. 1031; *Matthews v. Bates*, 93 Ga. 317, 20 S. E. 320; *Bowling v. Whatley*, 53 Ga. 24; *Cox v. North Western Stage Co.* 1 Idaho, 377; *George v. Swafford*, 75 Iowa, 491, 39 N. W. 804; *Allen v. Reilly*, 15 Nev. 452; *Weed v. Lee*, 50 Barb. 354; *Webb v. Wegley*, — N. D. —, 125 N. W. 562; *Bryce v. Jones*, 38 Tex. 205; *Skagit R. & Lumber Co. v. Cole*, 2 Wash. 57, 25 Pac. 1077; *Dimmey v. Wheeling & E. G. R. Co.* 27 W. Va. 32, 55 Am. Rep. 292.

In *Walt v. Walsh*, 10 Heisk. 314, the court declined to pass upon the practice of hearing counter-affidavits, but intimated that it is proper for the inferior court to hear enough of the testimony to enable it to pass upon the motion.

³ *Maher v. Pulley*, 8 La. 89; *Cushenberry v. McMurray*, 27 Kan. 328.

Even a justice of the peace has discretionary power to allow plaintiff to introduce evidence showing that defendant's application for postponement is not made in good faith and is groundless. *Weed v. Lee*, 50 Barb. 354.

But in the *Star Route Case* (D. C. 1882) *Wylie, J.*, refused to do so, saying that a motion for continuance must be decided on the affidavit of the party applying for it.

⁴ *Quincy Whig Co. v. Tillson*, 67 Ill. 351; *Barton v. McKay*, 36 Neb. 632, 54 N. W. 968.

The party making an affidavit for continuance may be called for the purpose of cross-examination by his adversary.¹ But evidence to disprove the facts which the applicant desires opportunity to prove is inadmissible.²

¹ *Smyth v. Wilmington City R. Co.* 1 Penn. (Del.) 218, 40 Atl. 189.

² *Horn v. State*, 62 Ga. 362. And in *Waldrup v. Maxwell*, 84 Ga. 613, 10 S. E. 597, judgment was reversed for error in refusing a continuance on a counter-showing of a statement by the absent witness to the adverse party that he knew nothing about the case.

c. Admitting desired facts.—Where the applicant discloses what facts he intends to prove by the desired evidence, it is a sufficient answer to the application to admit the truth of those facts.¹ But as to whether it is necessary to admit the truth of the facts expected to be proved by the witness, or whether it is sufficient to admit simply that the witness will testify as alleged,

the authorities are not agreed, though the weight of authority seems to be in favor of the latter rule.² In some states, however, it is held necessary to admit the truth of the facts themselves.³ The question is now governed by statute in most states, but even at common law the authorities were disagreed.⁴

¹ *Green v. King*, 17 Fla. 452; *Whitehall v. Lane*, 61 Ind. 93; *Hughes v. Waring*, Litt. Sel. Cas. (Ky.) 402; *Maysville & L. R. Co. v. Herrick*, 13 Bush, 122; *Brill v. Lord*, 14 Johns. 341; *Hammonds v. Kemmer*, 3 Hayw. (Tenn.) 145; *Fisk v. Miller*, 13 Tex. 227; *Page v. Arnim*, 29 Tex. 53; *St. Louis Southwestern R. Co. v. Campbell*, 32 Tex. Civ. App. 613, 75 S. W. 564.

So, also, even where the desired witness was the party himself on whose behalf the application was made. *Pate v. Tait*, 72 Ind. 450; *Pruyn v. Gibbens*, 24 La. Ann. 231.

The rule is otherwise, however, when the witness's presence is necessary to a fair trial because of his personal knowledge of the matters in controversy and ability to aid in preventing surprise. *Hopkinson v. Jones*, 28 Ill. App. 409.

And where the admission did not extend to all the matters which the party applying for continuance stated that he expected to prove by the absent witness, it was held that the admission was not broad enough to justify refusal of the continuance. *Peck v. Lovett*, 41 Cal. 521.

Any defect in the affidavit, which is not specially assigned, is waived by such an admission. *Beal v. Pratt*, 67 Ill. App. 483.

And where a party admits the facts contained in the statement, he cannot afterward introduce testimony to show that the statement was not true. *Brent v. Heard*, 40 Miss. 370.

So an admission that an absent witness will swear to facts set forth in an affidavit for continuance will not authorize the reading of the affidavit after postponement of the trial by the court, of its own motion, for over a month, where the witness resides in the city where the trial is held and there is nothing to show that his evidence is not attainable. *Padgitt v. Mill*, 159 Mo. 143, 52 L.R.A. 854, 81 Am. St. Rep. 347, 60 S. W. 121.

² *Hibbard v. Kirby*, 38 Ark. 102; *Loftus v. Fischer*, 113 Cal. 286, 45 Pac. 328; *Zobel v. Fanny Rawlings Min. Co.* 49 Colo. 134, 111 Pac. 843; *Baldwin Coal Co. v. Davis*, 15 Colo. App. 371, 62 Pac. 1041; *Utley v. Burns*, 70 Ill. 162; *Graff v. Brown*, 85 Ill. 89; *Montgomery County v. Robinson*, 85 Ill. 174; *Reed v. Lane*, 96 Iowa, 454, 65 N. W. 380; *Wasson v. American Patriots*, 148 Iowa, 142, 126 N. W. 778; *Brown v. Johnson*, 14 Kan. 377; *Sanford v. Gates*, 38 Kan. 405, 16 Pac. 807; *Rice v. Hodge*, 26 Kan. 164; *Hutton v. First Nat. Bank*, 20 Ky. L. Rep. 225, 45 S. W. 668; *Faulk v. Hough*, 14 La. Ann.

670; *Smith v. First Nat. Bank*, 45 Neb. 444, 63 N. W. 796; *Conrad v. Dobmeier*, 64 Minn. 284, 67 N. W. 5; *Matthews v. Missouri P. R. Co.* 142 Mo. 645, 44 S. W. 802; *O'Neil v. New York & S. P. Min. Co.* 3 Nev. 141; *Chandler v. Colcord*, 1 Okla. 260, 32 Pac. 330; *Lew v. Lucas*, 37 Or. 208, 61 Pac. 344.

³*Seward v. Wilmington*, 2 Marv. (Del.) 375, 43 Atl. 255; *Klugman v. Gammell*, 43 Ga. 581; *Kitchens v. Hutchins*, 44 Ga. 620; *Cheney v. Smith*, 42 Ga. 50; *Nave v. Horton*, 9 Ind. 563; *Bryan v. Coursey*, 3 Md. 61; *Murphy v. Murphy*, 31 Mo. 322; *Louisville & N. R. Co. v. Voss*, 109 Tenn. 718, 72 S. W. 983; *Horwitz v. La Roche*, — Tex. Civ. App. —, 107 S. W. 1148; *Maughmer v. Behring*, 19 Tex. Civ. App. 299, 46 S. W. 917.

But he need not admit what is cumulative. *Smith v. First Nat. Bank*, 45 Neb. 444, 63 N. W. 796.

The court may require the party applying for continuance to disclose what facts he expects to prove by the absent witness, in order that the opposite party may admit them if he chooses to do so, where injustice would be likely to result from a delay. *Dickson v. Lewis*, 2 Harr. (Del.) 289.

⁴*Smith v. Creason*, 5 Dana, 298, 30 Am. Dec. 688; *Larrat v. Carlier*, 1 Mart. (La.) 145; *Louisville & N. R. Co. v. Voss*, 109 Tenn. 718, 72 S. W. 983, holding it necessary to admit the truth of the facts themselves.

Contra, *Dial v. Valley Mut. Life Asso.* 29 S. C. 581, 8 S. E. 27; *Kerr-Murray Mfg. Co. v. Hess*, 38 C. C. A. 647, 98 Fed. 56.

Farrand v. Bouchell, Harp. L. 83, is sometimes cited as an authority in favor of the more liberal rule; and the statement of the facts in this case shows that the plaintiff agreed that, if defendant would state under oath what he expected to prove by certain absent witnesses because of whose absence he had moved for a continuance, plaintiff would admit that the witnesses, if present, would swear to the facts so stated, and that this should have the same effect as if the witnesses themselves deposed to the same in court, whereupon the continuance was refused. But the court seems to have regarded this admission as an admission of the truth of the facts, since it says that the statement of facts was to be received as if it was actually proved, and that a party cannot complain when his rights are determined on a statement of facts made out by himself.

After such admission the statement in the application is not entitled to any greater weight than would be the testimony of the witness himself if present.¹ And opposing testimony to impeach it cannot be introduced without the usual foundation be-

ing first laid.² Nor can such an admission be withdrawn because the witness has come into court.³

¹ *Waldron v. Home Mut. Ins. Co.* 16 Wash. 193, 47 Pac. 425 (refusing to disturb the verdict on the ground that the jury discredited such testimony, and believed a witness who swore in direct opposition to the affidavit). And *Burris v. Court*, 48 Neb. 179, 66 N. W. 1131, holds that such an admission is not equivalent to an admission that the proposed testimony is absolutely true and indisputable.

² *Pool v. Devers*, 30 Ala. 672; *St. Louis, I. M. & S. R. Co. v. Sweet*, 17 Ark. 287, 21 S. W. 587.

³ *Harris v. McArthur*, 90 Ga. 216, 15 S. E. 758.

26. Imposing conditions.

a. Costs.—The court may impose payment of costs and disbursements as a condition.¹

¹ *Voorhees v. Chicago, R. I. & P. R. Co.* 71 Iowa, 735, 30 N. W. 29; *McDonald v. Weir*, 76 Mich. 243, 42 N. W. 114; *Boone v. Skinner*, 85 Ark. 200, 107 S. W. 673; *Atchison, T. & S. F. R. Co. v. Jones*, 110 Ill. App. 626.

As, where no affidavit was presented therefor until after the jury were sworn and the evidence heard in part. *Morrison v. Beckham*, 16 Ky. L. Rep. 294, 27 S. W. 868.

In the absence of special cause for other conditions this is all that should be required. *Hall v. Dwinell*, 10 Wend. 628.

A party to whom a continuance is offered on terms, and in favor of whom judgment is rendered on trial had after the continuance, may, if the question be properly saved, have a ruling imposing the terms revised on appeal. *Couts v. Neer*, 70 Tex. 468, 9 S. W. 40.

Otherwise, if the judgment goes against him. *Ibid.*

In some states the matter is regulated by statute. N. Y. Code Civ. Proc. § 3255. And compare other statutes.

These statutes generally leave the imposition of such a condition discretionary with the trial court, though some of them are mandatory. For illustrative cases in those states having statutes, see *Eltzroth v. Ryan*, 91 Cal. 584, 27 Pac. 932; *Baumberger v. Arff*, 96 Cal. 261, 31 Pac. 53; *Williams v. Dickenson*, 28 Fla. 90, 9 So. 847; *Atchison, T. & S. F. R. Co. v. Huitt*, 1 Kan. App. 788, 41 Pac. 1051; *State ex rel. Congdon v. Second Judicial Dist. Ct.* 10 Mont. 456, 26 Pac. 182. Under the Vermont statute, the postponement may be granted on terms to be thereafter determined. *Collins v. Richardson*, 66 Vt. 89, 28 Atl. 877.

Amount.—In New York the costs cannot exceed \$10, besides taxable disbursements and witness fees. Code Civ. Proc. § 3255; *Noxon v.*

Bentley, 6 How. Pr. 418; Jackson v. McBurney, 6 How. Pr. 408; Kennedy v. Wood, 26 N. Y. S. R. 34, 7 N. Y. Supp. 90. Unless leave to amend is granted.

In Washington the court cannot impose the payment of more than \$10 in addition to witness fees. Code Civ. Proc. § 832; Tacoma Nat. Bank v. Peet, 9 Wash. 222, 528, 37 Pac. 426, 427.

In California the court is not limited to the taxable costs, but may impose payment of a reasonable gross sum. Pomeroy v. Bell, 118 Cal. 635, 50 Pac. 683.

And their payment within a fixed time may be further imposed as a condition to the party's further appearance and participation at trial.¹

¹ Alexander v. Moore, 111 Ala. 410, 20 So. 339, sustaining an order for continuance granted to defendant on such condition, which stipulated that in default of payment by the first day of the next term judgment by default would be rendered against him. But see Tacoma Nat. Bank v. Peet, 9 Wash. 222, 528, 37 Pac. 426, 427.

Unless otherwise directed such payment is to be made *instantly*,¹ and without awaiting formal demand.²

¹ Jackson ex dem. Pinkney v. Pell, 19 Johns. 270; Bulkeley v. Keteltas, 2 Sandf. 735. Compare Tacoma Nat. Bank v. Peet, 9 Wash. 222, 528, 37 Pac. 426, 427. And some of the statutes expressly provide that the order of continuance shall not be effective until the costs for the term shall have been paid or secured by the applicant. Thus, in Arkansas, Sand. & H. Dig. § 5799. Compare other statutes.

² Jackson ex dem. Pinkney v. Pell, 19 Johns. 270. Compare Tacoma Nat. Bank v. Peet, 9 Wash. 222, 528, 37 Pac. 426, 427.

And the applicant cannot excuse his nonpayment on the ground that an itemized bill was not furnished where he neither made offer of payment nor requested a bill. Maund v. Loeb, 87 Ala. 374, 6 So. 376.

b. Stipulations against abatement.—On granting an application made on behalf of a party dangerously ill, the court may require a stipulation that death before final judgment shall not abate the action.¹ The attorney has power to bind his client by such a stipulation.²

¹ Ames v. Webbers, 10 Wend. 576.

² Cox v. New York C. & H. R. R. Co. 63 N. Y. 414, reversing 4 Hun, 176, 6 Thomp. & C. 405. It was there conceded that counsel have the same

power as the attorney of record. But in *Nightingale v. Oregon C. R. Co.* 2 Sawy. 338, Fed. Cas. No. 10,264, Deady, J., granted plaintiff's motion to set aside an order for continuance, on the ground that it was entered on a stipulation signed by counsel only, he being of opinion that only the attorney of record could sign such a stipulation, and that neither counsel, even though interested in the cause of action, nor the client himself, having an attorney of record, could do so.

The true rule is that counsel, having sufficient authority to appear for the trial of the cause (and an application to postpone is part of the trial), have, at least in the absence of the attorney of record, and equally in his presence and without his dissent, authority to bind the client by acceding to any condition the court have power to impose.

c. Staying another suit.—A postponement, accepted on condition that the trial of an action between the same parties in another court of competent jurisdiction shall be stayed for a certain time, necessitates postponement of the former action if called for trial before the expiration of that time.¹

¹ Thus, an action by a receiver in a court of ancillary jurisdiction should be postponed, where postponement of another suit by the receiver on the same cause of action in the court of original jurisdiction had been accepted by him on condition that he would not proceed to trial with the ancillary suit until the next term of court of original jurisdiction, and that term had not convened when the ancillary suit was called for trial. *Wheeling Bridge & Terminal R. Co. v. Cochran*, 85 Fed. 500.

27. Remedy for refusal of application.

a. Exception and review of ruling.—By the weight of authority an exception lies to the refusal of an applicant to postpone,¹ if made before going on with the trial;² and the affidavits may be made a part of the record.³ In the Federal courts, however, the contrary has been held, the decision of the court below being regarded as discretionary, and not reviewable in error;⁴ but recent cases recognize the more liberal rule that, though discretionary, the decision can be reviewed if a clear case of abuse is established, resulting in material injury to the applicant.⁵ And some of the state courts also hold that no exception lies to a refusal,⁶ unless the application is based on a statutory ground, and the applicant has fully complied with the statute.⁷

¹ *Howard v. Freeman*, 3 Abb. Pr. N. S. 292, 7 Robt. 25; *Gallaudet v.*

Steinmetz, 6 Abb. N. C. 224, 13 Jones & S. 239; Gregg v. Howe, 5 Jones & S. 420; Lillienthal v. Anderson, 1 Idaho, 673; Johnson v. Dinsmore, 11 Neb. 391, 9 N. W. 558.

Granting or refusing a continuance rests in sound discretion, and the appellate court will only interfere in the cases of unreasonable discretion. Lillienthal v. Anderson, 1 Idaho, 673; Davis v. Read, — Ark. —, 12 S. W. 558; Barnes v. Barnes, 95 Cal. 171, 16 L.R.A. 660, 30 Pac. 298; Keegan v. Donnelly, 11 Colo. App. 31, 52 Pac. 292; Johnston v. Patterson, 91 Ga. 531, 18 S. E. 350; Post v. State ex rel. Hill, 14 Ind. App. 452, 42 N. E. 1120; Condon v. Brockway, 157 Ill. 90, 41 N. E. 634; Borland v. Chicago, M. & St. P. R. Co. 78 Iowa, 94, 42 N. W. 590; Westheimer v. Cooper, 40 Kan. 370, 19 Pac. 852; Labouisse v. Orleans Cotton Rope & Mfg. Co. 43 La. Ann. 582, 9 So. 492; Walter A. Wood Mowing & Reaping Mach. Co. v. Vanderbilt, 109 Mich. 489, 67 N. W. 691; Lowenstein v. Greve, 50 Minn. 383, 52 N. W. 964; Valle v. Picton, 91 Mo. 207, 3 S. W. 860; Keens v. Robertson, 46 Neb. 837, 65 N. W. 897; Slingluff v. Hall, 124 N. C. 397, 32 S. E. 739; Richardson v. Penny, 6 Okla. 328, 50 Pac. 231; DeGrote v. DeGrote, 175 Pa. 50, 34 Atl. 312; Nebraska Land & Live Stock Co. v. Burris, 10 S. D. 430, 73 N. W. 919; Leiper v. Earthman, — Tenn. Ch. —, 46 S. W. 321; Charter Oak L. Ins. Co. v. Gisborne, 5 Utah, 319, 15 Pac. 253; Trevelyan v. Lofft, 83 Va. 141, 1 S. E. 901; Ogle v. Jones, 16 Wash. 319, 47 Pac. 747; Bank of Ravenswood v. Hamilton, 43 W. Va. 75, 27 S. E. 296.

A judgment by default after refusal to adjourn will not be disturbed on appeal where, under the circumstances disclosed, the trial court was fully warranted in denying the adjournment and rendering the judgment. Bird v. Snow, 24 Misc. 759, 53 N. Y. Supp. 900. Nor will a judgment be disturbed which accords the complaining party all the relief that a postponement would have given him. Morrison v. Hedenburg, 138 Ill. 22, 27 N. E. 460.

But if a party be ruled into a trial when it appears that he is entitled to a postponement, the judgment or decree against him will be reversed on appeal. Marmet Co. v. Archibald, 37 W. Va. 778, 17 S. E. 299; Zuckerman v. Hawes, 146 Ill. 59, 34 N. E. 479.

But he must ask for the postponement; otherwise, the error is waived. Wyland v. Mendel, 78 Iowa, 739, 37 N. W. 160.

The propriety of the refusal will be tested by the affidavits in support of the application, and it cannot be justified by a reference to the proofs adduced on a subsequent trial. Davis & R. Bldg. & Mfg. Co. v. Riverside Butter & Cheese Co. 84 Wis. 262, 54 N. W. 506. But it is not reversible error for a witness to testify in the presence of a jury on an application, where no objection is offered, no motion made to strike out, and the court is not asked to instruct the jury to disregard the testimony. Roller v. James, 6 Kan. App. 919, Appx. 49 Pac. 630.

A ruling on an application to postpone, based on a question of fact as

to which the evidence is conflicting, will not be disturbed on appeal. *Sutherland v. Lawless*, 59 Mo. App. 157.

Error in refusing to postpone for a certain time is not waived by taking part in a subsequent trial on the merits. *Ogden v. Danz*, 22 Ill. App. 544. Unless the trial does not take place until after the expiration of the time asked. *Baldwin v. Rhea*, 33 Neb. 319, 50 N. W. 1.

2 A motion to suspend the trial to enable the applicant to obtain testimony is addressed to the discretion of the court. *Rapelye v. Prince*, 4 Hill, 119, 40 Am. Dec. 267. So held even where defendant wished to call plaintiff. *Halbrook v. Wilson*, 4 Bosw. 64, 72.

But there is no merit in error assigned on refusal of an application after all the evidence had gone to the jury. *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614. Or of an application, in an action to try title, grounded on surprise at the exclusion of deeds, and refusal to permit parol evidence identifying applicant with the land, where the description could not be aided by extrinsic evidence. *Simpson v. Johnson*, — Tex. Civ. App. —, 44 S. W. 1076. Or where no excuse is offered for the failure to procure the evidence within the time allowed for the purpose. *Robbins v. Hanbury*, 37 Fla. 468, 19 So. 886; *Atchison, T. & S. F. R. Co. v. O'Melia*, 1 Kan. App. 374, 41 Pac. 437.

Otherwise of an application to allow plaintiff time to meet an entirely new item of counterclaim which defendant was allowed to interpose by trial amendment. *Vale v. Trader*, 5 Kan. App. 307, 48 Pac. 458.

3 *Howard v. Freeman*, 3 Abb. Pr. N. S. 292, 7 Robt. 25; *Giraudat v. Korn*, 8 Daly, 406; *Kelly v. Weir*, 19 Misc. 366, 43 N. Y. Supp. 497.

4 *Woods v. Young*, 4 Cranch, 237, 2 L. ed. 607; *Barrow v. Hill*, 13 How. 54, 14 L. ed. 48; *Thompson v. Selden*, 20 How. 194, 15 L. ed. 1001; *Crumpton v. United States*, 138 U. S. 361, 34 L. ed. 958, 11 Sup. Ct. Rep. 355; *Cox v. Hart*, 145 U. S. 376, 36 L. ed. 741, 12 Sup. Ct. Rep. 962; *Richmond R. & Electric Co. v. Dick*, 3 C. C. A. 149, 8 U. S. App. 99, 52 Fed. 379; *Davis v. Patrick*, 6 C. C. A. 632, 12 U. S. App. 629, 57 Fed. 909; *Drexel v. True*, 20 C. C. A. 265, 36 U. S. App. 611, 74 Fed. 12; *Baker v. Texarkana Nat. Bank*, 20 C. C. A. 545, 41 U. S. App. 185, 74 Fed. 598. And in *Bradshaw v. Stott*, 7 App. D. C. 276, it was contended that the rigor of the old rule had been so modified as to allow a review on appeal of a refusal in case of abuse of discretion by the trial court, resulting in material injury; but the court refused to pass on the question, because, as they said, there clearly had been no abuse of discretion in that case.

5 In *Earnshaw v. United States*, 146 U. S. 60, 36 L. ed. 887, 13 Sup. Ct. Rep. 14, it was conceded by the court that there might be cases in which refusal of a continuance, where a clear case was made out entitling the applicant to it, would be such abuse of discretion as would work a reversal of the judgment; but the court refused to disturb the judgment in that case, holding that refusal under the

circumstances disclosed was no abuse of discretion. So, in later cases the court lays down the more liberal rule, that the trial court's ruling on an application for postponement will be reviewed if it be clearly shown to have abused its discretion, resulting in material injury. *Means v. Bank of Randall*, 146 U. S. 620, 36 L. ed. 1107, 13 Sup. Ct. Rep. 186; *Isaacs v. United States*, 159 U. S. 487, 40 L. ed. 229, 16 Sup. Ct. Rep. 51; *Goldsby v. United States*, 160 U. S. 70, 40 L. ed. 343, 16 Sup. Ct. Rep. 216.

⁶ *Wooldridge v. State*, 13 Tex. App. 443, 44 Am. Rep. 708.

In *Shaler & H. Quarry Co. v. Campbell*, 53 Conn. 327, 2 Atl. 755, the court said: "It is a well-settled rule that all questions of adjournment or of the continuance of a case, where there is no provision of statute determining the matter, are questions for the discretion of the court and cannot be made the subjects of error. . . . In the absence of conduct on the part of the triers that indicates corruption or fraud, or a prejudice or unfairness that is equivalent to fraud, their action in the matter is final and cannot be reviewed."

For further illustrative cases, see *Smith v. Collins*, 94 Ala. 394, 10 So. 334; *Trammell v. Hudmon*, 86 Ala. 472, 6 So. 4; *Lowering v. State*, 98 Ala. 45, 13 So. 498; *Banks v. Gay Mfg. Co.* 108 N. C. 282, 12 S. E. 741; *Dial v. Valley Mut. Life Asso.* 29 S. C. 560, 8 S. E. 27; *Soper v. Manning*, 158 Mass. 381, 33 N. E. 516; *Kittredge v. Russell*, 114 Mass. 67; *State v. Briggs*, 27 S. C. 80, 2 S. E. 854; *State v. Lucker*, 40 S. C. 549, 18 S. E. 797; *Capt v. Stubbs*, 68 Tex. 222, 4 S. W. 467; *San Antonio & A. P. R. Co. v. Manning*, 20 Tex. Civ. App. 504, 50 S. W. 177; *Dimmit County v. Oppenheimer*, — Tex. Civ. App. —, 42 S. W. 1029; *Richardson v. Wright*, 58 Vt. 367, 5 Atl. 287.

⁷ See *supra*, §§ 18 et seq.

b. Necessity of exception.—And in those jurisdictions recognizing the decision of the lower court as reviewable, an exception thereto is necessary before a review can be had.¹

¹ *Corn Exch. Bank v. Schuttleworth*, 99 Iowa, 536, 68 N. W. 827; *Burke v. Ward*, 50 Ill. App. 283; *State v. Brodden*, 47 La. Ann. 375, 16 So. 874; *Staples v. Arlington State Bank*, 54 Neb. 760, 74 N. W. 1066; *Moss v. Katz*, 69 Tex. 411, 6 S. W. 764; *McGregor v. Skinner*, — Tex. Civ. App. —, 47 S. W. 398; *Brennan v. Front Street Cable R. Co.* 8 Wash. 363, 36 Pac. 272.

And a motion to set aside a verdict rendered at a subsequent term is insufficient. *Whaley v. Cooper*, 82 Ga. 72, 8 S. E. 870.

c. Preservation of exception.—And generally to obtain a review on appeal, the bill of exceptions must preserve the appli-

cation, the ruling thereon, and the exception to the ruling, and must be incorporated in the record on appeal.¹

¹ Chicago & E. I. R. Co. v. Goyette, 133 Ill. 21, 24 N. E. 549; Hoskins v. Hight, 95 Ala. 284, 11 So. 253; State v. Jones, 134 Mo. 254, 35 S. W. 607.

And the correctness of the ruling will be presumed where a material portion of the moving evidence is omitted from the record. Ostler v. State, 3 Ind. App. 122, 29 N. E. 270. See also Holden v. Brimage, 72 Miss. 228, 18 So. 383. Or where no evidence in support of the facts relied on is preserved. Eddie v. Eddie, 138 Mo. 599, 39 S. W. 451; Long v. Behan, 19 Tex. Civ. App. 325, 48 S. W. 555. Or where the grounds of the application are not shown by the record except in the motion for a new trial. Ballew v. Casey, — Tex. —, 9 S. W. 189. But see Garfield Nat. Bank v. Colwell, 28 N. Y. S. R. 723, 8 N. Y. Supp. 380, reviewing an exception when made part of a record and when it was one of the grounds of a motion for a new trial.

So, also, the propriety of terms of refusal will not be considered on appeal where the record does not show that appellant had a meritorious defense. Hefling v. Van Zandt, 60 Ill. App. 662, affirmed in part and reversed in part in 162 Ill. 162, 44 N. E. 424.

d. Specification of error; sufficiency.—The assignment of error should specify the ruling complained of with sufficient definiteness to present it for review.¹

¹ The assignment of error in overruling appellant's motion for a continuance is insufficient where there are two separate and distinct rulings upon such motions. May v. State, 140 Ind. 88, 39 N. E. 701.

In Kansas the propriety of a refusal is presented for review in the court of appeals by an assignment of error to the overruling of the motion for a new trial, one of the grounds of which motion was in proceeding with the trial while the case was pending and undetermined in the supreme court "as set forth in said defendant's motion for a continuance." Topeka v. Smelser, 5 Kan. App. 95, 48 Pac. 874.

e. Necessity that judgment be final.—And to obtain a review of a ruling on application to postpone, the judgment must be final for purposes of appeal.¹

¹ Thus, a writ of error will not lie to an order granting a continuance where the cause is still pending in the lower court. Carter v. Rome & C. Constr. Co. 89 Ga. 158, 15 S. E. 36.

So of an appeal when the judgment on the merits is not appealed from. Newman v. Wilderstein, 42 La. Ann. 925, 8 So. 607.

So, denial of a motion to strike a cause from the calendar is equivalent to refusal of a continuance, and is not appealable. *Whitefoot v. Leflingwell*, 90 Wis. 182, 63 N. W. 82.

And in South Carolina an order for a continuance does not "involve the merits" or "affect the substantial rights" so as to be appealable. *Latimer v. Latimer*, 42 S. C. 205, 20 S. E. 159.

Refusal of trial court to grant postponement may be reviewed on motion for new trial, or by general term, on appeal from order; but it cannot be reviewed by court of appeals on appeal from judgment on verdict. *Smith v. Alker*, 102 N. Y. 87, 5 N. E. 791.

No appeal lies directly to the general term of the city court of New York from an order denying a postponement of a trial, by a defendant who withdraws therefrom, but the proper course is to make a nonenumerated motion at special term to set aside such decision. *McKeon v. Kellard*, 6 Misc. 31, 26 N. Y. Supp. 72. But an appeal lies to the general term from an order granting an adjournment if illegal conditions are imposed. *Kennedy v. Wood*, 54 Hun, 14, 7 N. Y. Supp. 90.

In Canada, a judgment on a contested application by a legatee to continue a suit to set aside a deed is final as a determination of the right to continuance, and therefore appealable to the supreme court. *Baptist v. Baptist*, 21 Can. S. C. 425.

28. Postponement by agreement or consent.

A cause may be postponed by agreement of the parties, acting for themselves or through counsel, and with the consent of the court.¹ And some courts provide in their rules that no cause on the trial list shall be postponed more than once by consent of counsel or parties.² And the agreement should be reduced to writing.³ But an agreement to postpone will not always be enforced,⁴—especially if its enforcement will work prejudice.⁵

¹ *Moulder v. Kempff*, 115 Ind. 459, 17 N. E. 906, holding such consent of court necessary.

A stipulation that if for any reason either party cannot attend on the day set for trial, the trial shall be postponed, does not require action by the justice, but in the absence of one party the other is to continue it by force of the agreement; and the word "party" includes counsel. *Standard Granite Co. Quarries v. Aikey*, 67 Vt. 116, 30 Atl. 806.

It will not be presumed that counsel was present and acquiesced in the continuance unless the record contains statements expressly to that effect. *Dickinson v. Mann*, 74 Ga. 217. But an order to postpone, granted on the court's misunderstanding induced by counsel's statement asking therefor, that opposing counsel consented thereto, is

properly set aside, though the latter is in court when the postponement is asked, unless he heard the statement and made no objection thereto. *Hunt v. Listenberger*, 14 Ind. App. 320, 326, 42 N. E. 240.

A defendant who, with plaintiff's consent, obtains a postponement for more than ninety days, under the Nebraska Code, cannot, on the day to which adjournment was had, demand a dismissal of the action. *Fischer v. Cooley*, 36 Neb. 626, 54 N. W. 960.

² So provided by rule of court of the common pleas of Lancaster county, Pennsylvania. And in *Schrington v. Bertolet*, 155 Pa. 638, 26 Atl. 776, it was held that the necessary meaning of this rule was that the court must grant at least one continuance if both parties consent, and that a refusal, which forces parties to trial without witnesses, and is in violation of this rule, is reversible error.

³ So required by a rule of court in Alabama. *Collier v. Falk*, 66 Ala. 224. See also *Griswold v. Lawrence*, 1 Johns. 507; *Peralta v. Mariea*, 3 Cal. 185.

⁴ As, an alleged oral agreement made out of court, the evidence leaving it uncertain whether the agreement was really made. *Felton v. Moffett*, 29 Neb. 582, 45 N. W. 930.

⁵ Thus, an agreement between counsel, made without the consent of one of the parties, will be set aside by the court in its discretion when enforcement of the agreement will result in serious injury to one of the parties and the other will not be prejudiced by its being so set aside. *McClure v. Sheek*, 68 Tex. 426, 4 S. W. 552.

29. Postponement by operation of law.

a. To next term.—Undisposed-of cases on the docket at the end of a term are, however, by operation of law, continued to the next term without a special order.¹ But an order of the court, on its own motion, continuing to the next term all cases undisposed of, may be set aside a few minutes later and the cases ordered for trial at that term.²

¹ *Harrison v. Com.* 81 Va. 491; Va. Code, chap. 161, § 16; *Poyer v. Des Plaines*, 124 Ill. 310, 15 N. E. 768; *Horn v. Excelsior Springs Co.* 52 Mo. App. 548; *Strickler v. Foegel*, 40 Neb. 773, 59 N. W. 384. And causes on the short-cause calendar in Cook county, Illinois, circuit court may be so continued from day to day if necessary to dispose of them for trial. *Armstrong v. Crilly*, 152 Ill. 646, 38 N. E. 936.

So, in West Virginia, a cause before a justice stands over for one week and from week to week until disposed of on the nonappearance of the justice at the hour set; and a judgment rendered by another justice called in by one party after the hour has expired, without notice to

the other party, is void and will be set aside on certiorari. *Parsons v. Aultman, M. & Co.* 45 W. Va. 473, 31 S. E. 935.

- ² *Lamont v. Williams*, 43 Kan. 558, 23 Pac. 592, sustaining such action by the trial court, and holding that jurisdiction and control over the case is not lost by the first order.

b. Extension by legal holiday.—A postponement to a day on which the court is prohibited from transacting business—as Sunday or a legal holiday—will extend to the first day thereafter on which it can legally transact business.¹

- ¹ *State ex rel. Carter v. King*, 23 Neb. 540, 37 N. W. 310. And a motion returnable on Labor Day, which by New York laws is made a legal holiday, stands over as of course until the next day, in the absence of a judge on that day. *Berthold v. Wallace*, 14 Misc. 55, 35 N. Y. Supp. 208.

But under the Wisconsin statute prohibiting the opening of court or transacting of business, except to instruct or discharge a jury or receive a verdict and render judgment thereon, a justice of the peace has no power to further adjourn a cause on Thanksgiving Day, to which day it had been previously adjourned by consent of parties; and a judgment rendered on the last adjourned day is void. *Milwaukee Harvester Co. v. Teasdale*, 91 Wis. 59, 59 N. W. 422. So, also, under a South Dakota statute. *Leonosio v. Bartilino*, 7 S. D. 93, 63 N. W. 543.

30. Postponements by justices of the peace.

a. In general.—In most states the postponement of causes before justices of the peace is regulated by statute;¹ and a postponement granted before the time allowed by statute,² or for a time in excess of the statutory period,³ or exceeding the number of postponements allowed,⁴ is unauthorized and ousts the justice of jurisdiction to further proceed with the cause, unless the postponement was expressly agreed to by the parties.⁵

- ¹ Thus, under a Kansas statute, a party is entitled of right to a continuance for any desired number of days not exceeding fifteen on filing the required affidavit. *Cook v. Larson*, 47 Kan. 70, 27 Pac. 113.

In West Virginia defendant in an action before a justice of the peace who, on the return day, makes oath that he has a just defense, is entitled to continuance for seven days. *Mullinax v. Waybright*, 33 W. Va. 84, 10 S. E. 25. But a mayor, before whom is returnable an order issued on a petition to the counsel to show why a merry-go-

round should not be abated as a nuisance, is not a justice of the peace within the meaning of the Code of West Virginia, allowing causes before justices to be postponed seven days, and his refusal to so postpone is not error. *Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906.

In Nebraska, continuance of a cause before a justice for not to exceed thirty days will be granted on the applicant proving, as required by the Code, by his own oath or otherwise, that he cannot, for want of material evidence expected to be produced by him, safely proceed to trial. *Belcher v. Skinner*, 28 Neb. 91, 44 N. W. 78; *Coombs v. Brenklander*, 29 Neb. 586, 45 N. W. 929. But not when he has already had one continuance of seventeen days by consent of the other party; he must then satisfy the justice by oath or otherwise, as required by another statute, of his inability to go to trial before the time asked for want of material evidence, describing it; that the delay is not from any fault of his, and that he expects to procure the testimony. *Moran v. McCullum*, 50 Neb. 449, 69 N. W. 938.

² Thus, jurisdiction is lost by an adjournment on the return day after both parties have appeared, but before issue is joined. *Duel v. Sykes*, 59 Hun, 117, 13 N. Y. Supp. 166. Or where plaintiff does not appear or put in a complaint on the return day, and defendant appears and demands dismissal because of plaintiff's failure to appear. *Todd v. Doremus*, 60 Hun, 385, 15 N. Y. Supp. 470.

³ *Holden v. McCabe*, 21 Pa. Co. Ct. 41.

So, in Iowa, an adjournment for three days from the return day without defendant's consent, in violation of the Code, divests the justice of jurisdiction; and verbal notice of the adjournment given by plaintiff to defendant's agent will not restore the jurisdiction. *Iowa Union Teleph. Co. v. Boylan*, 86 Iowa, 90, 52 N. W. 1122.

But the New York statute restricting the right of the justice of the New York city municipal court to grant adjournments to a period "not exceeding ninety days from the return of the summons" applies to the period of each particular adjournment asked, and is not violated so as to oust the court of jurisdiction because the aggregate time of all adjournments granted on application of either party exceeds the prescribed limit. *First Nat. Bank v. Smith*, 24 Misc. 709, 53 N. Y. Supp. 795.

And an adjournment for three days does not divest the justice of jurisdiction to hear the case on the return day because he omitted to state in his docket on whose motion the adjournment was had, where there is no general appearance by defendant, and plaintiff on the return day appears and files his complaint. *Wheeler v. Paterson*, 64 Minn. 231, 66 N. W. 964.

⁴ Thus, a third adjournment without cause shown, after two previous adjournments for cause, ousts jurisdiction. *State v. Gust*, 70 Wis. 631, 35 N. W. 559.

Abbott, Civ. Jur. T.—5.

And under the New York Code of Civil Procedure a second adjournment without consent of both parties ousts the court of jurisdiction. *Morris v. Hays*, 24 App. Div. 8, 43 N. Y. Supp. 639. Although payment of the objecting party's witness fees is imposed as a condition. *Newman v. Woodcock*, 16 Misc. 142, 38 N. Y. Supp. 957.

So, in Wisconsin, a second adjournment in the absence of, and without consent of, defendant, and without the oath or affidavit required, deprives a justice of jurisdiction under a statute prohibiting more than one adjournment unless the applicant shall satisfy the justice by oath that he cannot safely proceed to trial for want of material evidence, although the justice assigns, as one of the reasons for the adjournment, his own illness, as another statute requires transference of the case to another justice in case of illness. *Gallager v. Serfling*, 92 Wis. 544, 66 N. W. 692.

⁵ *Stoutenburg v. Humphrey*, 9 App. Div. 27, 41 N. Y. Supp. 140.

And under the Washington Code prohibiting postponement for a period exceeding sixty days, jurisdiction is lost where the adjournment exceeds sixty days and the docket entry fails to show that it is by consent of both parties. *Nelson v. Campbell*, 1 Wash. 261, 24 Pac. 539.

And in Iowa a finding shown by the justice's record, that an adjournment of three days, in violation of the Code, was with consent of the parties, when in fact defendant had not consented, is not conclusive on the latter; and a subsequent default judgment against him is void. *Iowa Union Teleph. Co. v. Boylan*, 86 Iowa, 90, 52 N. W. 1122.

In Minnesota an adjournment of one hour by consent of both parties when the pleadings are closed is proper, although, under the statute, an adjournment for more than six days without such consent is improper. *Caley v. Rogers*, 72 Minn. 100, 75 N. W. 114. See also *West v. Berg*, 66 Minn. 287, 68 N. W. 1077.

And in New York jurisdiction is not lost by an adjournment for the time agreed on by the parties after mistrial, which had been demanded by plaintiff alone, and without issuing a new venire, as required by the Code of Civil Procedure, where the plaintiff waives his right of trial by jury and defendant's attorney states that he does not demand a jury trial, although he does state that he wants the case tried according to law. *Suiter v. Kent*, 12 App. Div. 599, 43 N. Y. Supp. 137.

According to *Johnson v. Hagberg*, 48 Minn. 221, 50 N. W. 1037, an adjournment beyond the statutory limitation under a stipulation of the parties made and filed before the adjourned day, for further adjournment, if an irregularity, is an immaterial one, and the loss of jurisdiction is waived by the stipulation.

And the *undertaking* required by a Nevada statute to procure a continuance or adjournment is not necessary where the cause is adjourned,

though beyond the statutory period, by consent of the parties. Nevada C. R. Co. v. Lander County Dist. Ct. 21 Nev. 409, 32 Pac. 673.

b. Failure to specify time and place.—So, too, failure to specify the time¹ and place² to which the cause is adjourned de-vests him of jurisdiction.

¹ Thus, a justice loses jurisdiction by an adjournment without a fixed day on a verbal agreement by the parties to agree on the day, and that in case of their failure so to do the justice may appoint a day. Bonney v. Paul, 39 N. Y. S. R. 596, 15 N. Y. Supp. 442.

² Fitzhugh v. Rivard, 109 Mich. 154, 66 N. W. 947.

c. Holding cause open.—But merely holding open a cause for a few hours to allow defendant to appear,¹ or from day to day in order to perform other official duties,² will not work a loss of jurisdiction.

¹ Steele v. Wells, 56 N. Y. Supp. 367.

² Woempener v. Ketchum, 110 Mich. 34, 67 N. W. 1106 (holding that "holding open" is not technically an adjournment, within the meaning of Howell's Annotated Statutes, even though it is so called on the docket, and that it is not within the provision of a statute requiring the docket to show adjournments and the place to which they are made).

III.—IMPANELING THE JURY.

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2. Interrogating the jurors.
3. Evidence *aliunde*.
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 - c. When interposed.
 - d. Number of.
10. Court may set aside or excuse juror.
 - a. In general.
 - b. Time or stage of the case.
 - c. Sufficiency of showing.
 - d. On motion of court or against consent of party.
 - e. Harmless error.
 - f. Excusing person from jury list or venire.
 - g. Resumption of trial after substituting juror.

[The statutes abrogating resort to triers, and leaving it to the judge to determine all causes of challenge, do not, without more,

abrogate the distinction between challenges for principal cause and challenges to the favor. In the former class, if the fact suggested be established, incompetency is an inevitable conclusion of law; in the latter, incompetency is a mere question of fact.

The application of the following rules should be guided by the recognized principles that, in the absence of statute to the contrary: (1) A court of general jurisdiction, finding the statutory means of providing a jury inadequate, may fall back on its common-law powers; (2) an unfit juror may be set aside on a just objection, though the statutes do not provide for the case; and (3) the judge may properly interpose of his own motion, when necessary to secure a fit and impartial jury.]

1. The right to challenge.

The right to challenge jurors for a cause assigned, as distinguished from peremptory challenge, is a common-law right which cannot be taken away except by express statute.¹

¹ *Barrett v. Long*, 3 H. L. Cas. 395, 415. But see *Kundinger v. Saginaw*, 59 Mich. 355, 26 N. W. 634, where the court say: "It is not necessary that the statute should contain a provision that a challenge for cause may be allowed. It exists in all cases where the jury impaneled is a common-law jury, and a party cannot be deprived of this right by statute."

In South Dakota there may be a challenge to the array in civil cases as well as in criminal cases, although the Code of Civil Procedure makes no provision for such challenge. *Jones v. Woodworth*, 24 S. D. 583, 124 N. W. 844.

2. Interrogating the jurors.

Each party has the right before the jury is sworn to interrogate each proposed juror under oath,¹ or to have the court do so,² on points material to the question whether he has the qualifications required by law and is impartial.³

¹ To determine the competency of a juror an oath is administered to him, and he is required to answer all questions touching his qualifications as a juror, not generally, but in that particular case. *Ensign v. Harney*, 15 Neb. 330, 48 Am. Rep. 344, 18 N. W. 73.

But that jurors were not so sworn cannot be objected to on appeal in the absence of an exception to impaneling them, and it is not even stated that they were not qualified, or that appellant was in fact

prejudiced, and it does not appear when his counsel first knew of the omission. *Preston v. Hannibal & St. J. R. Co.* 132 Mo. 111, 33 S. W. 783.

It is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact nor concealing any material matter, since full knowledge of all material and relevant matters is essential to a fair and just exercise of the right to challenge either for cause or peremptorily. And a juror who falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, is guilty of misconduct, which is prejudicial to the party. And the injury done cannot be repaired by a subsequent statement correcting the untruthful answer. *Pearcy v. Michigan Mut. L. Ins. Co.* 111 Ind. 59, 60 Am. Rep. 673, 12 N. E. 98.

² In Alabama, neither party has the right to so examine, but the examination must be made by the judge. *Kansas City. M. & B. R. Co. v. Whitehead*, 109 Ala. 495, 19 So. 705.

That the court participated in the examination of jurors is not cause for reversal where appellant examined them as much as he desired, and accepted those who tried the case. *Kessel v. O'Sullivan*, 60 Ill. App. 548.

But the fact that the court had, in order to test their disinterestedness, put questions to the jurors as a whole, after the completion of the panel, to which no juror responded, cannot deprive a party of his right to interrogate the jurors for the same purpose by the same or a similar line of questioning. *American Bridge Works v. Pereira*, 79 Ill. App. 90.

³ *Hull v. Albrow*, 2 Disney (Ohio) 147, 149; *Loeffler v. Keokuk Northern Line Packet Co.* 7 Mo. App. 185; *Gilliam v. Brown*, 43 Miss. 641. Other cases in note to *State v. Crank*, 23 Am. Dec. 131. See also *Paducah, T. & A. R. Co. v. Muzzell*, 95 Tenn. 200, 31 S. W. 999; *Holton v. Hendley*, 75 Ga. 847. Contra, in South Carolina, *State v. Crank*, 2 Bail. L. 66, 23 Am. Dec. 117.

Interrogating as to general opinions of a juror's duties was held not allowed even for the purpose of ascertaining if the juror is "of sound judgment and well informed," as required by statute, in *Pennsylvania Co. v. Rudel*, 100 Ill. 603.

Prospective jurors may not be cross-examined as to the meaning of various technical terms likely to be used during the trial. *San Antonio & A. P. R. Co. v. Belt*, 24 Tex. Civ. App. 281, 59 S. W. 607.

Whether questions propounded to veniremen on such examination were properly excluded is immaterial, where none of them so questioned were accepted, and appellant had not exhausted his peremptory challenges, and it does not appear that he sought to so question those afterward accepted. *Grand Lodge I. O. of M. A. v. Wieting*, 168 Ill. 408, 48 N. E. 59, 68 Ill. App. 125.

Great latitude is allowed in exercising this right of examination of a juror,¹ and if it appears probable that he is not indifferent he is excluded.² But its scope and the pertinency of the questions propounded are discretionary with the trial judge, to be determined from the nature of the case on trial.³ And it is for the court to say what evidence is admissible on the question of impartiality.⁴

¹ But it is error to permit counsel to enlarge on his side of the case, and, under pretense of such an examination, set out what he claims he will prove, so as to prejudice the jurors before they are sworn. *Hudson v. Roos*, 76 Mich. 173, 42 N. W. 1099.

And counsel should not ask prospective jurors questions intended to suggest that the defendant was protected by indemnity insurance. *Stewart v. Brune*, 102 C. C. A. 534, 179 Fed. 350.

² *State v. Chapman*, 1 S. D. 414, 10 L.R.A. 432, 47 N. W. 411. And see *Pearcy v. Michigan Mut. L. Ins. Co.* 111 Ind. 59, 60 Am. Rep. 673, 12 N. E. 98, and cases cited.

³ *Van Skike v. Potter*, 53 Neb. 28, 73 N. W. 295. And for further illustrations see cases in notes following.

⁴ *Smith v. Floyd*, 18 Barb. 522.

This right extends to facts not in themselves disqualifying if, in connection with others, they might show bias;¹ or to facts which might so affect the juror's mind as to create bias or prejudice.² And even to the fact of prejudice itself,³ though not as to prejudice against crime.⁴

So, the juror may be asked if he has any knowledge of the facts of the case, or whether he has formed any opinion about it;⁵ but not as to his opinion on an assumed state of facts.⁶

But as to the propriety of asking jurors which party they would favor if the testimony were equally balanced, the cases do not agree.⁷

And the juror's relations with parties admitted to be really interested in the suit may be inquired into, though they are strangers to the record;⁸ but it is not proper to ask a juror if he is a debtor of a party.⁹

So, too, a juror may be questioned as to his acquaintance with counsel in the case,¹⁰ or so as to ascertain whether the relation of attorney and client exists between them.¹¹

So, also, the juror's kinship to a party may be inquired into, though it is not within the degree disqualifying him.¹²

And he may be asked if he is a man of family, to enable counsel to advisedly exercise his right of peremptory challenge.¹³

He may be asked as to his membership in secret societies and church organizations;¹⁴ and whether he is an officer of or interested in any accident or indemnity insurance company.¹⁵

But questions tending to his disgrace,¹⁶ or disadvantage,¹⁷ cannot be asked the juror.

¹ *Mechanics' & F. Bank v. Smith*, 19 Johns. 115.

² *Comfort v. Mosser*, 121 Pa. 455, 15 Atl. 612.

As, in a suit against a railway corporation, it is proper to ask the jury whether the fact that plaintiff was riding on a free pass would influence their verdict. *Jacksonville S. E. R. Co. v. Southworth*, 32 Ill. App. 307, affirmed, 135 Ill. 250, 25 N. E. 1093. So jurors may be asked as to prejudice against labor unions. *Gatzow v. Buening*, 106 Wis. 1, 49 L.R.A. 475, 80 Am. St. Rep. 17, 81 N. W. 1003.

But to ask a juror whether the testimony of witnesses who profess the Jewish faith would receive as much credit as that of members of any other faith is improper. *Horst v. Silverman*, 20 Wash. 233, 72 Am. St. Rep. 97, 55 Pac. 52.

So, too, in an action for services, a juror who has stated that he had difficulty with his employers, touching payment of wages, cannot be asked whether such difficulty would prejudice him against defendant. *Fish v. Glass*, 54 Ill. App. 655.

But where counsel, after all desired questions had been asked by the judge, announced themselves satisfied, and the jurors were drawn according to law, and were competent, the court may properly refuse to permit counsel to examine each individual juror to ascertain his bias. *London & L. F. Ins. Co. v. Rufer*, 11 Ky. L. Rep. 724, 12 S. W. 948.

³ Thus, *Ford v. Umatilla County*, 15 Or. 313, 16 Pac. 33, holds that, although not authorized by statute, it is proper to allow jurors to be asked as to prejudice existing in their minds for or against either party, and that refusal is reviewable on appeal. So, *Horst v. Silverman*, 20 Wash. 233, 55 Pac. 52, holds it proper to ask a juror if he is prejudiced against people professing the Jewish faith; and *Towl v. Bradley*, 108 Mich. 409, 66 N. W. 347, holds that defendant may ask jurors whether they are prejudiced against the defense of the statute of limitations, which he has pleaded.

But under a Virginia statute allowing examination of a juror to ascertain if he is related to either party, or has any interest in the cause, or is sensible of any bias or prejudice "therein," a juror cannot properly be asked if he is prejudiced against corporations. *Atlantic & D. R. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590.

A taxpayer in a city which is a party may be asked whether his interest as such would be likely to influence his verdict. *Davey v. Janesville*, 111 Wis. 628, 87 N. W. 813.

⁴ *Higgins v. Minaghan*, 78 Wis. 602, 11 L.R.A. 138, 47 N. W. 941.

⁵ *Houston & T. C. R. Co. v. Terrell*, 69 Tex. 650, 7 S. W. 670.

⁶ *Woollen v. Wire*, 110 Ind. 251, 11 N. E. 236; *Com. & Van Horn*, 4 Lack. L. News, 63; *Fish v. Glass*, 54 Ill. App. 655.

⁷ In Michigan it is held proper. *Otsego Lake Twp. v. Kirsten*, 72 Mich. 1, 40 N. W. 26; *Monaghan v. Agricultural F. Ins. Co.* 53 Mich. 238, 18 N. W. 797. While in Illinois it is not allowed. *Chicago & A. R. Co. v. Fisher*, 38 Ill. App. 33. See *Fish v. Glass*, 54 Ill. App. 655.

⁸ *Meyer v. Gundlach-Nelson Mfg. Co.* 67 Mo. App. 389.

⁹ *Richardson v. Planters' Bank*, 94 Va. 130, 26 S. E. 413.

¹⁰ *O'Hare v. Chicago, M. & N. R. Co.* 139 Ill. 151, 28 N. E. 923.

¹¹ *Vandalia v. Seibert*, 47 Ill. App. 477; *Lowe v. Webster*, 19 Ky. L. Rep. 1208, 43 S. W. 217. But refusal to permit the question is not reversible error unless it appears that the verdict was influenced by the relation of attorney and client between opposing counsel and one or more of the jurors. *Lowe v. Webster*, *supra*. And *Northern P. R. Co. v. Holmes*, 3 Wash. Terr. 202, 14 Pac. 688, while recognizing the line of inquiry as legitimate, holds that refusal to allow it was not in that particular instance an erroneous exercise of discretion.

¹² *Tegarden v. Phillips*, — Ind. App. —, 39 N. E. 212.

¹³ *Union P. R. Co. v. Jones*, 21 Colo. 340, 40 Pac. 891.

¹⁴ *Burgess v. Singer Mfg. Co.* — Tex. Civ. App. —, 30 S. W. 1110.

But the pertinency of the question to the particular case is committed to the sound discretion of the trial judge, and its exclusion is not such an abuse as to require reversal, in the absence of prejudice. *Van Skike v. Potter*, 53 Neb. 28, 73 N. W. 295.

¹⁵ *Owensboro Wagon Co. v. Boling*, 32 Ky. L. Rep. 816, 107 S. W. 264; *M. O'Connor & Co. v. Gillaspy*, 170 Ind. 428, 83 N. E. 738; *Saller v. Friedman Bros. Shoe Co.* 130 Mo. App. 712, 109 S. W. 794; *Heydman v. Red Wing Brick Co.* 112 Minn. 158, 127 N. W. 561; *Girard v. Grosvenordale Co.* 82 Conn. 271, 73 Atl. 747; *Brusseau v. Lower Brick Co.* 133 Iowa, 245, 110 N. W. 577; *Blair v. McCormack Constr. Co.* 123 App. Div. 30, 107 N. Y. Supp. 750; *Grant v. National R. Spring Co.* 100 App. Div. 234, 91 N. Y. Supp. 805.

So he may also be examined as to whether he is insured by or interested in a specified insurance company. *Rinklin v. Acker*, 125 App. Div. 244, 109 N. Y. Supp. 125.

And he may be asked whether he was or had been a solicitor of any indemnity insurance company. *Hoyt v. Independent Asphalt Paving Co.* 52 Wash. 672, 101 Pac. 367.

16 Burt v. Panjaud, 99 U. S. 180, 181, 25 L. ed. 452; Mechanics' & F. Bank v. Smith, 19 Johns. 115; People v. Fuller, 2 Park Crim. Rep. 16; Ryder v. State, 100 Ga. 528, 38 L.R.A. 721, 28 S. E. 246.

17 3 Bl. Com. 363.

3. Evidence aliunde.

A witness may be called to prove the ground of challenge.¹

¹ Pringle v. Huse, 1 Cow. 432; Burt v. Panjaud, 99 U. S. 180, 25 L. ed. 451. But compare Hughes v. People, 116 Ill. 330, 6 N. E. 55.

4. Exception to admission or exclusion of evidence.

An exception lies to the admission or exclusion of evidence under either of the preceding rules. But to render available the exclusion of evidence it must appear that the party had exhausted his peremptory challenges,¹ or that he was prevented from ascertaining whether the juror had such bias or prejudice as would influence his verdict.²

¹ Grand Lodge I. O. of M. A. v. Wieting, 68 Ill. App. 125, affirmed in 168 Ill. 408, 48 N. E. 59. And in Ford v. Cheever, 113 Mich. 440, 71 N. W. 837, such exclusion was held no ground for appeal where the juror was peremptorily excused by the party asking the question, who, without examining other jurors, announced himself as satisfied with the jury.

² Southern P. Co. v. Rauh, 1 C. C. A. 416, 7 U. S. App. 84, 49 Fed. Rep. 696; Ford v. Umatilla County, 15 Or. 313, 16 Pac. 33.

5. Grounds of challenge.

a. General disqualifications.—General disqualifications for jury service will support a challenge for cause,—as, for instance, conviction for infamous crime.¹ So, where there is doubt as to the juror's being an elector of the county.² And by statute in some states being a party interested in a suit pending and at issue at the term of the court for which he is summoned,³ is ground of challenge for cause. So, at least in one state, is ignorance of the English language.⁴ But a very imperfect knowledge of the law applicable to the case is not.⁵ Nor is the fact that the juror is exempt from jury duty ground of challenge for cause.⁶ Color is no test of right to serve on a jury.⁷ A juror need not be a taxpayer, if he possesses the other qualifica-

tions of an elector.⁸ And persons whose names are entered on the general list for the district are presumed qualified.⁹

¹ *Garrett v. Weinberg*, 54 S. C. 127, 31 S. E. 341 (S. C. Const. art. 5, § 22, and art. 2, § 6, and Rev. Stat. 1893, §§ 2377, 2379, 2406). But an unsigned information charging crime, filed fifteen years before, will not disqualify. *Missouri, K. & T. R. Co. v. Burrough*, — Tex. Civ. App. —, 46 S. W. 403. But failure to object on this ground, though the fact was known before the cause was submitted to the jury, waives that objection. *Blanton v. Mayes*, 72 Tex. 417, 10 S. W. 452.

² Even though on *voir dire* he brings himself within the statutory qualification, where no complaint is made that a fair jury was not obtained. *Omaha & R. Valley R. Co. v. Cook*, 37 Neb. 435, 55 N. W. 943.

The South Carolina Constitution requires jurors to be qualified electors as provided therein; and they must also be registered, registration being a qualification for suffrage. *Mew v. Charleston & S. R. Co.* 55 S. C. 90, 32 S. E. 828.

¹ In California, jurors, to be competent, must have been assessed on the last assessment roll of the county or city on property belonging to them; and an assessment of the property to two persons is one against each so as to qualify each within the Code requirement. *People v. Owens*, 123 Cal. 482, 56 Pac. 251.

³ N. C. Code, § 1728. But a juror interested as a creditor in a fund for which a receiver has sued is not a party within this statute. *Vickers v. Leigh*, 104 N. C. 248, 10 S. E. 308. And see various other codes and statutes.

A person is disqualified as a juror if he has an action pending against the same defendant on another issue arising from the same wrong alleged in the case on trial. *Stennett v. Bessemer*, 154 Ala. 637, 45 So. 890.

⁴ Thus, by statute, in Michigan (How. Anno. Stat. § 755). See *O'Neil v. Lake Superior Iron Co.* 63 Mich. 690, 35 N. W. 162. *Contra*, *Re Allison*, 13 Colo. 525, 22 Pac. 820.

Ability to read and write the English language is a requisite in Missouri. *Parman v. Kansas City*, 105 Mo. App. 691, 78 S. W. 1046.

⁵ *Union P. R. Co. v. Motzner*, 8 Kan. App. 431, 55 Pac. 670.

⁶ *Luebe v. Thorpe*, 94 Mich. 268, 54 N. W. 41; *Brown v. State*, 40 Fla. 459, 25 So. 63; *People v. Rawn*, 90 Mich. 377, 51 N. W. 522 (because juror over age); *People v. Owens*, 123 Cal. 482, 56 Pac. 251 (exemption under Cal. Code Civ. Proc. § 200, to persons holding county, city, or township offices); *Albany Phosphate Co. v. Hugger Bros.* 4 Ga. App. 771, 62 S. E. 533. In 8 L.R.A.(N.S.) 498 (*State v. Cantwell*, 142 N. C. 604, 55 S. E. 820, 9 A. & E. Ann. Cas. 141), authorities are cited to sustain the propositions that an exemption of firemen from jury duty is not a vested right, but a statute conferring it may be amended or repealed; that the exemption will be recognized by the

courts; and that such exemption must be claimed by the juror at the first opportunity. Alabama Criminal Code relative to disqualifications and exemptions of jurors applies to civil cases. Louisville & N. R. Co. v. Young, 168 Ala. 551, 53 So. 213.

⁷ McPherson v. McCarrick, 22 Utah, 232, 61 Pac. 1004.

⁸ Reed v. Peacock, 123 Mich. 244, 81 Am. St. Rep. 194, 82 N. W. 53.

⁹ Sprague v. Brown, 21 R. I. 329, 43 Atl. 636, 49 L.R.A. 423.

b. Prior service as juror. (1) *In same case.*—The fact that a juror has served on a former trial of the same case, in which a verdict was rendered, is good cause for challenge.¹ He is also disqualified, even though no verdict was reached on the former trial, where a mistrial resulted because the jury were unable to agree.² But the mere fact that a juryman had sat on a former trial constitutes no cause for challenge, where on the first trial a verdict was directed by the court³ or the jury was discharged after part of the evidence was introduced because it was discovered that the jury had not been sworn, and the juror stated that he had formed no opinion as to the merits of the case.⁴

But where a party, knowing of the juror's former connection with the case, fails to challenge him, the disqualification is waived and cannot subsequently be complained of.⁵ Otherwise, however, where the disqualification was not discovered in time to challenge the juror.⁶

¹³ Bl. Com. 363; Bellows v. Williams, Kirby, 166; Charleston & W. C. R. Co. v. Attaway, 7 Ga. App. 231, 66 S. E. 548; Herndon v. Bradshaw, 4 Bibb, 45; Kaighn v. Kennedy, 1 N. C. pt. 1, p. 26 (Martin, pt. 1 p. 37); Hunter v. Matthews, 12 Leigh, 228; Henry v. Cuvillier, 3 Mart. N. S. 524.

² Dothard v. Denson, 72 Ala. 541; Scott v. McDonald, 83 Ga. 28, 9 S. E. 770; Hester v. Chambers, 84 Mich. 562, 48 N. W. 152. Contra, Whitner v. Hamlin, 12 Fla. 18.

In Weeks v. Medler, 20 Kan. 57, it was held that under the Kansas statute, providing that it is good ground for challenge that one has formerly been a juror in the same cause, it is not essential, to bring one within this provision, that the cause shall have been at such former time fully tried and a verdict rendered, or the jury discharged because unable to agree. In this case the jury was discharged early in the proceedings, to enable defendant to amend his bill.

³ Atkinson v. Allen, 12 Vt. 619, 36 Am. Dec. 361.

⁴ Leas v. Patterson, 38 Ind. 465.

⁵ Bellows v. Williams, Kirby, 166.

- ⁶ Herndon v. Bradshaw, 4 Bibb, 45; Hunter v. Matthews, 12 Leigh, 228; Hester v. Chambers, 84 Mich. 562, 48 N. W. 152; Henry v. Cuvillier, 3 Mart. N. S. 524.

(2) *In other case.*—Jurors who have rendered a verdict in one case are subject to challenge when called in another case in which the issues are the same.¹ And where two jurors in an action of trespass had served on the grand jury which had found a true bill against the defendant for the same trespass on the criminal side of the court, a new trial was granted, defendant having been ignorant of the disqualification until after the trial.²

But the disqualification is waived by failure to challenge the juror.³

But where the second case is submitted upon different grounds than the first one, a juror who served in the former is not disqualified to serve in the latter.⁴

- ¹ Garthwaite v. Tatum, 21 Ark. 336, 76 Am. Dec. 402; Missouri P. R. Co. v. Smith, 60 Ark. 221, 5 Inters. Com. Rep. 348, 29 S. W. 752; Grady v. Early, 18 Cal. 108, 12 Mor. Min. Rep. 104; Swarnes v. Sitton, 58 Ill. 155 (a new trial was granted in this case, disqualification not being discovered in time to challenge); Baker v. Harris, 60 N. C. (1 Winst. L.) 277; Apperson v. Logwood, 12 Heisk. 262.

- Contra: Algier v. The Maria, 14 Cal. 167; Chariton Plow Co. v. Deusch, 16 Neb. 384, 20 N. W. 268; Central R. & Bkg. Co. v. Ogletree, 97 Ga. 325, 22 S. E. 953.

Where, during a recess taken upon trial on account of the illness of a juror, two of the panel were drawn and served in another case involving a question which was also an important question in the first case, such jurors were held incompetent to proceed with the trial of the first case, on the ground that they must necessarily have formed and expressed an opinion on the question involved in both cases. Weeks v. Lyndon, 54 Vt. 638.

- ² Hawkins v. Andrews, 39 Ga. 118.

- ³ Central R. & Bkg. Co. v. Ogletree, 97 Ga. 325, 22 S. E. 953; Jennings v. Heinroth, 71 Ill. App. 664.

- ⁴ Smith v. Wagenseller, 21 Pa. 491.

By statute in some states, previous service as a juror in the same court, within a designated time, is ground for challenge for cause.¹

- ¹ Kansas Gen. Stat. 1897, chap. 24, § 3; Hill's (Colo.) Anno. Stat. 1891,

§ 2595 (one year); Ind. Rev. Stat. § 1395 (one year); Neb. Code, § 665 (two years); Vt. Stat. 1884, chap. 111, § 1 (two years). And see statutes of other states for similar provisions.

Under the Kansas statute, service on an earlier case during the same term will support a challenge for cause. *Atchison, T. & S. F. R. Co. v. Snedeger*, 5 Kan. App. 700, 49 Pac. 103.

But under the Colorado statute previous service within the designated time in the county court will not support a challenge in the district court. *Courvoisier v. Raymond*, 23 Colo. 113, 47 Pac. 284.

Talesmen are also subject to the Nebraska statute. *Wiseman v. Bruns*, 36 Neb. 467, 54 N. W. 858.

But not to the Vermont statute. *First Nat. Bank v. Post*, 66 Vt. 237, 28 Atl. 989.

Under a Mississippi statute talesmen who have served at the same or last preceding term in as many as three cases are disqualified; but this statute does not apply to a juror who is a member of the regular panel for the week. *Louisville, N. O. & T. R. Co. v. Mask*, 64 Miss. 738, 2 So. 360.

And the Indiana statute, making it unlawful to select any person who has served during the year immediately preceding, applies to a talesman who has served as such in the same court some days before during the same term. *Goshen v. England*, 119 Ind. 368, 5 L.R.A. 253, 21 N. E. 977.

Such prior service entitles a juror to an exemption, but it is not a disqualification under act of Congress June 30, 1879, and Ind. Terr. Anno. Stat. 1899, § 2675; *National Bank v. Schufelt*, 76 C. C. A. 187, 145 Fed. 509.

c. Interest. (1) *In general.*—An interest in the result of the action disqualifies.¹ Membership in a corporation which is a party is an interest within this rule.²

At common law this is ground of a challenge for principal cause.

But membership in a religious denomination which is a party does not necessarily disqualify one on the ground of interest.³

So, a juror cannot be excluded because he and one of the parties are Odd Fellows, they not being members of the same lodge.⁴ Nor, in an action against one lodge of Odd Fellows, is a member of another lodge disqualified, though a member of the same lodge would be.⁵

But in an action against a fraternal society on a benefit certificate, members of the society, whose assessments would be affected by the result of the action, are disqualified.⁶

¹ Wood v. Stoddard, 2 Johns. 194; Melson v. Dickson, 63 Ga. 682, 36 Am. Rep. 128. And see Pearcey v. Michigan Mut. L. Ins. Co. 111 Ind. 59, 60 Am. Rep. 673, 12 N. E. 98, and authorities there cited.

But the fact that a juror is surety on a prosecution bond of plaintiff in a similar action against the same defendant does not disqualify. Jenkins v. Wilmington & W. R. Co. 110 N. C. 438, 15 S. E. 193.

It is not necessary to show a pecuniary interest; for a trustee of a charitable society serving without compensation and having no possible pecuniary benefit from its recovery in the action, would be incompetent. And members of a law and order league, who are contributors to the expense of a prosecution under the liquor excise law, are disqualified. Jackson v. Sandman, 45 N. Y. S. R. 633, 18 N. Y. Supp. 894.

But not an interest merely in the *legal questions* involved, without an interest in the result of the cause. See Williams v. Smith, 6 Cow. 166; Miller v. Wild Cat Gravel Road Co. 52 Ind. 51, 59. But compare Lewis v. Few, Anthon, N. P. 75, where it was properly held that a person present and acting at a political meeting was not competent as a juror in an action between other persons for a libel contained in an address adopted at the meeting; and Jefferson County v. Lewis, 20 Fla. 980, where a holder of similar county bonds to those sued on was held disqualified. But the interest which one has in an action by another to recover for services, because his own right to recover depends on the authority of the agent who employed plaintiff, is not such as to disqualify a relative as a juror, under the Arkansas statute. Arkansas S. R. Co. v. Loughridge, 65 Ark. 300, 45 S. W. 907.

Public policy requires that a prospective juror who has an interest in the result of the case should be deemed incompetent notwithstanding his assertion that his interest will not affect his judgment as a juror. Gershner v. Scott-Mayer Commission Co. 93 Ark. 301, 124 S. W. 772.

² McLaughlin v. Louisville Electric Light Co. 100 Ky. 173, 34 L.R.A. 812, 37 S. W. 851; Murchison Nat. Bank v. Dunn Oil Mills Co. 150 N. C. 683, 64 S. E. 883. But membership in a corporation does not disqualify in an action to which a corporation is not a party, merely because a servant of the corporation is the defendant, if the case be such that there could be no benefit to a recovery over against the corporation. Williams v. Smith, 6 Cow. 166.

Nor is a person who is a stockholder in a corporation which is a rival to one of the parties to the action necessarily thereby disqualified. Rogers Grain Co. v. Tanton, 136 Ill. App. 533.

³ Searle v. Roman Catholic Bishop, 203 Mass. 493, 25 L.R.A.(N.S.) 992, 89 N. E. 809, 17 A. & E. Ann. Cas. 340; Barton v. Erickson, 14 Neb. 164, 15 N. W. 206.

But in an action between the trustees of two religious denominations involving the right of possession of property, the members of each

denomination were held incompetent to act as jurors, because of their interest in the property. *Clauge v. Hyden*, 6 Heisk. 73.

⁴ *Reed v. Peacock*, 123 Mich. 244, 49 L.R.A. 423, 81 Am. St. Rep. 194, 82 N. W. 53.

⁵ *Delaware Lodge No. 1, I. O. O. F. v. Allmon*, 1 Penn. (Del.) 160, 39 Atl. 1098.

⁶ *Edmonds v. Modern Woodmen*, 125 Mo. App. 214, 102 S. W. 601.

(2) *Interest as taxpayer or resident*.—At common law, and also under statutes declaring interest a disqualification, a citizen and taxpayer in a town, city, or other municipality is disqualified in an action to which it is a party,¹ unless it is otherwise provided by statute.²

At common law this is a ground of challenge for principal cause. If the relation exists the disqualification is absolute.

¹ *Day v. Savage*, Hobart, *85, Am. ed. 212; *Bailey v. Trumbull*, 3 Conn. 581, 583, *dictum*; *Robinson v. Wilmington*, 8 Houst. (Del.) 409, 32 Atl. 347; *Russell v. Hamilton*, 3 Ill. 56 (where an officer was the nominal party for benefit of township); *Hearn v. Greensburgh*, 51 Ind. 119; *Goshen v. England*, 119 Ind. 368, 5 L.R.A. 253, 21 N. E. 977; *Cramer v. Burlington*, 42 Iowa, 315, 318; *Cason v. Ottumwa*, 102 Iowa, 99, 71 N. W. 192; *Gibson v. Wyandotte*, 20 Kan. 156; *Broadway P. Mfg. Co. v. Leavenworth Terminal R. & Bridge Co.* 81 Kan. 616, 28 L.R.A.(N.S.) 156, 106 Pac. 1034; *Hawes v. Gustin*, 2 Allen, 402; *Eberle v. St. Louis Public Schools*, 11 Mo. 247; *Fine v. St. Louis Public Schools*, 30 Mo. 166, 173; *Omaha v. Cane*, 15 Neb. 657, 20 N. W. 101; *Peck v. Essex County Freeholders*, 21 N. J. L. 656; *Diveny v. Elmira*, 51 N. Y. 506; *Wood v. Stoddard*, 2 Johns. 194; N. Y. Code Civ. Proc. § 1179; *Oklahoma City v. Meyers*, 4 Okla. 686, 46 Pac. 552; *Guthrie v. Shaffer*, 7 Okla. 459, 54 Pac. 698; *Ford v. Umatilla County*, 15 Or. 313, 16 Pac. 33; *Multnomah County v. Willamette Towing Co.* 49 Or. 204, 89 Pac. 389; *Watson v. Tripp*, 11 R. I. 98, 23 Am. Rep. 420. Contra, *Kemper v. Louisville*, 14 Bush, 87; *Kentucky Wagon Mfg. Co. v. Louisville*, 97 Ky. 548, 31 S. W. 130; *Jackson v. Pool*, 91 Tenn. 448, 19 S. W. 324.

Contra, *Anderson v. Wilmington*, 6 Penn. (Del.) 485, 70 Atl. 204; *Big Sandy R. Co. v. Floyd County*, 125 Ky. 345, 101 S. W. 354.

But the city itself cannot challenge a juror for this cause. *Conklin v. Keokuk*, 73 Iowa, 343, 35 N. W. 444.

In the city of New York, which is coextensive with the county, the objection is waived or ignored from necessity.

² General statutes in various jurisdictions, as well as special charter provisions, create numerous peculiar exceptions to this rule. Thus, in the city of New York, liability to pay taxes in a city, county, or town does

not disqualify in a *penal* action. N. Y. Code Civ. Proc. § 1179. Residence does not disqualify in an action in which a county is *interested*. N. Y. Rev. Stat. 384, § 4. Nor in an action in which a town is *interested unless the proceeding is by or against the town*. N. Y. Rev. Stat. 357, § 4. Nor does residence or liability to taxation in a village incorporated under the general act. N. Y. Laws 1870, chap. 291, title 8, §§ 9, 28; 2 N. Y. Rev. Stat. 7th ed. 904; N. Y. Code Civ. Proc. § 1179. And by the charter of Troy, residents and taxpayers of that city are competent, if not otherwise disqualified; and exclusion for that reason alone is reversible error. *Hildreth v. Troy*, 101 N. Y. 234, 4 N. E. 559.

So, a Texas statute expressly provides that residents of a county suing or sued may be jurors, if otherwise competent and qualified according to law; and they cannot be challenged on this ground under another statute forbidding generally a person interested directly or indirectly from sitting. *Watson v. De Witt County*, 19 Tex. Civ. App. 150, 46 S. W. 1061. See also *Marshall v. McAllister*, 18 Tex. Civ. App. 159, 43 S. W. 1043; *Missouri, K. & T. R. Co. v. Bishop*, — Tex. Civ. App. —, 34 S. W. 323.

And see *dictum* in *Johnson v. Wakulla County*, 28 Fla. 720, 9 So. 690 (Laws 1870, chap. 18, § 17).

And so by statute in Pennsylvania. And this statute also extends the exemption of this disqualification to members of city council, etc. And their exclusion on this ground alone is reversible error. *Scranton v. Gore*, 124 Pa. 595, 17 Atl. 144.

So, also, in Michigan. 1 How. Anno. Stat. § 466. See *Smith v. German Ins. Co.* 107 Mich. 270, 30 L.R.A. 368, 65 N. W. 236, recognizing the power of the legislature to so provide.

But the fact that a statute removes this disqualification does not go to the extent of qualifying them to serve where they are parties or quasi parties to the proceeding to be investigated, and which they induced the corporation to institute; and their participation subjects them to the imputation of bias in favor of one and prejudice against the other party. Thus, in Georgia, petitioners for a new road over the land of another are, when objected to, incompetent to sit as jurors on the question of damages between the county and the landowner. *Almand v. Rockdale County*, 78 Ga. 199. And in Pennsylvania members of a city council are properly rejected in an action against the city on a claim which has been presented to them and disallowed. *Lancaster County v. Lancaster*, 170 Pa. 108, 32 Atl. 567.

d. Relationship.—Relationship by consanguinity or affinity¹ to a party, or to one who is disqualified by interest, direct or indirect,² disqualifies.

At common law this disqualification extends to those in the
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ninth degree,³ and no further. By statute in some states it extends to the sixth;⁴ in others to the fourth.⁵

At common law this is ground of challenge for principal cause.

¹ Williamson v. Mayer Bros. 117 Ala. 253, 23 So. 3: Buddee v. Spangler, 12 Colo. 216, 20 Pac. 760; Houston & T. C. R. Co. v. Terrell, 69 Tex. 650, 7 S. W. 670; Geiger v. Payne, 102 Iowa, 581, 69 N. W. 554, 71 N. W. 571; Sims v. Jones, 43 S. C. 91, 20 S. E. 905; Davidson v. Wallingford. — Tex. Civ. App. —, 30 S. W. 286, 287; Mahaney v. St. Louis & H. R. Co. 108 Mo. 191, 18 S. W. 895. Compare Central R. & Banking Co. v. Roberts, 91 Ga. 513, 18 S. E. 315.

The affinity must be one subsisting at the time. If, upon a death in the line, issue do not survive, the affinity is severed. Cain v. Ingham, 7 Cow. 478, and note. After which it is only a circumstance to be considered on the question of actual bias as a ground of challenge to the favor.

Relationship to a plaintiff in a former action, whose judgment, which has been paid in full, is the basis of the present action, and who appears in the present action as a witness only, does not disqualify. Faith v. Atlanta, 78 Ga. 779, 4 S. E. 3.

² Thus, relationship to counsel or attorney, whose fees depend on a recovery, disqualifies equally as relationship to a party. Melson v. Dickson, 63 Ga. 682, 36 Am. Rep. 128. But see Fait & S. Co. v. Truxton, 1 Penn. (Del.) 24, 39 Atl. 457, accepting as juror a nephew of one of the counsel.

So, of relationship of a juror as son of a stockholder in a corporation party. Georgia R. Co. v. Hart, 60 Ga. 550.

So, it seems, of relationship to an inhabitant of a city or town which is a party. Day v. Savage, Hobart, 85, Am. ed. 212; Bailey v. Trumbull, 31 Conn. 581, 583, *dicta*.

³ 3 Bl. Com. 363. Recognized in Wirebach v. First Nat. Bank, 97 Pa. 543, 552, and in Cain v. Ingham, 7 Cow. 478. Coke speaks of relationship without limit as to degree.

In South Carolina, where there is no statute fixing the degree within which a juror is disqualified, the question whether the relationship is such as would be likely to render the juror not indifferent is left to the trial judge to determine. Sims v. Jones, 43 S. C. 91, 20 S. E. 905, and cases cited.

⁴ Me. Rev. Stat. chap. 1, § 6, rule 22; N. Y. Code Civ. Proc. § 1166; Ind. Rev. Stat. 1894, § 240. See Tegarden v. Phillips, — Ind. App. —, 39 N. E. 212.

The Maine statute provides, however, that the parties may, by written consent, waive the objection. But allowing a juror so disqualified to sit is ground for new trial, though neither parties nor the juror knew of

the relationship until after verdict. *Jewell v. Jewell*, 84 Me. 304, 18 L.R.A. 473, 24 Atl. 858.

The degree is ascertained by ascending from the juror to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the juror and party and excluding the common ancestor. N. Y. Code Civ. Proc. § 46. Generally, however, in this country the mode of computation adopted is that of the civil law, beginning with the juror and ascending to the common ancestor, and then descending to the party, recognizing a degree for each person in both ascending and descending lines. *Kahn v. Reedy*, 8 Ohio C. C. 345, 4 Ohio C. D. 284. And see statutes of various states.

⁵ Mo. Rev. Stat. § 6083; *Price v. Patrons' & Farmers' Home Protection Co.* 77 Mo. App. 236; Ohio Rev. Stat. § 5176. See *Kahn v. Reedy*, 8 Ohio C. C. 345, 4 Ohio C. D. 284.

e. Business relationship; obligation to party.—The existence of a business relationship between a juror and a party, as, for instance, that of master and servant¹ or landlord and tenant² or partners,³—is sufficient to disqualify the juror without evidence of bias.

And a juror is properly excluded upon challenge where he states that he might be influenced by the fact that he was under obligation to one of the parties for favors extended in the past and expected to be extended in the future.⁴

But the mere fact that a man is indebted to another is not cause for challenge to exclude the debtor from sitting as a juror in a case wherein the creditor is a party.⁵

And being a guest in an inn for pay is not cause for principal challenge, because not a case where one might be subject to control, the ability of one party to control the other being the basis of the disqualification.⁶

¹ *Hubbard v. Rutledge*, 57 Miss. 7; *Central R. Co. v. Mitchell*, 63 Ga. 173; *Louisville, N. O. & T. R. Co. v. Mask*, 64 Miss. 738, 2 So. 360; *Louisville & N. R. Co. v. Cook*, 168 Ala. 592, 53 So. 190; *Atlantic Coast Line R. Co. v. Bunn*, 2 Ga. App. 305, 58 S. E. 538; *Pearce v. Quincy Min. Co.* 149 Mich. 112, 112 N. W. 739, 12 A. & E. Ann. Cas. 304; *Blevins v. Erwin Cotton Mills*, 150 N. C. 493, 64 S. E. 428.

The mere fact that the proposed juror in a suit against a street-railway company is in the employ of another street-railway company, is insufficient. *Kohler v. West Side R. Co.* 99 Wis. 33, 74 N. W. 568.

If not made a statutory ground of disqualification, the challenge is addressed to the discretion of the trial judge. *Galveston, H. & S. A. R.*

Co. v. Thornsberry, — Tex. —. 17 S. W. 521. But the relationship must be conclusively shown as a fact. Coppersmith v. Mound City R. Co. 51 Mo. App. 357.

² People v. Bodine, 1 Denio, 281; Sherman v. Southern P. Co. — Nev. —, 111 Pac. 416; Pipher v. Lodge, 16 Serg. & R. 214; Hathaway v. Helmer, 25 Barb. 29. And the abolition of distress for rent has not changed the rule. Ibid.

But the fact that a juror was a tenant of a party under a lease which required him to deliver as rent a certain share of the crop after harvest, which had been delivered for that year, does not make him either a partner nor agent of the party, under Cal. Code Civ. Proc. § 602. Arnold v. Producers' Fruit Co. 141 Cal. 738, 75 Pac. 326.

And the relation of landlord and tenant between a juror and the bondsman for the prosecution of the suit is not a disqualification of such juror. Brown v. Wheeler, 18 Conn. 199.

³ Stumm v. Hummel, 39 Iowa, 478.

⁴ Denver S. P. & P. R. Co. v. Driscoll, 12 Colo. 520, 21 Pac. 708.

⁵ Thompson v. Douglass, 35 W. Va. 337, 13 S. E. 1015.

⁶ Cummings v. Gann, 52 Pa. 484.

On general principles one subject to the control of a person interested should be deemed equally disqualified.¹

¹ As, an employee of bondsmen on an instrument given by a party to secure him in possession of the property originally in controversy. Hill v. Corcoran, 15 Colo. 270, 25 Pac. 171.

But the relation of landlord and tenant between a juror and the bondsman for the prosecution of the suit has been held not a disqualification. Brown v. Wheeler, 18 Conn. 199.

And the fact that a juror is an employee of a defendant in another suit brought by plaintiff in the same court on the same issue, and set for trial the same day, of itself sufficient to raise a disqualifying presumption of bias, though it will support a challenge for favor, requiring inquiry into the question of bias. Calhoun v. Hannan, 87 Ala. 277, 6 So. 291.

So, an employee of a stockholder of a corporation is not, for that reason, disqualified in an action in which the corporation is interested. Sansouvier v. Glenlyon Dye Works, 28 R. I. 539, 68 Atl. 545.

f. Acquaintance; membership in church, secret society, etc.—Intimate acquaintance¹ with a party or fellow service in employment² does not disqualify, but is a circumstance to be considered on the question of bias. At common law this is ground of challenge to the favor only.

Membership in a religious denomination which is a party does not necessarily disqualify one.³

And the fact that a juror is a fellow member with a party in a secret society—as, for instance, the Masons—is only ground for challenge to the favor; that is, it raises only a question of actual bias in the particular case.⁴

So, a juror cannot be excluded because he and one of the parties are Odd Fellows, they not being members of the same lodge.⁵ And even in an action against one lodge of Odd Fellows a member of another lodge is not disqualified to sit as juror.⁶

But in an action against a fraternal society on a benefit certificate members of the society, whose assessments would be affected by the result of the action, are disqualified.⁷

¹ Moore v. Cass, 10 Kan. 238. But see *dictum* and authorities cited in Percy v. Michigan Mut. L. Ins. Co. 111 Ind. 59, 60 Am. Rep. 673, 12 N. E. 98.

But a proposed juror who testifies that his acquaintance with a party will influence his verdict is properly excused. Omaha Street R. Co. v. Craig, 39 Neb. 601, 58 N. W. 209.

So, also, that the juror is acquainted with a party's attorney, and had employed him professionally at some time, will not support a challenge for cause. Fairbanks v. Irwin, 15 Colo. 366, 25 Pac. 701; Scott v. Rues, 26 Misc. 834, 56 N. Y. Supp. 1057. Nor will the fact that the juror has his office in the same rooms with the attorney, where no other connection between them is shown to exist. State ex rel. Richards v. Taylor, 5 Ind. App. 29, 31 N. E. 543. But in Fealy v. Bull, 11 App. Div. 468, 42 N. Y. Supp. 569, a new trial was awarded because a juror had falsely stated on *voir dire* that he had never had business relations with counsel for the other party, when in fact he then was party to a pending suit, and was represented by that counsel.

² People v. Bodine, 1 Denio, 281, 306.

³ Searle v. Roman Catholic Bishop, 203 Mass. 493, 25 L.R.A. (N.S.) 992, 89 N. E. 809, 17 A. & E. Ann. Cas. 340; Barton v. Erickson, 14 Neb. 164, 15 N. W. 206; Smith v. Sisters of Good Shepherd, 27 Ky. L. Rep. 1107, 87 S. W. 1083.

But in United States v. Miles, 2 Utah, 19,—a prosecution against a Mormon for polygamy,—a Mormon was held incompetent, it appearing that he believed as part of his faith that polygamy is divinely appointed, and is thus above the laws of man.

And in Cleage v. Hyden, 6 Heisk. 73,—an action between the trustees of two religious denominations involving the right of possession of property,—the members of each denomination were held incompetent to act as jurors, because of their interest in the property.

⁴ *Purple v. Horton*, 13 Wend. 9, 27 Am. Dec. 167.

⁵ *Reed v. Peacock*, 123 Mich. 244, 49 L.R.A. 423, 81 Am. St. Rep. 194, 82 N. W. 53.

⁶ *Delaware Lodge No. 1, I. O. O. F. v. Allmon*, 1 Penn. (Del.) 160, 39 Atl. 1098. But, if he is a member of the lodge which is interested in the suit, he is disqualified. *Ibid*.

⁷ *Edmonds v. Modern Woodmen*, 125 Mo. App. 214, 102 S. W. 601.

g. Formation and expression of opinion. (1) *In general.*—An opinion upon the merits of the case, previously formed or expressed, disqualifies, if it is positive and not merely hypothetical, and would require evidence to remove. At common law this is ground of challenge for principal cause.¹

An opinion does not disqualify if the juror testifies that he believes he can render an impartial verdict according to the evidence, and that his previously formed opinion or impression will not bias or influence his verdict, and the court is satisfied that he does not entertain such a present opinion or impression as will influence his verdict.²

If his testimony is not clear to this effect he should be excluded.³

¹ *Chicago, B. & Q. R. Co. v. Perkins*, 125 Ill. 127, 17 N. E. 1; *Spangler v. Kite*, 47 Mo. App. 230; *Doherty v. Lord*, 8 Misc. 227, 28 N. Y. Supp. 720; *Long Mfg. Co. v. Gray*, 13 Tex. Civ. App. 172, 35 S. W. 32. See *Greenfield v. People*, 6 Abb. N. C. 1, and note. And in *Lewke v. Dry Dock, E. B. & B. R. Co.* 46 Hun, 283, a juror who testifies that he would credit the opinion of a certain doctor as an expert witness more than that of any other who might testify, if they should differ in opinion, was held disqualified, though he testified on cross-examination that he would try to act according to his conscience, was capable of doing so, and thought he could consider the testimony of other doctors. But to render disqualification of a juror for this reason ground for new trial it must appear of record that he was examined on that point. *Light v. Chicago, M. & St. P. R. Co.* 93 Iowa, 83, 61 S. W. 380.

So, of an opinion formed from service as juror on former trial. *Scott v. McDonald*, 83 Ga. 28, 9 S. E. 770. But see *Central R. & Bkg. Co. v. Ogletree*, 97 Ga. 325, 22 S. E. 953. Or from service as jurors in other cases tried at that term and involving the same issues. *Missouri P. R. Co. v. Smith*, 60 Ark. 221, 5 Inters. Com. Rep. 348, 29 S. W. 752. Jurors who had heard the same testimony in another case, and had formed an opinion, were held disqualified in *Barnett v. St. Francis Levee Dist.* 125 Mo. App. 61, 102 S. W. 583. And concealment of the fact of such previous service, and denial on *voir dire* of any opinion

formed or expressed, is ground for new trial if the fact of his previous service was not learned by the defeated party or his counsel until after verdict. *Johnson v. Tyler*, 1 Ind. App. 387, 27 N. E. 643. But see *Buck v. Hughes*, 127 Ind. 46, 26 N. E. 558.

But a "slight opinion" formed by one juror who has forgotten even the statement made to him, and a conditional opinion by another, which did not concern the merits of the case, are not unqualified opinions which will disqualify, under the Colorado statute. *Collins v. Burns*, 16 Colo. 7, 26 Pac. 145. Nor will vague and indefinite or merely floating impressions based on newspaper report, or heard at about the time of the transaction. *State v. Carey*, 15 Wash. 549, 46 Pac. 1050. And that a juror had, before trial, expressed a doubt as to the wisdom or expediency of the law under which the case was brought will not render him incompetent, if it is shown that he will be governed by the law of the case as laid down by the court. *Judd v. Claremont*, 66 N. H. 418, 23 Atl. 427.

² *People v. Casey*, 96 N. Y. 115, reversing 31 Hun, 158.

This is the modern rule sanctioned by the decisions in civil cases and established in New York, even in criminal cases, by statute, and in substance applied in other states, though not fully recognized in all. The principles involved are most frequently discussed in criminal cases.

To the same effect are:

¹ *Union Gold-Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. ed. 648; *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459; *Union Gold-Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565, 567; *Denver, St. P. & P. R. Co. v. Moynahan*, 8 Colo. 56, 5 Pac. 811; *Lycoming F. Ins. Co. v. Ward*, 90 Ill. 545; *Smith v. Eames*, 4 Ill. 76, 36 Am. Dec. 515; *Chicago, B. & Q. R. Co. v. Perkins*, 125 Ill. 127, 17 N. E. 1; *Seranton v. Stewart*, 52 Ind. 68; *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833; *Will v. Mendon*, 108 Mich. 251, 66 N. W. 58; *Montgomery v. Wabash, St. L. & P. R. Co.* 90 Mo. 446, 2 S. W. 409; *Rogers v. Rogers*, 14 Wend. 132; *Freeman v. People*, 4 Denio, 9; *Lowenberg v. People*, 5 Park. Crim. Rep. 414; *Sanchez v. People*, 22 N. Y. 147; *Kumli v. Southern P. R. Co.* 21 Or. 505, 28 Pac. 637; *Sims v. Jones*, 43 S. C. 91, 20 S. E. 905; *Haugen v. Chicago, M. & St. P. R. Co.* 3 S. D. 394, 53 N. W. 769; *Long Mfg. Co. v. Gray*, 13 Tex. Civ. App. 172, 35 S. W. 32; *Conway v. Clinton*, 1 Utah, 215; *Hopt v. Utah*, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614; *Jackson v. Com.* 23 Gratt. 919. But it is discretionary with the court, under such circumstances, to accept the juror. *Young v. Johnson*, 123 N. Y. 226, 25 N. E. 363; *Sprague v. Atlee*, 81 Iowa, 1, 46 N. W. 756.

³ *Long Mfg. Co. v. Gray*, 13 Tex. Civ. App. 172, 35 S. W. 32.

(2) *Opinion as to incidental question.*—An abstract opinion

as to a question incidentally involved¹ does not disqualify, unless found to be such as to be likely to influence the verdict.²

¹ For instance, in a life insurance case, the question whether suicide is evidence of insanity. Compare *Hagadorn v. Connecticut Mut. L. Ins. Co.* 22 Hun, 249, and *Boileau v. Life Ins. Co.* 9 Phila. 218. Or in an action for wilfully, fraudulently, and corruptly refusing a vote, an opinion as to the duty to receive a vote. *Elbin v. Wilson*, 33 Md. 135, 143.

² *Dew v. McDivitt*, 31 Ohio St. 139, 142; *Hughes v. Cairo*, 92 Ill. 339; *Davis v. Walker*, 60 Ill. 452.

h. Conversations with party.—A juror with whom a party has conversed as to the merits of the case is disqualified.¹

¹ *United States Rolling Stock Co. v. Weir*, 96 Ala. 396, 11 So. 436.

But not so of a private conversation during trial having no reference to the case. *Kelley v. Downing*, 69 Vt. 266, 37 Atl. 968.

i. Prejudice against business or calling.—Prejudice against the business or calling in connection with which the cause of action arises disqualifies, if found to be such as to be likely to influence the verdict; ¹ otherwise not.²

At common law this is ground of challenge to the favor only.

¹ *United States v. Borger*, 7 Fed. 193 (criminal case); *Lombardi v. California Street Cable R. Co.* 124 Cal. 311, 57 Pac. 66; *Winnesheik Ins. Co. v. Schueller*, 60 Ill. 465; *Robinson v. Randall*, 82 Ill. 521; *Albrecht v. Walker*, 73 Ill. 69; *Fletcher v. Crist*, 139 Ind. 121, 38 N. E. 472; *Atchison, T. & S. F. R. Co. v. Chance*, 57 Kan. 40, 45 Pac. 60; *Brockway v. Patterson*, 72 Mich. 122, 1 L.R.A. 708, 40 N. W. 192; *Theisen v. Johns*, 72 Mich. 285, 40 N. W. 727; *Marande v. Texas & P. R. Co.* 59 C. C. A. 567, 124 Fed. 42.

² *Maretzek v. Cauldwell*, 5 Robt. 660, 2 Abb. Pr. N. S. 407; *Missouri P. R. Co. v. Brown*, 5 Kan. App. 880, 47 Pac. 553; *Simmons v. McConnell*, 86 Va. 494, 10 S. E. 838; *Owen v. Kamer*, 16 Ky. L. Rep. 705, 29 S. W. 437; *Fortune v. Trainor*, 47 N. Y. S. R. 58, 19 N. Y. Supp. 598; *DePuy v. Quinn*, 61 Hun, 237, 16 N. Y. Supp. 708; *Van Skike v. Potter*, 53 Neb. 28, 73 N. W. 295.

A prejudice against the liquor business is not sufficient to disqualify a prospective juror in an action under the civil damage act, if he has no prejudice against the person engaged in the business. *Carpenter v. Hyman*, 67 W. Va. 4, 66 S. E. 1078, 20 A. & E. Ann. Cas. 1310.

j. Litigation.—Litigation between a party and a juror disqualifies absolutely, if an action implying ill-will, malice, or revenge,—such as assault, slander, etc.,—is pending; otherwise it does not disqualify, unless found to be likely to influence the verdict.¹

At common law the former is ground for challenge for principal cause; the latter, for challenge to the favor only.

¹ *People v. Bodine*, 1 Denio, 281, 305.

Having a cause of action against the defendant upon the same state of facts is enough to disqualify. *Davis v. Allen*, 11 Pick. 466, 22 Am. Dec. 386; *Little Rock & Ft. S. R. Co. v. Wells*, 61 Ark. 354, 30 L.R.A. 560, 33 S. W. 208. *Stennett v. Bessemer*, 154 Ala. 637, 45 So. 890. "There is abundant latitude for selection; none should sit who are not entirely impartial." (Shaw, Ch. J., in *Davis v. Allen*, *supra*.)

6. Sufficiency of challenge; time.

A challenge for cause, whether principal or to the favor, or for actual or implied bias, must specify the ground on which, if at all, it can be sustained,—simply challenging "for cause" being insufficient.¹

Either party may be allowed to challenge a juror for cause at any time before he has been sworn as a juror.² But a challenge after trial is too late.³

¹ *Southern P. Co. v. Rauh*, 1 C. C. A. 416, 7 U. S. App. 84, 49 Fed. 696 (Or. Code Civ. Proc. § 237); *Hopt v. Utah*, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614 (Utah Laws 1878, § 242); *Bonney v. Cocke*, 61 Iowa, 303, 16 N. W. 139; *Davis v. Anchor Mut. F. Ins. Co.* 96 Iowa, 70, 64 N. W. 687; *Haggard v. Petterson*, 107 Iowa, 417, 78 N. W. 53 (Iowa Code, § 2772).

² *Edelen v. Gough*, 8 Gill, 87, 89; *Scripps v. Reilly*, 38 Mich. 10. In the latter case, Marston, J., says: "Whether counsel for the different parties have exhausted their peremptory challenges, and announced themselves satisfied with the jury, or not, they have undoubtedly the right, certainly up to the time when the jury is sworn, to make further challenge for cause. It is the aim and policy of the law to have a fair and impartial jury, and to this end it would be the clear duty of the court up to the last minute to permit counsel to further examine the jurors." *People v. Damon*, 13 Wend. 351, lays down the broader, but very just, rule that the court may allow necessary challenges to secure an impartial jury, at any time before testimony has been taken. And this rule was followed in *People v. Carpenter*, 102 N. Y. 238, 6 N. E. 584. And see *People v. Owens*, 123 Cal. 482, 56 Pac. 251. But

a challenge must be made before the jury is impaneled. See *Baxter v. Wilson*, 95 N. C. 137.

³ *Sinsheimer v. Edward Weil Co.* — Tex. Civ. App. —, 129 S. W. 137.

7. Trial, evidence, and decision.

A challenge, whether for principal cause or to the favor, is now triable only by the judge.¹

At common law it may be tried by the judge, if no objection be made;² but if the judge or a party object, a question of fact raised by either kind of challenge is to be tried by triers.

On a question of actual bias even slight evidence is admissible.³ The object of inquiry is the state of mind of the proposed juror; and that state must be such, in order to make him competent, as will lead to the inference that he will act with entire impartiality.⁴

¹ This is now the common practice and prescribed in N. Y. Code Civ. Proc. § 1180. But the distinct and wholly different nature of the two grounds of challenge still exists in New York, notwithstanding this statute. *Butler v. Glens Falls, S. H. & Ft. E. Street R. Co.* 121 N. Y. 112, 24 N. E. 187.

So, also, by statute in most states. See *McCarthy v. Cass Ave. & F. G. R. Co.* 92 Mo. 536, 4 S. W. 516; *Haugen v. Chicago, M. & St. P. R. Co.* 3 S. D. 394, 53 N. W. 769. And see statutes of various other states.

² *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122.

³ *People v. Bodine*, 1 Denio, 281, 307.

⁴ *May v. Elam*, 27 Iowa, 365 (Dillon, J.)

8. Exception to overruling of challenge.

An exception lies to the erroneous overruling of an objection or challenge,¹ but it may be unavailing if the party does not finally exhaust his peremptory challenges;² or unless the court so erroneously exercised its discretion as to deprive the complaining party of trial by a fair and impartial jury.³ Some courts, however, hold the trial judge's decision on a challenge for actual bias final, and not reviewable.⁴

¹ In *Silcox v. Lang*, 78 Cal. 118, 20 Pac. 297, it was held that a ruling on a challenge for cause, if erroneous, is an error of law which must be presented for review by bill of exceptions, and not a mere irregularity which can be presented by affidavits.

² *Robinson v. Randall*, 82 Ill. 521 (Dickey, J., dissented, being of opinion

that not exhausting the peremptory challenges did not render the error harmless); *Sullings v. Shakespeare*, 46 Mich. 408, 41 Am. Rep. 166, 9 N. W. 451; *Whitaker v. Carter*, 20 N. C. (4 Ired.) 461. s. p. *Burt v. Panjaud*, 99 U. S. 180, 25 L. ed. 451; *Eekert v. St. Louis Transfer Co.* 2 Mo. App. 36, and *Conway v. Clinton*, 1 Utah, 215, where, however, the objectionable jurors had been excluded by other challenges.

To similar effect are: *Prewitt v. Lambert*, 19 Colo. 7, 34 Pac. 684; *Union P. R. Co. v. Tracy*, 19 Colo. 331, 35 Pac. 537; *Haggard v. Petterson*, 107 Iowa, 417, 78 N. W. 53; *State v. Simmons*, 38 La. Ann. 41; *Davidson v. Bordeaux*, 15 Mont. 245, 38 Pac. 1075; *Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1006; *Brumback v. German Nat. Bank*, 46 Neb. 540, 65 N. W. 198; *Savage v. Third Ave. R. Co.* 25 Misc. 426, 54 N. Y. Supp. 932; *State v. Hartley*, 22 Nev. 342, 28 L.R.A. 33, 40 Pac. 372; *State v. Freeman*, 100 N. C. 429, 5 S. E. 921; *Houston & T. C. R. Co. v. Terrell*, 69 Tex. 650, 7 S. W. 670; *Galveston, H. & S. A. R. Co. v. Thornsberry*, — Tex. —, 17 S. W. 521; *Hopt v. Utah*, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614; *State v. Moody*, 7 Wash. 395, 35 Pac. 132; *Pool v. Milwaukee Mechanics' Ins. Co.* 94 Wis. 447, 69 N. W. 65.

In New York the rule is that an exception duly taken to an erroneous overruling of defendant's challenge for cause is not waived by his omission to challenge peremptorily, though when the jury is filled he still has unused peremptory challenges. *People v. Bodine*, 1 Denio. 281; *Freeman v. People*, 4 Denio, 9. And that if by the erroneous ruling he is compelled to exhaust his peremptory challenges, reversal of the judgment is imperative. *Finkelstein v. Barnett*, 17 Misc. 564, 40 N. Y. Supp. 694; *People v. Casey*, 96 N. Y. 115; *People v. Larubia*, 140 N. Y. 87, 35 N. E. 412.

In Idaho a party who is compelled to use a peremptory challenge to exclude an incompetent juror, and who, before the jury is completed, desires to use a peremptory challenge, but cannot, because he has exhausted his allowance, should, on showing that the juror excluded was incompetent, have his peremptory challenge restored. *Burke v. McDonald*, 2 Idaho, 1022, 29 Pac. 98.

³ *Salazer v. Taylor*, 18 Colo. 538, 33 Pac. 369; *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015.

⁴ *State v. Potts*, 100 N. C. 457, 6 S. E. 657, and cases cited; *Hopt v. Utah*, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614 (*Utah Laws* 1884, p. 124); *Perry v. Miller*, 61 Minn. 412, 63 N. W. 1040; *Hawkins v. Manston*, 57 Minn. 323, 59 N. W. 309, and cases cited.

9. Peremptory challenge; nature and extent of right.

a. *In general*.—Unless given by statute, no right to peremptory challenges exists.¹

¹ *Brown v. Rome & D. R. Co.* 86 Ala. 206, 5 So. 195. *Colfax Nat. Bank v. Davis*, 50 Wash. 92, 96 Pac. 823, 16 A. & E. Ann. Cas. 264. Peremptory challenges are given in civil cases by the statute *ex gratia*, and the party is not entitled to them independently of the statute as matter of right. Peremptory challenges are exercised by a party, not in selection of jurors, but in rejection. It is not aimed at disqualification, but is exercised upon qualified jurors as matter of favor to the challenger. *O'Neil v. Lake Superior Iron Co.* 67 Mich. 560, 35 N. W. 162, citing *Hayes v. Missouri*, 120 U. S. 71, 30 L. ed. 580, 7 Sup. Ct. Rep. 350. The power of a state legislature to prescribe the number of peremptory challenges is limited only by the necessity of having an impartial jury; and a statute varying the number for different communities is not unconstitutional as denying to a party the equal protection of the law. *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350.

The Texas statute requiring the same proceedings in regard to talesmen as in impaneling other jurors includes the right of peremptory challenge if the number allowed has not been already exhausted. *Mitchell v. Mitchell*, 80 Tex. 101, 15 S. W. 705.

The right of peremptory challenge has no application, however, to a struck jury.¹

¹ *Watson v. St. Paul City R. Co.* 42 Minn. 46, 43 N. W. 904. There can be only challenges for cause. *Eldridge v. Hubbell*, 119 Mich. 61, 77 N. W. 631. And the fact that talesmen are called to complete the jury makes no difference. *Branch v. Dawson*, 36 Minn. 193, 30 N. W. 545.

A peremptory challenge is a *privilege*, the cause of which the party is never bound to make known, and on which the court must act without requiring reasons.¹

¹ *Gulf, C. & S. F. R. Co. v. Keith*, 74 Tex. 287, 11 S. W. 1117.

b. Order of.—By statute in some states, plaintiff must be the first to exercise the right of peremptory challenge.¹ But in the absence of a statute or rule of court governing the order of peremptory challenges, the matter is discretionary with the trial court, whose decision is final, unless he has abused his discretion.²

¹ *Hegney v. Head*, 126 Mo. 619, 29 S. W. 587 (Mo. Rev. Stat. 1889, § 6081); *Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909.

And under such a statute defendant cannot be compelled to challenge first, though he has the burden of proof. *Hegney v. Head*, *supra*.

An interpleader in attachment is the plaintiff within the Missouri statute; and it is error not to require him to challenge. *Cunningham v. Prusansky*, 59 Mo. App. 498. But error in requiring defendant to challenge first is not cause for reversal, if it does not appear that he is prejudiced thereby. *Hegney v. Head*, 126 Mo. 619, 29 S. W. 587.

² *Gravely v. State*, 45 Neb. 878, 64 N. W. 452.

In Minnesota practice the parties entitled to peremptory challenges should exercise the right alternately, one at a time, beginning with the defendant. *Swanson v. Mendenhall*, 80 Minn. 56, 82 N. W. 1093.

c. When interposed.—A party has a right to reserve his peremptory challenges until the number is full, after objections or challenges for cause have been disposed of.¹

¹ *Sterling Bridge Co. v. Pearl*, 80 Ill. 251, 254; *Taylor v. Western P. R. Co.* 45 Cal. 323. The headnote in the latter case is as follows: "In a civil action a party is not bound to exercise his right of peremptory challenge to jurors until there are in the jury box twelve persons whom the court has adjudged to be competent jurors." Judgment was reversed for error in requiring a party to do so.

The reason is that unless a party has ascertained what jurors can be excluded for cause, and therefore need not be challenged peremptorily, he may have the chief value of this privilege. *Hunter v. Parsons*, 22 Mich. 96, citing 4 Bl. Com. 353; *People v. Bodine*, 1 Denio, 281. To the same effect is *Taylor v. Western P. R. Co.* 45 Cal. 323.

And according to *Gulf, C. & S. F. R. Co. v. Greenlee*, 70 Tex. 553, 8 S. W. 129, if after challenges for cause twelve jurors remain on the panel and are in the box, the parties must then proceed to challenge peremptorily, and cannot insist on calling in the whole panel into the box, or filling the vacancies.

But a party who voluntarily and without objection exercises his right of peremptory challenge alternately with the other party as the jurors are being drawn, and who, after the panel is filled, refuses to challenge in his turn, cannot complain of the court's refusal to allow him to challenge after the jury has been accepted by the other party. *Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909.

The statutes in some states are held to impose a different rule. Thus, under an Illinois statute, when a panel of four has been accepted by both parties, they become a part of the jury, and cannot thereafter be challenged peremptorily. *Mayers v. Smith*, 121 Ill. 442, 13 N. E. 216, 25 Ill. App. 67. So, also, of a panel of eight. *Ibid*.

A peremptory challenge is not too late at any time before the

jury is sworn unless there is reason to doubt its good faith.¹ But it will not be allowed after the jury is sworn,² unless for good cause shown.³

¹ Hunter v. Parsons, 22 Mich. 96; Adams v. Olive, 48 Ala. 551.

And the fact that a party may pass the panel as satisfactory to him will not prevent him challenging one of the jurors so passed at any time before he is sworn. Silcox v. Lang, 78 Cal. 118, 20 Pac. 297.

Although ordinarily the court should be satisfied of the good faith of an application to withdraw approval and challenge peremptorily instead, yet where an adjournment has intervened so that the jury may have been influenced, the right of peremptory challenge exists at the time of swearing the jury, and it is error to refuse to allow it. Spencer v. DeFrance, 3 G. Greene, 216. Especially, if, after approving the jury as it stood, a vacancy was made and a new juror called. United States v. Daubner, 17 Fed. 793, 797.

But in Massachusetts it is the practice to swear jurors at the beginning of the session to give a true verdict in all causes committed to them. When the right of peremptory challenge was first given in civil causes by statute 1862, § 84, the supreme judicial court was authorized to prescribe by rules the manner in which it should be exercised (Pub. Stat. chap. 170, § 37); but, no rules having been prescribed, the practice in civil causes became established of permitting peremptory challenges up to the time when the trial commenced by the reading of the writ, or by some action which, in the ordinary sense of the words, may be said to be the beginning of the trial. And this statutory right extends to bystanders upon the panel as well as to jurors regularly summoned, and they may be challenged after they have been sworn, but before anything else is done. Sackett v. Ruder, 152 Mass. 397, 9 L.R.A. 391, 25 N. E. 736.

² Thorp v. Deming, 78 Mich. 124, 43 N. W. 1097; Ayres v. Hubbard, 88 Mich. 155, 50 N. W. 111.

³ Peoria, D. & E. R. Co. v. Puckett, 52 Ill. App. 222.

d. Number of.—The number of peremptory challenges depends on the statute of the jurisdiction.¹ Where several defendants unite in pleading, and appear by the same counsel, they are entitled to but one set of peremptory challenges.² If they plead separately and appear by different counsel with defense on which the verdict may be for one and against another they are each entitled to the statute number.³

¹ The New York statute allows six to each party in a court of record, and three to each party in a court not of record. Code Civ. Proc. § 1176. The United States statute three. U. S. Rev. Stat. § 819.

United States v. Daubner, 17 Fed. 793, 979. And compare the statutes of the various other states.

Where a juror is excused for illness, and another juror called in his place during the trial and the trial commenced *de novo*, as provided by a Tennessee statute, a party who has exhausted his peremptory challenges is not entitled to further peremptory challenges. Bruce v. Beall, 100 Tenn. 573, 47 S. W. 204.

² Stone v. Segur, 93 Mass. 568; Bibb v. Reid, 3 Ala. 88; Stroh v. Hinchman, 37 Mich. 490.

The word "party" in a statute giving each party two peremptory challenges signifies "side;" and only two peremptory challenges may be had on a side, although there are a number of parties. Moores v. Bricklayers' Union No. 1, 7 Ry. & Corp. L. J. 108.

So, the defendants in the aggregate, and not each defendant, in a suit in which the issues to be tried between plaintiff and all the defendants are the same, are entitled to six peremptory challenges under the Texas statute allowing each party six peremptory challenges. Hargrave v. Vaughn, 82 Tex. 347, 18 S. W. 695. So, also, of several officers sued jointly for false imprisonment where there is no antagonism of interest between them. Wolf v. Perryman, 82 Tex. 112, 17 S. W. 772. And several attaching creditors who are identified with each other and together constitute the parties on one side against interveners who claim that a sale to the defendant of the goods attached was obtained by fraud will be treated as one party under this statute. Raby v. Frank, 12 Tex. Civ. App. 125. And so of plaintiff and interveners who both seek to hold defendant liable on an insurance policy. Kelly-Goodfellow Shoe Co. v. Liberty Ins. Co. 8 Tex. Civ. App. 227, 28 S. W. 1027. And refusal to allow two defendants whose interests are similar three challenges each is not reversible error,—especially where it does not appear that they exhausted their peremptory challenges, or that an objectionable jury was forced on them. Allen v. Waddill, — Tex. Civ. App. —, 26 S. W. 273.

And a refusal to allow six peremptory challenges to each of several defendants sued jointly, if error, is not prejudicial, where after six challenges had been exhausted two additional jurors were placed on the panel, neither of whom was challenged by any of the defendants. Wolf v. Perryman, 82 Tex. 112, 17 S. W. 772.

³ Stroh v. Hinchman, 37 Mich. 490 (Cooley, J.); McLaughlin v. Carter, 13 Tex. Civ. App. 694, 37 S. W. 666. Compare Soudousky v. McGee, 4 J. J. Marsh. 267, 269. Contra in the United States courts. U. S. Rev. Stat. § 819.

An order of court that actions by the same plaintiff against different defendants be consolidated and tried together cannot deprive the defendants of their several challenges. Mutual L. Ins. Co. v. Hillmon, 145 U. S. 285, 36 L. ed. 707, 12 Sup. Ct. Rep. 909; Hogsett v. Northern Texas Traction Co. — Tex. Civ. App. —, 118 S. W. 807.

10. Court may set aside or excuse juror.

a. In general.—The court has discretionary power to set aside a juror¹ because of business relations or interests,² interest in similar cause,³ relations personal or contractual,⁴ prejudices,⁵ opinions or conclusions already formed,⁶ imperfect knowledge of the English language,⁷ sickness,⁸ use of intoxicants,⁹ citizenship,¹⁰ or position as a public official.¹¹

It was held error to set aside a juror for mere misnomer in summons.¹²

¹ *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885 (criminal case); *State v. Dickson*, 6 Kan. 209 (criminal case); *Michigan Condensed Milk Co. v. Wilcox*, 78 Mich. 431, 44 N. W. 281; *Gilliam v. Brown*, 43 Miss. 641, 652, and cases cited; *State v. Taylor*, 134 Mo. 109, 35 S. W. 92 (criminal case); *State v. Bartley*, 56 Neb. 810, 77 N. W. 438; *Perry v. Western North Carolina R. Co.* 129 N. C. 333, 40 S. E. 191; *Grace v. Dempsey*, 75 Wis. 313, 43 N. W. 1127.

The questions of the competency of jurors are determinable in the discretion of the judge. *Dictum* in *Dale v. Colfax Consol. Coal Co.* 131 Iowa, 67, 107 N. W. 1096. This discretion, however, is not an arbitrary one to be indulged without reasons. Thus in *Welch v. Tribune Pub. Co.* 83 Mich. 661, 11 L.R.A. 233, 21 Am. St. Rep. 629, 47 N. W. 562, it is said that setting aside cannot be sustained as to a juror with whom both the parties have expressed their satisfaction and against the consent of one of them, unless the reasons for the action are set out in the record; and the reason so set out must afford a good cause for rejecting the juror.

It is the duty of the court to watch over the impaneling of the jury and to preserve its impartialty and purity. *Gilliam v. Brown*, 43 Miss. 641; *United States v. Reed*, 2 Blatchf. 435, 450, Fed. Cas. No. 16,134; *Torrent v. Yager*, 52 Mich. 506, 18 N. W. 239. That it is the duty of the court to set aside an unfit juror, see an expression in *Lawlor v. Linforth*, 72 Cal. 205, 13 Pac. 496. N. Y. Code Civ. Proc. § 1174, which requires that the juror must serve unless "excused or set aside," uses the quoted terms in a distinctive sense; "excused" meaning discharged on reasons personal to the juror and at his instance, while "set aside" means discharged on objection by counsel or court. *Santee v. Standard Pub. Co.* 36 App. Div. 555, 55 N. Y. Supp. 361.

² Juror excused who had extensive business dealings with a party but not any contract. *Quay v. Duluth, S. S. & A. R. Co.* 153 Mich. 567, 18 L.R.A. (N.S.) 250, 116 N. W. 1101. Juror excused after acceptance by parties, where he stated to court that, on reflection, he felt biased because of his business relations with defendant. *Robinson v. State*, 33 Ark. 180. Juror set aside because indebted to one of the defendants. *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015.

³ Juror excused against consent of party, because he had been interested in a similar case. *Schieffelin v. Schieffelin*, 127 Ala. 14, 28 So. 687. Juror discharged because of another cause at issue in the court which might be tried at the same term. *Claggett's Case*, 2 Cranch, C. C. 247, Fed. Cas. No. 2,779.

⁴ Juror excused on court's own motion, because first cousin of defendant's son-in-law. *Williamson v. Mayer Bros.* 117 Ala. 253, 23 So. 3. Jurors set aside on their affirmation that they were related to parties, were witnesses in the case, or had served as jurors at a former trial. *Steed v. Knowles*, 97 Ala. 573, 12 So. 75. It was within the discretion of the court to reject a juror on the challenge of one of the parties because of his intimate relations with the other party. *Burch v. Hylton*, 89 Va. 441, 16 S. E. 342. Court erred in setting aside juror on objection that his partner was a friend of the defendant's attorney. *Santee v. Standard Pub. Co.* 36 App. Div. 555, 55 N. Y. Supp. 361. Juror set aside on the court's own motion, because a brother of the defendant's agent. *Atlas Min. Co. v. Johnston*, 23 Mich. 36, 1 Mor. Min. Rep. 388. Juror excused because of relationship to one of the parties. *Thomas v. Leonard*, 5 Ill. 556.

Agency or contract relations.—Juror set aside because of his employment by defendant in the transaction out of which the cause arose. *Tatum v. Young*, 1 Port. (Ala.) 298. Juror set aside because of former employment by defendant and opinions formed on rumor. *State v. Miller*, 29 Kan. 43 (criminal). Jurors excused where a struck jury was demanded because of their employment by defendant. *Louisville & N. R. Co. v. Young*, 168 Ala. 551, 53 So. 213. Juror discharged because of former employment by one of the parties on challenge by the other party. *Murphy v. Southern P. Co.* 31 Nev. 120, 101 Pac. 322. Juror excused because in the employ of a corporation having the same president as the defendant corporation. *Glasgow v. Metropolitan Street R. Co.* 191 Mo. 347, 89 S. W. 915. Jurors excused in proceedings against a county, because of employment by county commissioners. *Calhoun County v. Watson*, 152 Ala. 554, 44 So. 702.

⁵ Thus, where the juror expressed a hostility to all landlords, and the case was one for treble rent and restitution of leased premises. *Lawlor v. Linforth*, 72 Cal. 205, 13 Pac. 496. Juror in the insurance business set aside because of assertion that he would be influenced if it should appear during the case that an insurance company was the real party in interest. *Marande v. Texas & P. R. Co.* 59 C. C. A. 567, 124 Fed. 42. Jurors set aside on a prosecution for murder, because they were Quakers. *United States v. Cornell*, 2 Mason, 91 Fed. Cas. No. 14,868. The fact that the juror cross-examined one of the witnesses quite sharply did not of itself afford a reason for excluding him from the jury. *Chicago, M. & St. P. R. Co. v. Harper*, 128 Ill. 384, 21 N. E. 561.

Residence in a locality affected by the result of the action, or where such residence might prejudice the trial, may warrant discharge of the
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juror. Juror excluded in an action against a municipality, because he was a taxpayer therein. *Dively v. Cedar Falls*, 21 Iowa, 565. Court excluded juror in action against city treasurer, because citizen of the city. *Snow v. Weeks*, 75 Me. 105. Juror excused on challenge, because not drawn from the body of the county outside the place where the transaction took place, as requested by the court. *Felsch v. Babb*, 72 Neb. 736, 101 N. W. 1011.

As to citizenship of juror see post, this section, note 10.

⁶ A juror may, after his acceptance by both parties, be set aside where, on his own *voir dire*, he testifies that he has reached an unalterable conclusion. *State v. West*, 46 La. Ann. 1009, 15 So. 418. It was not error to discharge, on challenge, jurors who stated that they had formed opinions, although they also stated they would nevertheless be able to render a fair and impartial verdict. *Bradford v. Territory*, 2 Okla. 228, 37 Pac. 1061. Juror set aside on motion of court, because of his statements that he had formed an opinion. *Atlas Min. Co. v. Johnston*, 23 Mich. 36, 1 Mor. Min. Rep. 388. Juror properly excused where, on examination, it did not appear that he was indifferent. *Rowell v. Boston & M. R. Co.* 58 N. H. 514.

⁷ Juror discharged after examination by the court, because of his imperfect knowledge of the English language. *State v. Ring*, 29 Minn. 78, 11 N. W. 233 (criminal case); *Sutton v. Fox*, 55 Wis. 531, 42 Am. Rep. 744, 13 N. W. 477. Juror excused because of deafness and his imperfect knowledge of the English language. *Atlas Min. Co. v. Johnston*, 23 Mich. 36, 1 Mor. Min. Rep. 388.

⁸ Juror may be excused from service because of sickness. *Lindsey v. Tioga Lumber Co.* 108 La. 468, 92 Am. St. Rep. 384, 32 So. 464; *State v. Ronk*, 91 Minn. 419, 98 N. W. 334 (criminal); *Silsby v. Foote*, 14 How. 218, 14 L. ed. 394; *Houston City Street R. Co. v. Ross*, — Tex. Civ. App. —, 28 S. W. 254. Court erred in excusing juror because of mental distress caused by illness in his family and continuing the trial over the objection of defendant's counsel. *Houston & T. C. R. Co. v. Waller*, 56 Tex. 331.

⁹ Juror set aside because of his unfitness in consequences of the excessive use of intoxicating liquors while acting as a juror, and another called to complete the panel. *Torrent v. Yager*, 52 Mich. 506, 18 N. W. 239. Jurors excused after being drawn, because of intoxication. *Bullard v. Spoor*, 2 Cow. 430.

¹⁰ Juror excused after examination by court on the question of his citizenship. *Keady v. People*, 32 Colo. 57, 66 L.R.A. 353, 74 Pac. 892.

¹¹ Juror excused from a struck jury because he was postmaster. *Stewart v. State*, 1 Ohio St. 66 (criminal). Inspector of banks excused from jury because his duties were not delegable. *Piper's Case*, 2 Browne (Pa.) 59.

- ¹² It was error to set aside a juror *ex mero motu* because of a misnomer of his Christian name in summoning. *Sullivan v. State*, 102 Ala. 135, 48 Am. St. Rep. 22, 15 So. 204 (criminal case).

b. Time or stage of the case.—The proper time to do this is before the jury is sworn,¹ or before testimony is taken, but after swearing the jury.²

- ¹ It can be done at any time before the jury is sworn. *O'Neil v. Lake Superior Iron Co.* 67 Mich. 560, 35 N. W. 162.
- ² According to the better opinion, it may be done at any time before testimony has been taken. *People v. Damon*, 13 Wend. 351; *Silsby v. Foote*, 14 How. 218, 14 L. ed. 394. It was proper to permit the re-examination of a juror after jury was sworn and the case was ready for the trial, where it appeared that the juror had extensive dealings with one of the parties, and to excuse such juror because of it. *Quay v. Duluth, S. S. & A. R. Co.* 153 Mich. 567, 18 L.R.A.(N.S.) 250, 116 N. W. 1101. Juror set aside after being sworn, but before evidence given, because of relationship to one of parties. *Thomas v. Leonard*, 5 Ill. 556. In *Lawlor v. Linforth*, 72 Cal. 205, 13 Pac. 496, it was done when the trial was ready to proceed, after the jury was complete. A court erred in setting aside a juror sworn in without objection, when plaintiff thereafter objected to him on the grounds that juror's partner was a friend of the defendant's attorney. *Santee v. Standard Pub. Co.* 36 App. Div. 555, 55 N. Y. Supp. 361.

c. Sufficiency of showing.—Evidence of showing of incapacity of juror need not be of such a nature that it would be admissible as evidence in the trial of a cause, it being sufficient if it satisfy the court of such incapacity; mere statements of counsel,¹ assertions and affidavits of the jurors themselves,² and messages from third persons to the court have been held sufficient.³

- ¹ Juror set aside on mere statements of counsel to court that he was related to the defendant. *Thomas v. Leonard*, 5 Ill. 556.
- ² Jurors set aside on a prosecution for murder, on their mere assertion that they were Quakers. *United States v. Cornell*, 2 Mason, 91 Fed. Cas. No. 14,868. Juror discharged on his affidavit that he had a cause at issue in the court which he expected would be tried in the same term. *Claggett's Case*, 2 Cranch, C. C. 247, Fed. Cas. No. 2,779.
- ³ A court might excuse an absent juror from service, on the receipt of a telegram from a third person stating that such juror was sick and unable to attend the jury. *Houston City Street R. Co. v. Ross*, — Tex. Civ. App. —, 28 S. W. 254.

d. On motion of court or against consent of party.—A court may on its own motion excuse a juror for cause;¹ but where the grounds for the discharge are insufficient, the discharge will be error if made over the objections or against the consent of the parties.² The erroneous discharge of a juror against the consent of a party was not waived by proceeding with the trial.³

¹ *Williamson v. Mayer Bros.* 117 Ala. 253, 23 So. 3; *Atlas Min. Co. v. Johnston*, 23 Mich. 36, 1 Mor. Min. Rep. 388. Juror excused against assent of party because he had been interested in a similar case. *Schieffelin v. Schieffelin*, 127 Ala. 14, 28 So. 687. Juror excused against the assent of one of the parties, it appearing he was in the insurance business and there was a dispute as to whether or not any question relating to insurance would arise. *Marande v. Texas & P. R. Co.* 59 C. C. A. 567, 124 Fed. 42.

² It was error for the court to set aside a juror on the motion of the plaintiff, on grounds not constituting a legal disqualification and against the consent of the defendant. *Greer v. Norvill*, 3 Hill, L. 262. A court erred in discharging a juror because, on examination, he stated he had formed an opinion, after he had been accepted by the defendant and before he had been accepted or challenged by the people. *Van Blaricum v. People*, 16 Ill. 364, 63 Am. Dec. 316 (criminal case). Court erred in setting aside a juror *ex mero motu* because of misnomer of his Christian name in summoning. *Sullivan v. State*, 102 Ala. 135, 48 Am. St. Rep. 22, 15 So. 264 (criminal case).

³ *Mahoney v. San Francisco & S. M. R. Co.* 110 Cal. 471, 42 Pac. 968.

e. Harmless error.—Though the court set aside a juror improperly, it is not reversible error, if the jury which tried the case was fair and impartial, or if peremptory challenges remained whereby the objectionable jurors, if any, might have been excluded;¹ since the reversal of the cause would, in such a case, only give what already has been had, *viz.*, a fair jury.² Rejection of a proper juror is not so likely to be prejudicial as acceptance of an improper one.³

¹ *Tatum v. Young*, 1 Port. (Ala.) 298; *Decker v. Laws*, 74 Ark. 286, 85 S. W. 425; *Keady v. People*, 32 Colo. 57, 66 L.R.A. 353, 74 Pac. 892 (criminal case); *Heaston v. Cincinnati & Ft. W. R. Co.* 16 Ind. 275, 79 Am. Dec. 430; *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582; *Atlas Min. Co. v. Johnston*, 23 Mich. 36, 1 Mor. Min. Rep. 386; *Omaha Southern R. Co. v. Beeson*, 36 Neb. 361, 54 N. W. 557; *Murphy v. Southern P. Co.* 31 Nev. 120, 101 Pac. 322; *Thompson v. Douglass*,



35 W. Va. 337, 13 S. E. 1015; Sutton v. Fox, 55 Wis. 531, 42 Am. Rep. 744, 13 N. W. 477. It was not error to set aside a juror who stated that he would be prejudiced if any question of insurance would arise in the case, no complaint being made that the jury actually impaneled was not fair and impartial. Marande v. Texas & P. R. Co. 59 C. C. A. 567, 124 Fed. 42. Changes made by court during the formation of the jury were not error where it appeared that the jury as formed was fair and impartial. Walker v. Kennison, 34 N. H. 257. The discharge of a juror, for an insufficient reason, during impaneling, is not reversible error where an impartial jury was secured and peremptory challenges were not exhausted. Atchison, T. & S. F. R. Co. v. Franklin, 23 Kan. 74, citing People v. Ferris, 1 Abb. Pr. N. S. 193. The act of the court in excusing a juror over the objection of the defendant, without legal cause, was without prejudice to the defendant where he had not exhausted his peremptory challenges. Brennan v. O'Brien, 121 Mich. 491, 80 N. W. 249. Excusing a juror not disqualified was not prejudicial, where such act did not prevent plaintiff having a jury drawn from the regular panel and he had not exhausted his peremptory challenges. Commercial Bank v. Chatfield, 121 Mich. 647, 80 N. W. 712. The fact that the peremptory challenges were exhausted does not deprive the judge of power to set aside jurors, if all those who composed the jury were qualified. O'Neil v. Lake Superior Iron Co. 67 Mich. 560, 35 N. W. 162.

But that it will not be presumed that exclusion of competent jurors was harmless, see Santee v. Standard Pub. Co. 36 App. Div. 555, 55 N. Y. Supp. 361, following Hildreth v. Troy, 101 N. Y. 234, 54 Am. Rep. 686, 4 N. E. 559.

² Quay v. Duluth, S. S. & A. R. Co. 153 Mich. 567, 18 L.R.A.(N.S.) 250, 116 N. W. 1101.

³ State v. West, 46 La. Ann. 1009, 15 So. 418 (criminal case).

f. Excusing person from jury list or venire.—A court may, in its discretion, excuse jurors called on the regular panel,¹ it appearing there were more than a sufficient number left to try the cause.²

¹ Jurors excused within the discretion of the court and "stood over" to a later date in the term. Fulton County v. Amorous, 89 Ga. 614, 16 S. E. 201.

² State v. Somnier, 33 La. Ann. 237 (criminal).

It was not prejudicial error to excuse them over a bare objection, where the party had not done that which was necessary to

entitle him to a jury trial, and where rather than accept the jury that was left to him he waived trial by jury.¹

Talesman no longer needed may be excused;² but a special or talesman list should be exhausted by calling those who failed to appear, before calling more jurors.³

¹ Doll v. Mundine, 7 Tex. Civ. App. 96, 26 S. W. 87.

² Court properly excused talesmen jurors, it appearing their services were no longer necessary. State v. West, 35 La. Ann. 28 (criminal).

³ Court erred, in a criminal cause, in refusing to stay the further call of jurors and force the attendance of jurors summoned upon a special venire, and who failed to appear. Boles v. State, 24 Miss. 445 (criminal).

g. Resumption of trial after substituting juror.—The trial may be resumed on the substitution of another competent juror if evidence has not yet been taken.¹ After taking of evidence the setting aside of a juror will work a mistrial and continuance unless the parties assent.²

¹ When a juror has been excused after swearing but before the trial proper. Quay v. Duluth, S. S. & A. R. Co. 153 Mich. 567, 18 L.R.A. (N.S.) 250, 116 N. W. 1101; State v. Moncla, 39 La. Ann. 868, 2 So. 814 (criminal); State v. Johnson, 48 La. Ann. 437, 19 So. 476 (criminal). When excused after swearing but before evidence introduced, because of sickness. Silsby v. Foote, 14 How. 218, 14 L. ed. 394.

It was no error on the part of a commissioner of special bail to call another juror and continue the trial, where a juror who had been sworn failed to appear before any testimony was taken. Rice v. Sims, 3 Hill, L. 5.

² As to practice of withdrawing juror, see post, chapter XIX., § 2.

A juror may be excused because of sickness after the trial has begun and proof taken, and the trial proceeded with, where no objections are raised by either party. Lindsey v. Tioga Lumber Co. 108 La. 468, 92 Am. St. Rep. 384, 32 So. 464; State v. Ronk, 91 Minn. 419, 98 N. W. 334 (criminal). Juror discharged and trial continued where, after the commencement of the trial, the juror, after an adjournment, appeared before the court intoxicated, although he stated he would be sober in the morning. Routledge v. Elmendorf, 54 Tex. Civ. App. 174, 116 S. W. 156. Court erred in discharging juror against defendant's objection after the trial has begun and proof taken, because of the statement of the juror that he did not believe the statements of certain of the witnesses. Mahoney v. San Francisco & S. M. R. Co. 110 Cal. 471, 42 Pac. 968.

IV.—MOTIONS ON THE PLEADINGS.

1. Defendant's motion to dismiss or for judgment on the pleadings, for insufficiency of complaint.
 - a. In general.
 - b. Several defendants.
 - c. Specifying the ground.
 - d. Exception to ruling.
 - e. Amending to defeat the motion.
 - f. Motion, when to be made.
2. Defendant's motion to dismiss or for judgment on the pleadings, because of admitted defense.
3. Plaintiff's motion for judgment for insufficiency of answer, or because of admitted cause of action.
 - a. In general.
 - b. Test of sufficiency.
 - c. Motion, when to be made.
 - d. Waiver of right to move.
 - e. Exception to ruling.
4. Motion to compel election.
 - a. Inconsistent causes of action or defenses.
 - b. Time for objection; waiver.
 - c. Misjoinder.
 - d. Exception to ruling.
5. Assessing damages.
6. Motion to strike out.
 - a. In general.
 - b. Discretion of court.
7. Motion to make more definite and certain.

1. Defendant's motion to dismiss or for judgment on the pleadings, for insufficiency of complaint.

a. *In general*.—The objection that the complaint does not state facts to constitute a cause of action is not waived by going to trial without raising it by answer or demurrer, but it may be taken by motion, at the trial, to dismiss,¹ or for such judgment for defendant as he is entitled to on the pleadings.² So, of the objection that the court has not jurisdiction of the subject of

the action. For the purposes of the motion, the allegations of the complaint are to be deemed true, as on demurrer.⁸

¹ *Tooker v. Arnoux*, 76 N. Y. 397, and cases cited; *Mosselman v. Caen*, 4 *Thomp. & C.* 171, 1 *Hun*, 647; *Luddington v. Taft*, 10 *Barb.* 447; *Stannard v. Eytinge*, 5 *Robt.* 80, 3 *Abb. Pr. N. S.* 42, 33 *How. Pr.* 262; *Steuben County v. Wood*, 24 *App. Div.* 442, 48 *N. Y. Supp.* 471; *Weeks v. O'Brien*, 141 *N. Y.* 199, 36 *N. E.* 185; *Hand v. Shaw*, 20 *Misc.* 698, 46 *N. Y. Supp.* 528; *McCullough v. Pence*, 85 *Hun*, 271, 32 *N. Y. Supp.* 986; *Mills v. Knapp*, 39 *Fed.* 592; *Milhollin v. Fuller*, 1 *Ind. App.* 58, 27 *N. E.* 112; *Martin v. Creech*, 58 *Mo. App.* 391; *Knowles v. Norfolk S. R. Co.* 102 *N. C.* 62, 9 *S. E.* 7; *Jackson v. Jackson*, 105 *N. C.* 433, 11 *S. E.* 173; *Pescud v. Hawkins*, 71 *N. C.* 299. Compare *Saunders v. Pendleton*, 19 *R. I.* 292, 36 *Atl.* 89; *Richmond v. Brookings*, 48 *Fed.* 241; *United Bldg.-Material Co. v. Odell*, 67 *Misc.* 584, 123 *N. Y. Supp.* 313. But see *Thomas v. Smith*, 75 *Hun*, 573, 27 *N. Y. Supp.* 589, where, although recognized as lawful, this practice was not commended as the best means to promote the ends of justice; but judgment of dismissal was reversed because the court held the complaint sufficient, though the court considered defendant had recognized its sufficiency by answering.

Such a motion admits the truth of the pleadings and also the statements of counsel in his opening. *Roberts v. Colorado Springs & I. R. Co.* 45 *Colo.* 188, 101 *Pac.* 59.

A motion made at the commencement of a trial to dismiss a complaint on the ground that it does not state facts sufficient to constitute a cause of action is practically a demurrer to the complaint on that ground, and it cannot be sustained unless it appears that, admitting all the facts alleged, no cause of action whatever is stated. *Abbott v. Easton*, 195 *N. Y.* 372, 88 *N. E.* 572. On such a motion at the opening of the trial, the complaint must be liberally construed in favor of, and not against, it, as to matters of form. *Catterson v. Brooklyn Heights R. Co.* 132 *App. Div.* 399, 116 *N. Y. Supp.* 760. See also *Eckes v. Stetler*, 98 *App. Div.* 76, 90 *N. Y. Supp.* 473; *Oakeshott v. Smith*, 104 *App. Div.* 384, 93 *N. Y. Supp.* 659; *Hoffman House v. Foote*, 172 *N. Y.* 348, 65 *N. E.* 169. The complaint may be dismissed if the opening shows no right of action. *Miner v. Hopkinton*, 73 *N. H.* 232, 60 *Atl.* 433; *Sims v. Metropolitan Street R. Co.* 65 *App. Div.* 270, 72 *N. Y. Supp.* 835; *Eckes v. Stetler*, 98 *App. Div.* 76, 90 *N. Y. Supp.* 473; *Brooks v. McCabe & Hamilton*, 39 *Wash.* 62, 80 *Pac.* 1004.

If the complaint is dismissed on counsel's opening, it must be assumed that the facts stated in the complaint and opening are true. *Yaple v. New York, O. & W. R. Co.* 57 *App. Div.* 265, 68 *N. Y. Supp.* 292. If the plaintiff is entitled to nominal damages the complaint cannot be dismissed. *Nilsson v. De Haven*, 47 *App. Div.* 537, 62 *N. Y. Supp.* 506.

- An allegation of the conclusion of law which the omitted fact was essential to make out was held not enough to sustain the complaint against such motion, in *Sheridan v. Jackson*, 72 N. Y. 170.
- In Georgia, a defendant desiring to assail the petition for insufficiency must do so at the first term; failing in which, plaintiff is entitled to be heard on the merits, and an oral motion at trial to dismiss will not be entertained. *Bishop v. Woodward*, 103 Ga. 281, 29 S. E. 968. But see *Maddox v. Randolph County*, 65 Ga. 216.
- In Colorado, failing to demur and answering accepts the complaint as stating a cause of action; and the court cannot, of its own motion during the trial, dismiss a count setting up a separate cause of action on the ground of insufficiency. *Kyes v. Best*, 8 Colo. App. 129, 45 Pac. 227.
- In Iowa, the objection can be taken only by motion in arrest of judgment before judgment is entered. *Draper v. Ellis*, 12 Iowa, 316; *Pierson v. Independent School Dist.* 106 Iowa, 695, 77 N. W. 494.
- In some states insufficiency of the complaint or petition to state a cause of action is made the ground of an objection to the introduction of any evidence, interposed immediately after plaintiff's opening; and this question will be discussed in the Brief on the Pleadings, in its appropriate place.
- Objections waived.*—A motion to dismiss is not proper, however, for other objections to be taken by answer or demurrer, and which are expressly waived if not so raised; as, for instance, misjoinder of causes of action. *Barnard v. Brown*, 43 N. Y. S. R. 602, 17 N. Y. Supp. 532; *Davis Lumber Co. v. Home Ins. Co.* 95 Wis. 542, 70 N. W. 59; *Burns v. Ashworth*, 72 N. C. 496; *Densmore v. Shepard*, 46 Minn. 54, sub nom. *Densmore v. Red Wing Lime & Stone Co.* 48 N. W. 528, 681.
- Or that the action was not brought by the real party in interest. *Spooner v. Delaware, L. & W. R. Co.* 115 N. Y. 22, 21 N. E. 696.
- Or that plaintiff is seeking equitable relief, when he has an adequate remedy at law, if jurisdiction of equity and law is not concurrent. *Ketchum v. Depew*, 81 Hun, 278, 30 N. Y. Supp. 794.
- So, also, of the objection that the cause of action is not equitable in its nature, but is merely for money paid and received in violation of a statute, although plaintiff is seeking equitable relief. *Stiefel v. New York Novelty Co.* 14 App. Div. 371, 43 N. Y. Supp. 1012.
- And of misjoinder of parties plaintiff. *Schwartzel v. Karnes*, 2 Kan. App. 782, 44 Pac. 41; *Densmore v. Shepard*, 46 Minn. 54, sub nom. *Densmore v. Red Wing Lime & Stone Co.* 48 N. W. 528. The remedy being, according to *Liverpool & L. & G. Ins. Co. v. Ellington*, 94 Ga. 785, 21 S. E. 1006, correction of the petition by striking out the improper party by special demurrer.

So, in a personal action in a justice's court, withdrawal of a motion to dismiss for want of jurisdiction of the parties, and consent to try the case on the merits, waives the objection of want of jurisdiction. *Luco v. Tuolumne County Super. Ct.* 71 Cal. 555, 12 Pac. 677.

Nor does the practice apply to a cause of action defectively stated as to form. *Johnson v. Crookshanks*, 21 Or. 339, 28 Pac. 78. Or where the cause is tried on an agreed statement of facts. *Hines v. Wilmington & W. R. Co.* 95 N. C. 434. And defendant cannot, after admitting in his answer the execution and delivery of the note sued on, move to dismiss, because the note was not filed with the petition, though so stated therein. *Fenwick v. Bowling*, 50 Mo. App. 516.

It is not a fatal objection to a complaint, upon motion to dismiss, that it contains irrelevant or redundant matter, or that the allegations are indefinite or uncertain. Such defects are to be remedied by motion to strike out, or to make more definite and certain. *Simmons v. Eldridge*, 29 How. Pr. 309, 10 Abb. Pr. 296. See post, §§ 6, 7.

² *Denis v. Velati*, 96 Cal. 223, 31 Pac. 1; *Greenleaf v. Egan*, 30 Minn. 316, 15 N. W. 254; *Hibernia Sav. & L. Soc. v. Thornton*, 117 Cal. 481, 49 Pac. 573; *Hawkins v. Overstreet*, 7 Okla. 277, 54 Pac. 472; *Mills v. Hart*, 24 Colo. 505, 52 Pac. 680.

A motion for judgment on the pleadings goes to the substance of the pleading attacked, and not to the form; and, as a general proposition, such a motion, based on the facts established by the pleadings, cannot be sustained, except where, under those facts, a judgment different from that pronounced could not be rendered, notwithstanding any evidence which might be produced; or unless, under the admitted facts, the moving party is entitled to judgment, without regard to what the findings might be on the facts upon which issue is joined; hence the rule that the motion cannot prevail, unless, on the facts established, the court can, as matter of law, pronounce judgment on the merits,—that is, determine the rights of the parties to the subject-matter of the controversy, and render a judgment in relation thereto which is final between the parties. *Mills v. Hart*, 24 Colo. 505, 52 Pac. 680. See also *Rice v. Bush*, 16 Colo. 484, 27 Pac. 720.

So, frivolousness of plaintiff's pleadings will support such a motion. N. Y. Code Civ. Proc. § 537. But its insufficiency in this respect must be so clear that it appears upon the statement without any further argument. *Henriques v. Trowbridge*, 27 App. Div. 18, 50 N. Y. Supp. 108 (holding that § 537, above, applies only to a reply served for the reason that the answer sets up a counterclaim).

But a mere formal defect, such as want of verification, cannot be reached by such a motion. *Speer v. Craig*, 16 Colo. 478, 27 Pac. 891.

The question of sufficiency of pleadings, generally, to withstand such a motion, belongs properly to the Brief on the Pleadings, and will be there fully discussed under the appropriate heads.

³ *Sheridan v. Jackson*, 72 N. Y. 170, affirming 10 Hun, 89; *Floyd v. Johnson*, 17 Mont. 471, 43 Pac. 631; *People v. Johnson*, 95 Cal. 471, 31 Pac. 611; *Merchants' Nat. Bank v. Eckels*, 191 Pa. 372, 43 Atl. 245; *Haun v. Trainer*, 190 Pa. 1, 42 Atl. 367; *Ketchum v. Van Dusen*, 11 App. Div. 332, 42 N. Y. Supp. 1112.

And it will be so treated on appeal, if plaintiff excepts to a dismissal instead of amending. *Sheridan v. Jackson*, 72 N. Y. 170, affirming 10 Hun, 89. The question being, Do the facts alleged constitute a cause of action? *Hibernia Sav. & L. Soc. v. Thornton*, 117 Cal. 481, 49 Pac. 573.

And the complaint, although not stating an essential fact by explicit, positive averment, as required by the rules of pleading, will be upheld when first assailed by motion for judgment on the pleadings, if such fact appears by plain and necessary implication. *Hargro v. Hodgdon*, 89 Cal. 623, 26 Pac. 1106. And the motion, whether demanding dismissal or judgment for defendant on the pleadings, denied, if the complaint states facts entitling plaintiff to any relief, legal or equitable. *Sanders v. Soutter*, 126 N. Y. 193, 27 N. E. 263; *Staford v. Merrill*, 62 Hun, 144, 16 N. Y. Supp. 467; *Hawkins v. Overstreet*, 7 Okla. 277, 54 Pac. 472.

Whether the motion to dismiss can be denied because the answer contains the matter which the defendant objects has not been alleged, is disputed.¹

But a motion for judgment for defendant is precluded if plaintiff's pleadings raise a material issue to be tried,² or if the defect in the complaint is so apparent as not to mislead defendant,³ and is supplied by the answer.⁴

¹ Compare *Miller v. White*, 4 Hun, 62, 6 Thomp. & C. 255; *Toop v. New York*, 36 N. Y. S. R. 724, 13 N. Y. Supp. 280, and *Leon v. Bernheimer*, 10 Week. Dig. 288, on the one hand; and *Smith v. Van Ostrand*, 64 N. Y. 278, 280, and *Russell v. New York*, 1 Daly, 263, on the other. See also *Hughes v. Carson*, 90 Mo. 399, 2 S. W. 441, holding that any omission to state a material fact in the petition is obviated if the answer put it in issue.

² A single material issue precludes a judgment on the pleadings. See *Iba v. Central Asso.* 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20. See also *Mills v. Hart*, 24 Colo. 505, 52 Pac. 680; *Raymond v. Morrison*, 9 Wash. 156, 37 Pac. 318; *Miles v. Edsall*, 7 Mont. 185, 14 Pac. 710; *Floyd v. Johnson*, 17 Mont. 469, 43 Pac. 631, and cases cited; *Pfister v. Wade*, 69 Cal. 133, 10 Pac. 369; *Penny v. Ludmick*, 152 N. C. 375, 67 S. E. 919; *Powers v. Miller*, 123 App. Div. 396, 107 N. Y. Supp. 960.

A judgment on the opening cannot be granted unless the facts stated preclude any recovery. *Coffeyville Min. & Gas Co. v. Carter*, 65 Kan. 565, 70 Pac. 635; *Brashear v. Rabenstein*, 71 Kan. 455, 80 Pac. 950; *Stewart v. Rogers*, 71 Kan. 53, 80 Pac. 58. The complaint should not be dismissed on counsel's opening in which he stated that he had no eyewitness to the accident, and would have to prove his allegations by circumstantial evidence, and rely on hostile witnesses whose testimony he could not forecast. However improbable the chances of success might appear, the plaintiff was entitled to present her evidence. *Darton v. Interborough Rapid Transit Co.* 125 App. Div. 836, 110 N. Y. Supp. 171.

³ *Clement v. Hughes*, 13 Ky. L. Rep. 352, 17 S. W. 285.

⁴ *Chicago, B. & Q. R. Co. v. German Ins. Co.* 2 Kan. App. 395, 42 Pac. 594.

b. Several defendants.—If the action is against more than one defendant the objection may be made on behalf of any one or more of them as to whom sufficient facts are not stated, and the complaint dismissed as to him or them.¹

¹ *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459.

c. Specifying the ground.—The motion to dismiss should specify the defect with sufficient clearness to enable plaintiff to amend.¹

¹ See *Higgins v. Newton & F. R. Co.* 66 N. Y. 604, affirming 3 Hun, 611; *Robbins v. Woolcott*, 66 Barb. 63; *Rector v. Clark*, 78 N. Y. 21, reversing 12 Hun, 189; *Boldt v. Epstein*, 29 Misc. 583, 61 N. Y. Supp. 248; *E. T. Burrowes Co. v. Rapid Safety Filter Co.* 49 Misc. 539, 97 N. Y. Supp. 1048. In *Elam v. Barnes*, 110 N. C. 73, 14 S. E. 621, a motion to dismiss for insufficiency was held a demurrer, and should be disregarded, as provided by a statute forbidding consideration of demurrer, unless it specify the particulars in which the complaint is deficient.

d. Exception to ruling.—The granting of the motion, when the complaint is bad and the motion is seasonably made and amendment is not made, is not matter of discretion, but of legal right.¹ But if the defect is one proper for amendment, subsequent proof of the omitted facts cures error in denying the motion to dismiss.² And an exception to its denial will be unavailing if the complaint is subsequently held bad on demurrer.³

And an exception to denial of motion to dismiss is waived if defendant afterward introduces evidence.⁴

¹ *Tooker v. Arnoux*, 76 N. Y. 397; *Fuller v. Brown*, 76 Hun, 557, 28 N. Y. Supp. 189; *Hand v. Shaw*, 20 Misc. 698, 46 N. Y. Supp. 528. And see *Clift v. Rodger*, 25 Hun, 39, 43. Compare, however, *Clark v. Crego*, 51 N. Y. 646, affirming 47 Barb. 599.

An order of denial of the motion is not appealable. *Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947; *Burrell v. Hughes*, 116 N. C. 430, sub nom. *State ex rel. Burrell v. Hughes*, 21 S. E. 971. And a review can be had only on appeal from the judgment on exception taken. *Ronalds v. Cammann*, 40 N. Y. S. R. 690, 16 N. Y. Supp. 72. Or from a judgment denying a new trial or dismissing the action. *Thorp v. Lorenz*, 34 Minn. 350, 25 N. W. 712.

In Ohio, dismissal for insufficiency, in the absence of request to amend, is not a dismissal without final hearing from which an appeal will lie. *Radeliff v. Radeliff*, 15 Ohio C. C. 284, 8 Ohio C. D. 278.

In the absence of a bill of exceptions showing the ground of dismissal, it will be presumed that the dismissal was proper on the facts. *Chicago v. Porter*, 124 Ill. 589, 16 N. E. 854.

And in Missouri the motion and ruling thereon cannot be considered unless set out in the bill of exceptions. *Reitz v. Patton*, 73 Mo. App. 616.

But in Rhode Island the granting or refusal of a motion to dismiss being a matter of discretion with the court, no exception lies. *Duggan v. McCarthy*, — R. I. —, 13 Atl. 400.

² *Lounsbury v. Purdy*, 18 N. Y. 515; *Morton v. Pinckney*, 8 Bosw. 135; *Horowitz v. Pakas*, 22 Misc. 520, 49 N. Y. Supp. 1008.

³ *Conaway v. Conaway*, 10 Ind. App. 229, 37 N. W. 189.

⁴ *Leber v. Stores*, 31 Misc. 474, 64 N. Y. Supp. 464; *American Bonding Co. v. Strasburger*, 99 C. C. A. 622, 176 Fed. 348; *Baker v. Racine-Sattley Co.* 86 Neb. 227, 125 N. W. 587.

e. Amending to defeat the motion.—The court has power to allow the defect to be supplied by amendment to defeat the motion¹ if the amendment does not substantially change the cause of action,² nor make the case one requiring a different mode of trial.³ But defendant should be allowed to defend also to meet the new allegations,⁴ and to have an adjournment if surprised.⁵

¹ *Woolsey v. Rondout*, 2 Keyes, 603; *Simmons v. Lyons*, 55 N. Y. 671, affirming 3 Jones & S. 554; *Bauman v. Bean*, 57 Mich. 1, 23 N. W. 451, with disapproval of the practice of dismissing on the pleadings, when no demurrer was taken (*Cooley, J.*). And see *Steuben County*

v. Wood, 24 App. Div. 442. But a plaintiff who has not asked leave to so amend cannot be allowed to amend on appeal by defendant after denial of the motion. *Alleman v. Bowen*, 61 Hun, 30, 15 N. Y. Supp. 318.

² Same cases.

³ *Bockes v. Lansing*, 74 N. Y. 437, affirming 13 Hun, 38; *Stevens v. New York*, 84 N. Y. 296.

⁴ See *Union Bank v. Mott*, 11 Abb. Pr. 42; *Crane v. Lipscomb*, 24 S. C. 430.

⁵ See ante, chapter I., § 13.

f. Motion, when to be made.—The appropriate time for a motion to dismiss the complaint for insufficiency is before the case is opened or before evidence is adduced; but the court may entertain such a motion at any stage of the case¹ before evidence supplying the defect is heard.² If the motion to dismiss is not made until after the evidence is in, it should not be granted merely for insufficiency of the complaint, if the cause of action is proved and defendant has not been surprised or prejudiced.³

¹ *Scofield v. Whitelegge*, 49 N. Y. 259, 12 Abb. Pr. N. S. 320, affirming 10 Abb. Pr. N. S. 104; *Steuben County v. Wood*, 24 App. Div. 442, 48 N. Y. Supp. 471; *Ryan v. Fulghum*, 96 Ga. 234, 22 S. E. 940 (holding such motion proper any time before verdict).

And *Kime v. Jesse*, 52 Neb. 606, 72 N. W. 1050, held that a motion for judgment on the pleadings for insufficiency of the petition may be interposed before trial or verdict, or at any time during the course of the pleadings.

² *Perkins v. Giles*, 53 Barb. 342.

The reason is, the court is not bound to try an action where no cause is alleged. The motion was made (and sustained on appeal) in *Sheridan v. Jackson*, 72 N. Y. 170, after admissions of fact had been made by plaintiff. 10 Hun, 89, 90. And in *Smith v. Van Ostrand*, 64 N. Y. 278, after some evidence had been given under the complaint but none under the answer.

And, a motion to dismiss, made at the close of plaintiff's case, and after evidence proving it had been admitted without objection, is not proper, if no such motion was made at opening. *Kruger v. Galewski*, 13 Misc. 56, 34 N. Y. Supp. 451; *Cielfield v. Browning*, 9 Misc. 98, 29 N. Y. Supp. 710; *McLain v. British & Foreign Marine Ins. Co.* 16 Misc. 336, 38 N. Y. Supp. 77. And even where it is made at the opening, and renewed at the close, of plaintiff's case, its denial will not require reversal when testimony is thereafter offered by defendant. *Derrick v. Emmens*, 38 N. Y. S. R. 481, 14 N. Y. Supp. 360.

³ *Miller v. White*, 8 Abb. Pr. N. S. 46, less fully, 57 Barb. 504, reversed on

another ground, in 50 N. Y. 137; *Rector v. Clark*, 78 N. Y. 21, reversing 12 Hun, 189; *Meyers v. Cohn*, 4 Misc. 185, 23 N. Y. Supp. 996.

2. Defendant's motion to dismiss or for judgment on the pleadings, because of admitted defense.

The court may entertain a motion at the trial for dismissal of the complaint,¹ or a motion for such judgment for defendant as he is entitled to on the pleadings,² on the ground that a defense is admitted on the pleadings.

¹ *Cauchois v. Proctor*, 1 App. Div. 16, 36 N. Y. Supp. 957. Even if the admission claimed is inferred from the ambiguity or informality of an allegation or denial. *Clark v. Dillon*, 15 Abb. N. C. 265; *Millville Mfg. Co. v. Salter*, 15 Abb. N. C. 305. Contra, *Green v. Raymond*, 14 N. Y. Week. Dig. 322.

But an admission of the defense set up, coupled with an allegation that it is a conditional defense, and that defendant has not complied with the condition, is not an admission within the rule. *Mollyneaux v. Wittenberg*, 39 Neb. 547, 58 N. W. 205.

² Thus, where plaintiff fails to reply. *Schurmeier v. English*, 46 Minn. 306, 48 N. W. 1112; *Watkins v. Southern P. R. Co.* 4 L.R.A. 239, 38 Fed. 711; *Orr, S. & Co. v. Gilbert*, 68 Ill. App. 429; *Dean v. Messer*, 17 Ky. L. Rep. 14, 30 S. W. 198. But under the Oklahoma Code of 1890 a motion by defendant for judgment on the pleadings before plaintiff had been ruled, as required by the Code, to reply to allegations of new matter in the answer, was properly refused. *Keokuk F. Improv. Co. v. Kingsland & D. Mfg. Co.* 5 Okla. 32, 47 Pac. 484. If a reply is unnecessary, because the answer amounts only to the general issue, and sets up new facts constituting a defense, a motion for judgment on the pleadings is not proper. *Brown v. Spear*, 5 How. Pr. 146. And see *Iba v. Central Asso.* 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20.

Or fails to reply within the proper time. *Heebner v. Shepard*, 5 N. D. 56, 63 N. W. 892.

Or fails to specifically deny new matter set up by way of defense. See *Wyatt v. Henderson*, 31 Or. 48, 48 Pac. 790. And if the admissions of the reply so contradict the allegations of the complaint as to defeat the right of action, the remedy is by motion for judgment on the pleadings. *Ibid.* And defendant's right to judgment on the pleadings on this ground is not affected by the fact that he did not move until after verdict. *Benicia Agri. Works v. Creighton*, 21 Or. 495, 28 Pac. 775, 30 Pac. 676.

Or to file the requisite verified denial of allegations of new matter set up by way of defense. *Limerick v. Barrett*, 3 Kan. App. 573, 43 Pac. 853. But mere failure of the reply to designate the count of the answer it is in-

tended to deny will not authorize judgment for defendant on the pleadings. *Highlands v. Raine*, 23 Colo. 295, 47 Pac. 283.

Where the reply admits certain facts set out in defendant's answer, the question, on defendant's motion for judgment because of those admissions, is the sufficiency of the admitted facts to warrant the judgment demanded by defendant, and the materiality or immateriality of those upon which issue is joined. *Mills v. Hart*, 24 Colo. 505, 52 Pac. 680. And if the admitted facts are insufficient to support the judgment demanded by defendant, the motion is properly refused. *Knaus v. Givens*, 110 Mo. 58, sub nom. *Knaus v. Dudgeon*, 19 S. W. 535.

In Washington, it is only in cases where no reply whatever has been filed to the affirmative answer that judgment is authorized, and not where a reply has been actually filed, though found to be insufficient in law. *Davis v. Ford*, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393. See also *Raymond v. Morrison*, 9 Wash. 156, 37 Pac. 318.

3. Plaintiff's motion for judgment for insufficiency of answer, or because of admitted cause of action.

a. In general.—If defendant has not in his answer denied either of the allegations in the complaint, and has not alleged new matter sufficient to constitute a defense, the plaintiff, if a cause of action is sufficiently alleged in his complaint, is prima facie entitled to recover without giving evidence of the truth of his allegations.¹ So, too, where the answer is held frivolous² or evasive.³

And an answer admitting plaintiff's cause of action as good, in part, will authorize a judgment for plaintiff to the extent of the admitted liability.⁴

But partial insufficiency of an affidavit of defense is not an admission of any liability within the rule in Pennsylvania, if it is sufficient as to any part of plaintiff's claim.⁵

¹ *Bacon v. Cropsey*, 7 N. Y. 195; *Eaton v. Wells*, 82 N. Y. 576, affirming 22 Hun, 123; *United States v. Dashiell*, 4 Wall. 182, 185, 18 L. ed. 319, 321. And to the same effect are: *Loveland v. Garner*, 74 Cal. 298, 15 Pac. 844; *Benham v. Connor*, 113 Cal. 168, 45 Pac. 258; *Schoonover v. Birnbaum*, 148 Cal. 548, 83 Pac. 999; *Seaton Mountain Electric Light, Heat & P. Co. v. Idaho Springs Invest Co.* 49 Colo. 122, 33 L.R.A. (N.S.) 1078, 111 Pac. 834; *Lawrence v. Middle States Loan, Bldg. & Constr. Co.* 7 App. D. C. 161; *Purity Ice Works v. Roundtree*, 104 Ga. 676, 30 S. E. 885; *Horn v. Butler*, 39 Minn. 515, 40 N. W. 833; *Norton v. Beckman*, 53 Minn. 456, 55 N. W. 603; *Sweeney v. Schlessinger*, 18 Mont. 326, 45 Pac. 213; *McDonald v. Pincus*, 13 Mont. 83, 32 Pac. 283; *Irish v. Pheby*, 28 Neb. 231, 44 N. W. 438; *Bristol*

Iron & S. Co. v. Sellicz, 175 Pa. 18, 34 Atl. 309; *First Nat. Bank v. Crosby*, 179 Pa. 63, 36 Atl. 155; *Mantua Hall & Market Co. v. Brooks*, 163 Pa. 40, 29 Atl. 744.

But that an affidavit of defense might be more clear, definite, and particular does not necessarily prove its sufficiency to prevent judgment. *Steiner v. Bartlett*, 2 Pa. Super. Ct. 4.

A material issue is raised by an answer denying plaintiff's performance of the contract. *Hudson Cos. v. Briemer*, 113 N. Y. Supp. 997.

Whatever the system of pleading may be, it can hardly justify or require the court to give an instruction contrary to law. *Nelson, J. United States v. Dashiell*, 4 Wall. 182, 185, 18 L. ed. 319, 321. And see *Grocers' Bank v. Murphy*, 9 Daly, 510, and cases cited.

The question of the sufficiency of the facts set up in an answer to constitute a good defense, whether tested by demurrer or motion, is fully discussed in the Brief on the Pleadings, under appropriate titles.

² *Vass v. Brewer*, 122 N. C. 226, 29 S. E. 352 (Code, § 388); *First Nat. Bank v. Pearson*, 119 N. C. 494, 26 S. E. 46.

An answer is frivolous within this rule where it is obvious from mere inspection that it contains a defense to no part of the cause of action alleged, and neither raises nor tenders an issue of fact. *Fargo v. Vincent*, 6 S. D. 209, 60 N. W. 858. But not where it denies knowledge or information sufficient to form a belief as to material allegations of the complaint. *Bryne v. Hegeman*, 24 App. Div. 152, 48 N. Y. Supp. 783.

And where it shadows forth a good defense, but states it imperfectly, the defects should be met by a motion calling for an amendment, and not by a motion for judgment on the answer as frivolous. *Yerkes v. Crum*, 2 N. D. 72, 49 N. W. 422.

And judgment will not be rendered on an answer as frivolous, if an argument is necessary to establish the insufficiency. *German Exch. Bank v. Kroder*, 13 Misc. 192, 34 N. Y. Supp. 133. Nor because part of an answer is frivolous, if another part is held good and raises triable issues. *Siriani v. Deutsch*, 12 Misc. 213, 34 N. Y. Supp. 26.

And the rule is equally applicable to a motion for judgment for frivolousness of defendant's demurrer to plaintiff's reply. *Charlton v. Webster*, 44 N. Y. S. R. 117, 17 N. Y. Supp. 539.

³ *South Bethlehem School Dist. v. McGovern*, 6 Northampton Co. Rep. 237; *Chapman v. Natalie Anthracite Coal Co.* 11 App. D. C. 386. But not where the objection can be removed by changing the word "when" to "where." *Raker v. Bucher*, 100 Cal. 214, 217, 34 Pac. 654, 849.

⁴ *O'Connor v. Henderson Bridge Co.* 95 Ky. 633, 27 S. W. 251, 983 (Civ. Code, § 380); *McConnell v. First Nat. Bank*, 38 Neb. 252, 56 N. W. 1013; *Frey v. Fitzpatrick-Cromwell Co.* 108 La. 125, 32 So. 437.

And this under Pa. act May 31, 1893, without prejudice to plaintiff's right to proceed for the balance. *Jordan v. Kleinsmith*, 5 Pa. Dist. R. 674;

Abbott, Civ. Jur. T.—S.

DeMorat v. Entrekin, 33 W. N. C. 160; Roberts v. Sharp, 161 Pa. 185. 28 Atl. 1023.

The operation of this act is not confined to the admission of distinct items, but applies where an amount is admitted to be due on items, all of which are more or less in dispute. Calkins v. Keely, 3 Pa. Dist. R. 339. But not where defendant, though admitting certain items, alleges payment of a larger amount on account of his indebtedness to plaintiff, without stating on what items and what account, and the court is unable to determine whether such payment was applied to the admitted or disputed items. Philadelphia v. Second & T. Streets-Pass. R. Co. 2 Pa. Dist. R. 705.

But the rendition of a judgment on the pleadings without proof, for a larger sum than is admitted to be due by the answer, is erroneous. Van Etten v. Kusters, 48 Neb. 152, 66 N. W. 1106.

⁵Jordan v. Kleinsmith, 5 Pa. Dist. R. 674; Reilly v. Daly, 159 Pa. 605, 28 Atl. 493; New Castle v. New Castle Electric Co. 2 Pa. Super. Ct. 228; Myers v. Cochran, 3 Pa. Dist. R. 135; Muir v. Shinn, 2 Pa. Super. Ct. 24; Ganor v. Hinrichs, 2 Pa. Super. Ct. 522. But see Coburn v. Reynolds, 3 Pa. Dist. R. 475.

But where the *answer denies* all the *material allegations* of the petition or complaint plaintiff is not properly entitled to judgment without proof of his cause of action.¹

¹Jones v. Rowley, 73 Fed. 286; Wagner v. Boyce, 6 Ariz. 71, 52 Pac. 1122; Hibernia Sav. & L. Soc. v. Thornton, 117 Cal. 481, 49 Pac. 573; People ex rel. Atty. Gen. v. Brown, 23 Colo. 425, 48 Pac. 661; Tyrer v. Chew, 7 App. D. C. 175; Johnson v. Manning, 2 Idaho, 1073, 29 Pac. 101; Doyal v. Landes, 119 Ind. 479, 20 N. E. 719, 21 N. E. 1108; Hutchison v. Meyers, 52 Kan. 290, 34 Pac. 742; Wichita Nat. Bank v. Maltby, 53 Kan. 567, 36 Pac. 1000; Parks v. Smith, 155 Mass. 26, 28 N. E. 1044; Malone v. Minnesota Stone Co. 36 Minn. 325, 31 N. E. 170; Wheeler v. Winnebago Paper Mills, 62 Minn. 429, 64 N. W. 920; Saville v. Huffstetter, 63 Mo. App. 273. See Floyd v. Johnson, 17 Mont. 469, 43 Pac. 631; Van Etten v. Kusters, 48 Neb. 152, 66 N. W. 1106; Waldron v. Union Trust Co. 28 App. Div. 156, 50 N. Y. Supp. 891; Morgan v. Roper, 119 N. C. 367, 25 S. E. 952; Willis v. Holmes, 28 Or. 265, 42 Pac. 989; Hummel v. Lilly, 188 Pa. 463, 41 Atl. 613; Newton Rubber Co. v. Kahn, 186 Pa. 306, 40 Atl. 483; Townsend v. Price, 19 Wash. 415, 53 Pac. 668; Port Townsend S. R. Co. v. Weir, 15 Wash. 507, 46 Pac. 1044; State ex rel. Perkins v. Sheridan County. 7 Wyo. 161, 51 Pac. 204.

And failure of the answer to deny an immaterial fact does not take the case out of this rule. McKenzie v. Poorman Silver Mines, 31 C. C. A. 409, 60 U. S. App. 1, 88 Fed. 111.

A motion for judgment because the answer was not verified was held to be

not strictly proper practice in *Speer v. Craig*, 16 Colo. 478, 27 Pac. 891, the better practice being to move to strike out the unverified answer and for judgment as for default.

b. Test of sufficiency.—On a motion for judgment for insufficiency of the affidavit of defense, the matters presented by the claim and affidavit are all that can be considered.¹

¹*Musser v. Stauffer*, 178 Pa. 99, 35 Atl. 709. Either in support of or against the defense disclosed by the affidavit. *Allegheny v. McCaffrey*, 131 Pa. 137, 18 Atl. 1001.

But the reasonableness or unreasonableness of the statements therein is not before the court. *Rockwell Mfg. Co. v. Cambridge Springs Co.* 191 Pa. 386, 43 Atl. 327.

And affidavits of third persons cannot be considered under a rule of court providing only for affidavits by plaintiff and defendant. *The Richmond v. Cake*, 1 App. D. C. 447.

But a Federal court may take judicial notice of a judgment of a state not within its jurisdiction, holding valid and regular the judgment on which the suit before it is based. *Ball v. Warrington*, 87 Fed. 695.

c. Motion, when to be made.—A motion for judgment for insufficiency of the answer should be made before plaintiff has adduced evidence to prove his cause of action.¹

¹*Tevis v. Hicks*, 41 Cal. 123.

d. Waiver of right to move.—The right to judgment for insufficiency of an adversary's pleading may be waived by not moving therefor¹ at the proper time.²

¹*Louisville & N. R. Co. v. Copas*, 95 Ky. 460, 26 S. W. 179.

²*Green v. Raymond*, 14 N. Y. Week. Dig. 322.

e. Exception to ruling.—Granting a motion seasonably made¹ is a matter, not of discretion, but of legal right, if the answer or affidavit of defense is held insufficient and no amendment sought.² And error in denying it is not waived by afterwards proceeding to trial.³

¹Such a motion will not be considered on appeal, if it was not made at trial. *United States ex rel. Search v. Choctaw, O. & G. R. Co.* 3 Okla. 404, 41 Pac. 729.

² *Johnson v. Wright*, 2 App. D. C. 216. And a judgment of refusal which is clearly improper will be reversed. *No. 2 Assistance Bldg. & L. Asso. v. Wampole*, 6 Pa. Super. Ct. 238. But the error in law must be apparent. *Ferree v. Young*, 6 Pa. Super. Ct. 307.

In some states a judgment showing by its recitals that it was rendered on the pleadings on plaintiff's motion, without trial of the issues, may be reviewed without a bill of exceptions setting forth the facts recited. *Weeks v. Garibaldi South Gold Min. Co.* 73 Cal. 599, 15 Pac. 302. See also *Power v. Gum*, 6 Mont. 5, 9 Pac. 575 (holding formal exception to a denial unnecessary).

It will not be disturbed, however, because there is inserted in the transcript what purports to be a notice of the hearing of the motion on an earlier day than that mentioned in the judgment, and which was a legal holiday, in the absence of a bill of exceptions showing that such notice was the one pursuant to which the motion was finally heard. *Prescott v. Grady*, 91 Cal. 518, 27 Pac. 755.

But in *Evans v. Paige*, 102 Cal. 132, 36 Pac. 406, denial of such a motion was held reviewable only on appeal from the judgment, and not on appeal from an order denying the party's motion for a new trial.

On appeal from a ruling on such a motion the only question is as to whether the answer or affidavit defense raises any issue for trial. *East River Electric Light Co. v. Clark*, 45 N. Y. S. R. 635, 18 N. Y. Supp. 463; *Aetna Ins. Co. v. Confer*, 158 Pa. 598, 28 Atl. 153. And, according to *Sullivan County v. Middendorf*, 7 Pa. Super. Ct. 71, a judgment for want of sufficient affidavit of defense will be reversed on appeal if the declaration fails to state a cause of action.

³ *Power v. Gum*, 6 Mont. 5, 9 Pac. 575. But *Becker v. Simons*, 3 Neb. 680, 50 N. W. 1129, holds that error in denying a motion is waived by pleading anew and going to trial on the merits.

4. Motion to compel election.

a. Inconsistent causes of action or defenses.—If incompatible causes of action or defenses¹ are stated in the same pleading, the court may, at the trial² compel the party to elect between them.

But an objection to the restating of the same contract or grievance in different forms or under different aspects cannot avail to exclude evidence at the trial.³

But a plaintiff who sets out causes of action which are identical, one merely setting out the facts more fully than the other, cannot be required to elect between them; the appropriate remedy being to move to strike out one of the causes as surplusage.⁴

A party ought not to be compelled to elect, before evidence has been given, between two causes of action or defenses unless they are absolutely inconsistent, that is to say, incompatible;

nor even where they are, if the case be such that he is entitled to a discovery, at the trial, as to the facts necessary to enable him to elect. The present practice sanctions a pleader in asking alternative relief on the same facts; and in supporting the same claim by stating facts in several counts or causes of action, although success upon one will supersede any right to recover on the other share of his claim. The inconsistency which is ground for compelling election is an absolute incompatibility in the facts alleged, not a mere superfluity of grounds for recovery, nor a mere alternative in legal results arising in such doubts as it may be a part of the object of the trial to investigate and determine.⁵

The better opinion is that where a plaintiff has really two distinct and separate grounds for claiming the relief demanded in the complaint, and states each one therein separately and plainly, or where he is somewhat uncertain as to the exact ground of recovery the proof may afford, he may frame a complaint for the recovery of a single claim in several distinct counts or statements, and the court will not compel him to elect between them.⁶

¹ *Southworth v. Bennett*, 58 N. Y. 659; *Hazen v. Bay City Traction & Electric Co.* 152 Mich. 457, 116 N. W. 364; *Lankford v. Lankford*, — Ky. —, 117 S. W. 962. In *Fadley v. Smith*, 23 Mo. App. 87, the law is stated to be that where causes of action which may properly be joined in one petition are placed in one count instead of being separately stated in separate counts, the remedy is by motion to compel plaintiff to elect one, and to strike out the remaining causes improperly joined. And in *Dooley v. Missouri P. R. Co.* 36 Mo. App. 381, a motion to elect was held the proper and only practice to reach improper mingling or joining of two or more causes of action in a count. See also *Brown v. Kansas City, St. J. & C. B. R. Co.* 20 Mo. App. 427; *Dougherty v. Wabash, St. L. & P. R. Co.* 19 Mo. App. 419; *Alexander v. Thacker*, 30 Neb. 614, 46 N. W. 825. But *Austin, T. & W. Mfg. Co. v. Heiser*, 6 S. D. 429, 61 N. W. 445, holds such motion inappropriate as to a plaintiff who failed to state separately several causes of action as required by a South Dakota statute.

But the right to make the election ordered rests with the party, and cannot be exercised by the court. *Stewart v. Huntington*, 124 N. Y. 127, 26 N. E. 289. See also *Shannon v. Rester*, 69 Miss. 238, 13 So. 587. Nor by the party asking for the election. See *Brown v. Kansas City, St. J. & C. B. R. Co.* 20 Mo. App. 427.

And for illustrative cases requiring an election by plaintiff between incompatible causes of action stated in the complaint, see *Matz v. Chicago & A. R. Co.* 88 Fed. 770; *Burgett v. Grider*, 54 Ark. 560, 16 S. W. 573; *Seymore v. Rice*, 94 Ga. 183, 21 S. E. 293; *Louisville & N. R. Co. v.*

- Kellem, 13 Ky. L. Rep. 225; *Alsop v. Central Trust Co.* 100 Ky. 375, 38 S. W. 510; *Brady v. Ludlow Mfg. Co.* 154 Mass. 468, 28 N. E. 901; *Roberts v. Quincy, O. & K. C. R. Co.* 43 Mo. App. 287; *Union Nat. Bank v. Lyons*, 220 Mo. 538, 119 S. W. 540; *Stokes v. Behrenes*, 23 Misc. 442, 52 N. Y. Supp. 251; *Wiley v. Cleveland, C. C. & St. L. R. Co.* 4 Ohio Dec. 269; *Reed v. Northeastern R. Co.* 37 S. C. 42, 16 S. E. 289; *Shanks v. Mills*, 25 S. C. 358; *Hill v. Hill*, 51 S. C. 134, 28 S. E. 309; *Ross v. Sheldon*, — Ky. —, 119 S. W. 225.
- ² *Southworth v. Bennett*, 58 N. Y. 659; *Spaulding v. Saltiel*, 18 Colo. 86, 31 Pac. 486; *Ruff v. Columbia & G. R. Co.* 42 S. C. 114, 20 S. E. 27. See also *Stokes v. Behrenes*, 23 Misc. 442, 52 N. Y. Supp. 251, sustaining the practice of moving before answer.
- But *Tuthill v. Skidmore*, 124 N. Y. 148, 26 N. E. 348, holds that when the inconsistency is apparent on the face of the complaint defendant should, before answering, move that plaintiff be compelled to elect; and if he lies by until trial, and then moves, the court may, in its discretion, wait until part or all the evidence is in before ruling on the motion, and that its decision will not be reviewed when it appears that defendant was not harmed.
- So, in *Boemer v. Central Lead Co.* 69 Mo. App. 601, an action by a widow for the negligent killing of her husband, plaintiff, as between the counts of the petition, one of which was founded on a special statute and the other on the general damage act, was not compelled to elect before trial, but was held to have the right to elect at the close of the testimony, if required, by instructions to the jury, which was, in effect, done by an instruction to find for the defendant on the first count.
- ³ *Gillett v. Borden*, 6 Lans. 219, 221; *Tregent v. Maybee*, 51 Mich. 191, 16 N. W. 374; *Kelly v. Bernheimer*, 3 Thomp. & C. 140; *American Dock & Improv. Co. v. Staley*, 8 Jones & S. 539; *Newton v. Cecil*, 19 Ky. L. Rep. 1430, 43 S. W. 734; *Remy v. Olds*, — Cal. —, 21 L.R.A. 645, 31 Pac. 216; *Cawker City State Bank v. Jennings*, 89 Iowa. 230, 56 N. W. 494.
- In *Manders v. Croft*, 3 Colo. App. 236, 32 Pac. 836, whether or not a repetition of a cause of action in a different form is unnecessary and will require an election under the Code was held discretionary with the trial judge.
- ⁴ *Pollock v. Whipple*, 45 Neb. 844, 64 N. W. 210. But compare *Shenners v. West Side Street R. Co.* 74 Wis. 447, 43 N. W. 103.
- ⁵ But on this question rulings adverse to this view have often been made. Compare, for instance, *Walters v. Continental Ins. Co.* 5 Hun, 343; *Roberts v. Leslie*, 14 Jones & S. 76; *Comstock v. Hoeft*, 1 Month. L. Bull. 43; *Brinkman v. Hunter*, 73 Mo. 172, 39 Am. Rep. 492; *Chicago & A. R. Co. v. Smith*, 10 Ill. App. 359; *Clapp v. Campbell*, 124 Mass. 50; *Sullivan v. Fitzgerald*, 12 Allen, 482; *Gardner v. Locke*, 2 N. Y. Civ. Proc. Rep. 252; *Dickens v. New York C. R. Co.* 13 How. Pr. 228.

and cases cited. *Lake Shore & M. S. R. Co. v. Warren*, 3 Wyo. 134, 6 Pac. 724 (classifying conflicting authorities).

If plaintiff claims under a count for performance of a contract and on another count on a *quantum meruit*, he cannot be compelled to elect between the two. *Norbeck & N. Co. v. Pease*, 21 S. D. 368, 112 N. W. 1136.

⁶ *Southern R. Co. v. Chambers*, 126 Ga. 404, 7 L.R.A.(N.S.) 926, 55 S. E. 37.

So held, in an action against an insurance company for the loss of property by fire, the complaint alleging, first, the issue of a policy thereon, and, second, a contract by defendant to insure and to issue a policy. *Velie v. Newark City Ins. Co.* 12 Abb. N. C. 309, 65 How. Pr. 1. To the same effect in a negligence case. *Railway Co. v. Hedges* (Ohio Com. June, 1884) 11 Week. L. Bull. 326; *McDuffee v. Boston & M. R. Co.* 81 Vt. 52, 130 Am. St. Rep. 1019, 69 Atl. 124.

In *Bruce v. Burr*, 67 N. Y. 237, it is held that the Code allows a defendant to put in as many defenses or counterclaims as he may have, and the objection of inconsistency between them is not available. In this case the exception was to the referee's refusal to compel defendant to elect between his original defense (which was rescission for false representations) and a defense added by leave of court (*viz.*, a counterclaim for false warranty). It was held not error to refuse to compel defendant to elect. It is not held that if the allegations of act had been incompatible it would have been error to compel election.

The courts are never bound to give a party time both to prove and disprove the same thing.

For illustrative cases of the rule stated in the text, see *American Nat. Bank v. National Wall Paper Co.* 23 C. C. A. 33, 40 U. S. App. 646, 77 Fed. 85; *Cowan v. Abbott*, 92 Cal. 100; *Leonard v. Roberts*, 20 Colo. 88, 36 Pac. 880; *Craft Refrigerating Mach. Co. v. Quinneapolis Brewing Co.* 63 Conn. 551, 25 L.R.A. 856, 29 Atl. 76; *Plano Mfg. Co. v. Parmenter*, 30 Ill. App. 569; *Trench v. Hardin County Canning Co.* 168 Ill. 135, 48 N. E. 64; *Perrin v. Lebus*, 14 Ky. L. Rep. 26, 18 S. W. 1010; *Turner v. Johnson*, 18 Ky. L. Rep. 202, 31 S. W. 1087; *McNair v. Gourrier*, 40 La. Ann. 353, 4 So. 310; *Beauregard v. Webb Granite & Constr. Co.* 160 Mass. 201, 35 N. E. 555; *Cadwell v. Corey*, 91 Mich. 335, 51 N. W. 888; *Antenrieth v. St. Louis & S. F. R. Co.* 36 Mo. App. 254; *Globe Light & Heat Co. v. Doud*, 47 Mo. App. 439; *Follett v. Brooklyn Elev. R. Co.* 91 Hun, 296, 36 N. Y. Supp. 200; *Building & Sav. Co. v. Bank*, 3 Ohio Dec. 689; *Farley v. Charleston Basket & Veneer Co.* 51 S. C. 222, 28 S. E. 193, 401; *Shenners v. West Side Street R. Co.* 74 Wis. 447, 43 N. W. 103; *Marshall v. Rugg*, 6 Wyo. 270, 33 L.R.A. 679, 44 Pac. 700, 45 Pac. 486.

A defendant may, as a general rule, unless expressly prohibited by statute, plead as many defenses as he may have; and a

plea or defense separately pleaded in an answer, though it contain several matters, should be consistent as to these; but a plea or defense, regarded as an entirety, if otherwise sufficient in form and substance, is not to be defeated or disregarded merely because it is inconsistent with some other plea or defense pleaded; hence the rule that a defendant, though his defense be utterly inconsistent, cannot be compelled to elect between them, nor can evidence under either be excluded because of the inconsistency.¹ This rule does not, however, obtain in some states.²

¹ Thus, the New York Code of Civil Procedure expressly provides that a defendant may set forth in his answer as many defenses or counterclaims, or both, as he may have. But a ruling requiring an election between a defense and a counterclaim on the ground of inconsistency is not ground of error, where the facts stated as constituting the counterclaim, which was abandoned, do not state a valid counterclaim. *Societa Italiana Di Beneficenza v. Sulzer*, 138 N. Y. 468, 34 N. E. 193.

And for further cases where defendant was not compelled to elect between defenses interposed, see *Buhne v. Corbett*, 43 Cal. 264; *Barr v. Hack*, 46 Iowa, 308; *Lane v. Bryant*, 100 Ky. 138, 36 L.R.A. 709, 37 S. W. 584; *Weingartner v. Louisville & N. R. Co.* 19 Ky. L. Rep. 1023, 42 S. W. 839; *Stebbins v. Lardner*, 2 S. D. 127, 48 N. W. 847; *Connor v. Raddon*, 16 Utah, 418, 52 Pac. 764; *Whittaker v. McQueen*, 128 Ky. 260, 108 S. W. 236.

² *Minnesota is a notable exception* to this rule. The Code of that state has the same provision as the New York Code of Civil Procedure, but in *Derby v. Gallup*, 5 Minn. 119, the practice of allowing inconsistent defenses was vigorously condemned, the court insisting that the provision of the Code allowing the defendant "to set forth by his answer as many defenses as he shall have" must be understood with the restriction that those defenses must be true—that they must be such as the facts to be proved will sustain.

So, in *Kansas and Missouri*, the rule is settled that a motion to compel defendant to elect between inconsistent defenses will prevail, notwithstanding the Code providing, as in New York, that defendant may plead all the defenses he may have. *Ferguson v. Prince*, 2 Kan. App. 7, 41 Pac. 988; *Sherman v. Rockwood*, 26 Mo. App. 407. See also *Auld v. Butcher*, 2 Kan. 159; *Butler v. Kaulback*, 8 Kan. 672.

And on a trial *de novo* in the district court on appeal from a justice, defendant's statement that he will offer evidence to support two separate defenses has the same effect as if the two defenses had been set up by answer or bill of particulars, empowering the court to compel him to elect between them if they are inconsistent, even though by the Code he is not required to file any pleadings in either the justice's or district court, unless they are demanded by plaintiff. *Ferguson v.*

Prince, 2 Kan. App. 7, 41 Pac. 988. See also *Sherman v. Rockwood*, 26 Mo. 403.

Defenses are inconsistent, within the rule requiring election between them by defendant, when they are so contradictory of each other that some of them must necessarily be false. *Snodgrass v. Andross*, 19 Or. 236, 23 Pac. 969; *Gammon v. Ganfield*, 42 Minn. 368, 44 N. W. 125; *State v. Cooley v. Samuels*, 28 Mo. App. 649. Thus, where defendant denies positively the allegations of the complaint, and then pleads, as a defense thereto, new matter in the nature of confession and avoidance, the denial and new matter are not necessarily inconsistent with each other, as it is possible for both of them to be true. *Snodgrass v. Andross*, 19 Or. 236, 23 Pac. 969. But a defense that the contract in suit was a mere joke is inconsistent with the defense of breach of warranty. *Sherman v. Rockwood*, 26 Mo. App. 403. See also, for instances of cases holding the defenses not inconsistent, *DeLissa v. Fuller Coal & Min. Co.* 59 Kan. 319, 52 Pac. 886; *Backdahl v. Grand Lodge A. O. U. W.* 46 Minn. 61, 48 N. W. 454; *Cavitt v. Tharp*, 30 Mo. App. 131.

b. Time for objection; waiver.—A motion to compel plaintiff to elect between counts is too late after the trial begins.¹ And failure to move at the proper time to compel plaintiff to elect on which cause of action he will rely waives the objectionable statement of incompatible causes of action in the same complaint or petition.²

¹ *Chicago, P. & St. L. R. Co. v. Bay Shore Lumber Co.* 140 Mo. App. 52, 119 S. W. 973; *Diamond Coal Co. v. Carter Dry Goods Co.* 20 Ky. L. Rep. 1444, 49 S. W. 438.

² *National Security Bank v. Butler*, 129 U. S. 223, 32 L. ed. 682, 9 Sup. Ct. Rep. 281; *Bowen v. Carolina, C. G. & C. R. Co.* 34 S. C. 217, 13 S. E. 421; *Norfolk & W. R. Co. v. Wysor*, 82 Va. 250; *Hardigen v. Simpkins*, 19 Ky. L. Rep. 1376, 43 S. W. 410; *Walters v. Hamilton*, 75 Mo. App. 237.

And the court may properly submit to the jury both causes of action on each count. *Joy v. Bitzer*, 77 Iowa, 73, 3 L.R.A. 184, 41 N. W. 575.

And in *Bassett v. Shares*, 63 Conn. 39, 27 Atl. 421, it was said that a defendant, by delaying the motion till the opening of the trial, might fairly be regarded as waiving the objection, and it was held to be discretionary with the trial court to allow the motion.

But in *Kansas Refrigerator Co. v. Pert*, 3 Kan. App. 364, 42 Pac. 943, judgment was reversed because it could not be sustained on any of the remedies sought, or by combining any of them not inconsistent with each other, though defendant had not moved at trial to compel plaintiff to elect; but it was said that the judgment would not have been disturbed if it could have been so upheld.

c. Misjoinder.—The misjoinder of causes of action or defenses not appropriate to be united in the same pleading, unless they are such as to require different modes of trial,¹ is not an incompatibility within the above rule, and will not sustain a motion at the trial to compel the party to elect.²

¹ Thus, in *Schneider v. Kirkpatrick*, 72 Mo. App. 103, plaintiff, whose petition set up a cause of action at law, and also one at equity, was held to have been properly required to elect which he would try first, since one was triable by jury and the other by the court without a jury.

² *Lee Bank v. Kitching*, 7 Bosw. 664, 11 Abb. Pr. 435; *Sherman v. Inman Steamship Co.* 26 Hun, 107; *Blossom v. Barrett*, 37 N. Y. 434, 97 Am. Dec. 747; *Woodman v. Davis*, 32 Kan. 344, 4 Pac. 263.

d. Exception to ruling.—An exception lies to a decision on a motion made at trial to compel election between incompatible causes of action or defenses stated in the same pleading.¹

¹ But such a motion to compel plaintiff to elect is so far discretionary that it will not be reviewed when it appears that defendant was not harmed. *Tuhill v. Skidmore*, 124 N. Y. 148, 26 N. E. 348. See also *Bassett v. Shares*, 63 Conn. 39, 27 Atl. 421.

But *Milbauer v. Schotten*, 95 Wis. 28, 69 N. W. 984, holds that an order denying the motion is not appealable, as it is not included in the Wisconsin statute regulating appeals from orders entered before judgment.

The motion should be set out in the transcript on appeal, in *Montana*, together with the order of denial by bill of exceptions or otherwise, and a mere reference to it in the affidavits, on the motion to set aside a default judgment against defendant, is insufficient. *Butte Butchering Co. v. Clarke*, 19 Mont. 306, 48 Pac. 303.

Barnes v. Scott, 29 Fla. 285, 11 So. 48, however, holds that a requirement of the court that defendant elect between two pleas, followed by the required election, is apparent on the face of the record, and requires no exception to render it reviewable on appeal.

Harmless error.—But a ruling requiring plaintiff to elect at the close of her evidence on which count she will rely is harmless error where there is no evidence to go to the jury on the abandoned count. *McLean v. Fiske Wharf & Warehouse Co.* 158 Mass. 472, 33 N. E. 499; *Conroy v. Clinton*, 158 Mass. 318, 33 N. E. 525. Or if plaintiff is not entitled to recover on either count. *May v. Whittier Mach. Co.* 154 Mass. 29, 27 N. E. 768. Or where evidence was taken on both causes of action. *Thomas v. Turner*, 18 Ky. L. Rep. 209, 35 S. W. 1035; *Estep v. Hammons*, 20 Ky. L. Rep. 448, 46 S. W. 715. Or where the evidence affirm-

actively discloses that the abandoned count could not, under the facts, lead to recovery. *Boyer v. Richardson*, 52 Neb. 156, 71 N. W. 981.

And defendant is not prejudiced by denial of his motion to compel plaintiff to elect, where plaintiff was permitted to give evidence as to one cause of action only, and the instructions confined the damages to be awarded to that. *Pinnell v. St. Louis, A. & T. R. Co.* 49 Mo. App. 170. Or where though they are substantially the same, but one is tried, though proof required for one would support the other. *Freet v. Kansas City, St. J. & C. B. R. Co.* 63 Mo. App. 548. Or where the recovery is for one only, though proof is adduced in support of both. *Cram v. Springer Lithographing Co.* 10 Misc. 660, 30 N. Y. Supp. 1130. And where an election is made on renewal of the motion at opening of the trial. *Van Hook v. Burns*, 10 Wash. 22, 38 Pac. 763.

5. Assessing damages.

When the court directs judgment on the pleadings the jury may, under the direction of the court, assess the damages.¹

¹ N. Y. Code Civ. Proc. § 1183, last clause. See also *Cowart v. Stanton*, 104 Ga. 520, 30 S. E. 743; *Everett v. Westmoreland*, 92 Ga. 670, 19 S. E. 37. But compare *Humboldt Min. Co. v. American Mfg. & Mill Co.* 10 C. C. A. 415, 22 U. S. App. 334, 62 Fed. 356.

6. Motion to strike out.

a. In general.—Irrelevant, redundant, scandalous, and other improper matter does not vitiate a good pleading¹ and may be stricken out;² but the objection is waived unless raised by motion to strike out³ interposed before demurrer or answer,⁴ or within the time fixed by rules of court,⁵ and cannot be taken by motion at the trial.⁶

For the purposes of the motion, the truth of all facts well pleaded are deemed true, as on demurrer.⁷

¹ The question whether a pleading, or parts of it, are irrelevant, redundant, scandalous, and the like, whether tested by demurrer or motion, is fully treated in the Brief on the Pleadings, under the appropriate titles; and the following text and notes will be limited, therefore, to a treatment of the motion to strike, solely with reference to its propriety and exclusiveness as such to reach the defect, and when it shall be made.

² Thus, under the New York Code of Civil Procedure irrelevant, redundant, or scandalous matter contained in a pleading may be stricken out upon the motion of a person aggrieved thereby. *Armstrong v. Phillips*, 60 Hun, 243, 14 N. Y. Supp. 582. But allegations will not

be stricken out as irrelevant, unless the irrelevancy is clear, and there is more than a barely possible danger of false issues. *Finger v. Kingston*, 29 N. Y. S. R. 703, 9 N. Y. Supp. 175.

The practice does not extend to striking out an answer or part thereof as frivolous. If the entire pleading is frivolous the party aggrieved may move for judgment thereon, and that is the only proper practice. *Owens v. Hudnut's Pharmacy*, 35 N. Y. S. R. 567, 12 N. Y. Supp. 700.

But *Fosdick v. Kingdoods*, 5 Ohio N. P. 330, 7 Ohio S. & C. P. Dec. 413, holds that a plea frivolous, equivocal, and evasive should be stricken out of the answer or from the files on motion.

And the burden of proof is upon the moving party to show that he is aggrieved. *Smith v. Smith*, 50 S. C. 54, 27 S. E. 545.

Power is inherent in courts, according to *Christie v. Drennon*, 1 Ohio Dec. 374, to strike from the files frivolous or sham pleadings, both at law and in equity, and exists although not expressly given by statute. It is, however, a discretionary power. *Smythe v. Parsons*, 37 Kan. 79, 14 Pac. 444. See post, § 6, b. But they have neither inherent nor statutory power, according to *Larson v. Winder*, 14 Wash. 647, 45 Pac. 315, to strike denials out from an answer as sham and frivolous, although they have both inherent and statutory power to strike sham and frivolous answers.

An answer containing no defense may be stricken out. *Elmer v. Heid*, 2 Alaska, 600.

But if a complaint does not state facts sufficient to constitute a cause of action the remedy is by demurrer or objection to evidence. It cannot be stricken out. *First Nat. Bank v. Cochran*, 17 Okla. 538, 87 Pac. 855.

And the sufficiency of a counterclaim cannot be determined on a motion to strike out an answer as frivolous. *Smith v. Smith*, 137 App. Div. 911, 121 N. Y. Supp. 1085.

³ For exclusiveness of the remedy, as against a demurrer, to reach such defects, see generally: *Henry v. United States*, 22 Ct. Cl. 75; *Cole v. Tuck*, 108 Ala. 227, 19 So. 377; *Davis v. Louisville & N. R. Co.* 108 Ala. 660, 18 So. 687; *Milligan v. Pollard*, 112 Ala. 465, 20 So. 620; *Springfield F. & M. Ins. Co. v. De Jarnett*, 111 Ala. 248, 19 So. 995; *Hagely v. Hagely*, 68 Cal. 348, 9 Pac. 305; *Camp v. Hall*, 39 Fla. 535, 22 So. 792, and cases cited; *Smith v. Champion*, 102 Ga. 92, 29 S. E. 160; *Reed v. Lane*, 96 Iowa, 454, 65 N. W. 380; *St. Louis v. Weitzel*, 130 Mo. 600, 31 S. W. 1045; *Hershiser v. Delone*, 24 Neb. 380, 38 N. W. 863; *Fox v. Graves*, 46 Neb. 812, 65 N. W. 887; *Armstrong v. Phillips*, 60 Hun, 243, 14 N. Y. Supp. 582; *Fosdick v. Kingdoods*, 5 Ohio N. P. 330, 7 Ohio S. & C. P. Dec. 413.

Special demurrer was held the appropriate remedy to reach a material averment defectively stated, and not a motion to strike out, in *Swain v. Burnetta*, 76 Cal. 299, 18 Pac. 394.

The sufficiency of a defense, whether as a whole, or one fact pleaded as such, is to be tested by demurrer, and not by motion to strike out. *Smith v. American Turquoise Co.* 77 Hun, 192, 28 N. Y. Supp. 329; *Nordlinger v. McKim*, 38 N. Y. S. R. 886, 14 N. Y. Supp. 515; *Kelly v. Ernest*, 26 App. Div. 90; *Silsby v. Tacoma, O. & G. H. R. Co.* 6 Wash. 295, 32 Pac. 1067. See also *Humble v. McDonough*, 5 Misc. 508, 25 N. Y. Supp. 965. The motion to strike out the entire defense being available only when it is shown to be sham or irrelevant, or a portion redundant, immaterial, or insufficient. *Cochrane v. Parker*, 5 Colo. App. 527, 39 Pac. 361.

A petition is to be stricken from the files at the discretion of the court, and not at the option of the adverse party, for failure of the party filing the petition to file a copy for the use of the adverse party, as required by a rule of court. *Searles v. Lux*, 86 Iowa, 61, 52 N. W. 327; *Searles v. Haag*, 85 Iowa, 754, 52 N. W. 328.

Nieukirk v. Nieukirk, 84 Iowa, 367, 51 N. W. 10 (holding any error in refusing the motion was waived by demurrer subsequently filed assailing the pleading on its merits, although both motion and demurrer are based on the same ground).

Holt County v. Cannon, 114 Mo. 514, 21 S. W. 851 (holding that any error in refusing the motion was waived and not available on appeal when defendant answered over to the merits). See also *Atty. Gen. v. London & N. W. R. Co.* [1892] 3 Ch. 274; *Pitkin v. New York & N. E. R. Co.* 64 Conn. 482; *Voorheis v. Eiting*, 15 Ky. L. Rep. 161, 22 S. W. 80; *Paddock v. Somes*, 102 Mo. 226, 10 L.R.A. 254, 14 S. W. 746.

⁵ In New York it is required by a rule of court that motions to strike out must be noticed before demurrer or answer, and within twenty days from service of the pleadings assailed. Rule 22, General Rules of Practice, App. Div. (Hun's ed. 1896) p. 103. *Siriani v. Deutsch*, 12 Misc. 213, 34 N. Y. Supp. 26. See also *New York Ice Co. v. Northwestern Ins. Co.* 21 How. Pr. 234, 12 Abb. Pr. 74; *Roosa v. Sauger-ties & W. Turnp. Road Co.* 8 How. Pr. 237; *Barber v. Bennett*, 4 Sandf. 705; *Walker v. Granite Bank*, 1 Abb. Pr. N. S. 406.

A pleading cannot be stricken out after verdict. *Uzzell v. Horn*, 71 S. C. 426, 51 S. E. 253.

⁶ *Smith v. Countryman*, 30 N. Y. 655; *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406. And see *Richmond & D. R. Co. v. Worley*, 92 Ga. 84, 18 S. E. 361. So a motion to strike, interposed at the commencement of a second trial, after reversal on appeal, the first trial having been had without any such motions made, comes too late, the delay operating as waiver of the objection. *Hunt v. Elliott*, 77 Cal. 588, 20 Pac. 132.

As to the propriety of motions to strike, as applied to trial amendments, compare *Cason v. Ottumwa*, 102 Iowa, 99, 71 N. W. 192; *Security Nat. Bank v. Latimer*, 51 Neb. 498, 71 N. W. 38; *Hobbs v. First Nat.*

Bank, 15 Tex. Civ. App. 398, 39 S. W. 331; Nelson v. Hays, 75 Iowa, 671, 37 N. W. 177.

7 Paddock v. Somes, 102 Mo. 226, 10 L.R.A. 254, 14 S. W. 746; Mabin v. Webster, 129 Ind. 430, 28 N. E. 863; Faylor v. Brice, 7 Ind. App. 551, 34 N. E. 833.

The test of the materiality of averments in a pleading on a motion to strike out is whether they tend to constitute a cause of action or defense; and, if taken as true, they do, it is error to strike the portion assailed. Atkinson v. Wabash R. Co. 143 Ind. 501, 41 N. E. 947, and cases cited. Unless the same facts are admissible under another paragraph of the pleading. Faylor v. Brice, 7 Ind. App. 551, 34 N. E. 833. See also Gilbert v. Loberg, 86 Wis. 661, 57 N. W. 982.

But the rule which obtains on the argument of general demurrers of examining the whole record does not apply in deciding motions to strike out, according to Wilson v. Johnson, — N. J. L. —, 29 Atl. 419; and, although it may be defective, a count in the declaration cannot be considered.

And in Davis v. Louisville & N. R. Co. 108 Ala. 660, 18 So. 687, it is held that a motion to strike out a plea as frivolous cannot be made to take the place of a demurrer.

b. Discretion of court.—A motion to strike out is addressed to the sound judicial discretion of the trial court, and, though causes for its allowance exist, refusal of the court to allow it is not reviewable error.¹

¹ As the party pleading can take nothing on the trial by reason of improper matter, no injury can result to the adverse party from refusal of the motion. Davis v. Louisville & N. R. Co. 108 Ala. 660, 18 So. 687. See also Smythe v. Parsons, 37 Kan. 79, 14 Pac. 444, citing Drake v. Ft. Scott First Nat. Bank, 33 Kan. 639, 7 Pac. 219.

It should use this power with reluctance and caution. There is little benefit in motions of this kind, and there may be much harm. Immaterial evidence can always be rejected at the trial. Essex v. New York & C. R. Co. 8 Hun, 361.

But denial of the motion does not involve the merits of the action or involve a substantial right. Emmens v. McMillan Co. 21 Misc. 638, 47 N. Y. Supp. 1099. See also Dunton v. Hagerman, 18 App. Div. 146, 46 N. Y. Supp. 758; Hatch v. Matthews, 85 Hun, 522, 33 N. Y. Supp. 332; Dunkirk v. Lake Shore & M. S. R. Co. 75 Hun, 366, 27 N. Y. Supp. 105.

7. Motion to make more definite and certain.

As a general rule, indefiniteness and uncertainty in a pleading¹ is reached only by a motion to make the pleading more

definite and certain² but the objection is waived unless taken by appropriate remedy, during the time allowed for pleading,³ or before the party has notice the cause for trial,⁴ but cannot be taken by motion at the trial.⁵

And a motion filed out of time may, on application of the adverse party, be stricken from the files.⁶

¹The sufficiency of pleadings in this respect, generally, is discussed in the Brief on the Pleadings, in appropriate places; this section being limited in its scope to the propriety of the remedy, and when the objection may be raised with reference to the trial.

²As to exclusiveness of the remedy, see, generally, *Bush v. Cella*, 52 Ark. 378, 12 S. W. 783; *Thomson v. Madison Bldg. & Aid Asso.* 103 Ind. 279, 2 N. E. 735; *Roe v. Elk County Comrs.* 1 Kan. App. 219, 40 Pac. 1082; *Gfeller v. Graefemann*, 64 Mo. App. 162; *Dexter v. Fulton*, 86 Hun, 433, 33 N. Y. Supp. 901; *Stokes v. Taylor*, 104 N. C. 394; *Giroux Amalgamator Co. v. White*, 21 Or. 435, 28 Pac. 390; *Long v. Hunter*, 48 S. C. 179, 26 S. E. 228; *Fares v. Gleason*, 14 Wash. 657; *Dr. Shoop Family Medicine Co. v. Wernich*, 95 Wis. 764, 70 N. W. 160; *Dickerson v. Hamby*, — Ark. —, 131 S. W. 674; *Stewart v. Fleming*, — Ark. —, 131 S. W. 955; *Yarslowitz v. Bienenstock*, 141 App. Div. 64, 125 N. Y. Supp. 649; *Roberts v. St. Louis, I. & M. & S. R. Co.* 95 Ark. 249, 130 S. W. 531.

In *Kellogg v. Baker*, 15 Abb. Pr. 286, this motion was said to be a substitute for a special demurrer, which formerly discharged the same office.

And some of the courts still hold to the special demurrer. *Colton v. Onderdonk*, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395; *Printup v. Rome Land Co.* 90 Ga. 180, 15 S. E. 764; *Randall v. Rosenthal*, — Tex. Civ. App. —, 31 S. W. 822.

³As before demurrer. *Fritz v. Grosnicklaus*, 20 Neb. 413, 30 N. W. 411; *Burr v. Brantley*, 40 S. C. 538, 19 S. E. 199; *Van Etten v. Medland*, 53 Neb. 569, 74 N. W. 33.

Or before plea to the merits. *Huntington v. Mendenhall*, 73 Ind. 460; *German Nat. Bank v. Leonard*, 40 Neb. 676, 59 N. W. 107; *Weaver v. Harlan*, 48 Mo. App. 319; *Huber v. Wilson*, 33 N. Y. S. R. 849, 11 N. Y. Supp. 377; *Pugh v. White*, 78 Ky. 210; *Williams v. Myers*, 18 Pa. Co. Ct. 416; *Gaines v. Summers*, 39 Ark. 482.

But a stipulation extending the time to answer or demur does not waive the right. *Young v. Lynch*, 66 Wis. 514, 29 N. W. 224.

⁴*Kellogg v. Baker*, 15 Abb. Pr. 286.

⁵*Nischke v. Wirth*, 66 Wis. 319, 28 N. W. 342; *St. Louis & S. F. R. Co. v. Snavely*, 47 Kan. 637, 28 Pac. 615. See also *Stickney v. Blair*, 50 Barb. 341.

- All mere technical or formal objections—and these include indefiniteness and uncertainty—must be raised by appropriate remedy before trial; otherwise, they are waived. *Orman v. Mannix*, 17 Colo. 564, 17 L.R.A. 602, 30 Pac. 1037; *Chesterson v. Munson*, 27 Minn. 498, 8 N. W. 593; *Boston & A. R. Co. v. Pearson*, 128 Mass. 445. And see *Folsom v. Brawn*, 25 N. H. 114.
- And such defects in pleading cannot be questioned by oral demurrer at the opening of the trial. *Glaspie v. Keator*, 56 Fed. 203. Nor by oral demurrer at trial objecting to the introduction of any evidence under the pleading. *Weaver v. Harlan*, 48 Mo. App. 319; *Hurst v. Ash Grove*, 96 Mo. 168, 9 S. W. 631; *Armstrong v. Danahy*, 75 Hun. 405, 27 N. Y. Supp. 60. And see *Stickney v. Blair*, 50 Barb. 341.
- ⁶ *Fritz v. Grosnicklaus*, 20 Neb. 413, 30 N. W. 411.

V.—THE RIGHT TO OPEN AND CLOSE.

1. Who entitled to, generally.
2. Effect of admissions.
 - a. In general; sufficiency.
 - b. Necessity of admitting quantum of damages.
 - c. Necessity of incorporating in pleadings.
 - d. Admissions offered at the trial.
 - e. Several defendants and admissions not made by all.
 - f. Defendant's failure to introduce evidence.
 - g. Time for making admission or request to open and close.
 - h. Effect of reply to restore right to plaintiff.
3. Refusal of the right, error.
4. Duty to begin.
5. Waiver of the opening and closing.

1. Who entitled to, generally.

The burden of proof, with its incident right to open and close, naturally and necessarily is, in the first instance, with the plaintiff or party who initiates the action, and, if he has to give any evidence in order to be entitled to a verdict, he has the right to begin by opening the case to the jury and adducing his evidence first.¹

¹ This is the only sound rule under the new procedure. It is fully established in practice in the state of New York, and, I believe, is also in force, or has been recognized in principle to a greater or less extent, in the states indicated below, as well as in England.

England—*Mercer v. Whall*, 5 Q. B. 447. 14 L. J. Q. B. N. S. 267, 9 Jur. 576.

Arkansas—*Sillivant v. Reardon*, 5 Ark. 140; *Pogue v. Joyner*, 7 Ark. 462; *Pierce v. Lyman*, 28 Ark. 550; *Bertrand v. Taylor*, 32 Ark. 470, 476; *Mine La Motte Lead & Smelting Co. v. Consolidated Anthracite Coal Co.* 85 Ark. 123, 107 S. W. 174.

Florida—*Pyles v. Mt. Airy Guano Co.* 58 Fla. 348, 50 So. 872.

Georgia—*McKibbin v. Folds*, 38 Ga. 235.

Illinois—*Geringer v. Novak*, 117 Ill. App. 160.

Indiana—*Aurora v. Cobb*, 21 Ind. 492; *Baltimore & O. R. Co. v. McWhinney*, 36 Ind. 436, 444; *Fetters v. Muncie Nat. Bank*, 34 Ind. 251. 7 Am. Rep. 225; *Camp v. Brown*, 48 Ind. 575. But held otherwise in actions of tort in Indiana. *Heilman v. Shanklin*, 60 Ind. 424.

Kansas—Perkins v. Ermel, 2 Kan. 325.

Kentucky—Barker Cedar Co. v. Roberts, 23 Ky. L. Rep. 1345, 65 S. W. 123.

Maine—Johnson v. Josephs, 75 Me. 544, where the rule is clearly stated.

Missouri—Elder v. Oliver, 30 Mo. App. 575, where a large number of cases is cited.

Nebraska—Rolfe v. Pilloud, 16 Neb. 21, 19 N. W. 615; Mizer v. Bristol, 30 Neb. 138, 46 N. W. 293.

New York—See cases cited under next point, and Katz v. Kuhn, 9 Daly, 166, as qualified in 32 Moak Eng. Rep. 276, note; Lake Ontario Nat. Bank v. Judson, 122 N. Y. 278, 25 N. E. 367.

North Carolina—Love v. Dickerson, 85 N. C. 5.

If defendant introduces no evidence, he is entitled to open and close the argument. Brown v. Southern R. Co. 140 N. C. 154, 52 S. E. 198.

Ohio—Dille v. Lovell, 37 Ohio St. 415 (a well-considered case).

South Carolina—Burckhalter v. Coward, 16 S. C. 435.

Vermont—See reasoning in Goss v. Turner, 21 Vt. 437.

Virginia—Young v. Highland, 9 Gratt. 16 (a well-considered case).

It has been held in Alabama, California, Maryland, and Massachusetts that the plaintiff has the right to open and close in all cases. Chamberlain v. Gaillard, 26 Ala. 504; Benham v. Rowe, 2 Cal. 387, 56 Am. Dec. 342; Townshend v. Townshend, 7 Gill, 10, 25; Dorr v. Tremont Nat. Bank, 128 Mass. 349.

Except in Massachusetts, in an avowry for rent in replevin, where the practice was said to be not uniform. Page v. Osgood, 2 Gray, 260.

The books abound in conflicting authorities under the common-law procedure, where it was sought to settle the question on theoretic considerations and in view of artificial rules of pleading which often made it difficult to determine who had the affirmative. The question, Who has the affirmative of the issue? if it be applied as the test, will generally lead to the above conclusion; but as there are cases in which a legal presumption supplies the place of evidence to establish that affirmative, and other cases in which the party having the negative has the burden of giving evidence because the facts are peculiarly within his knowledge, that rule does not serve as a guide to the right to open and close, unless close attention is paid to its exceptions. The little volume of Best on the Right to Begin—an admirable analysis of conflicting authorities and deductions of resulting rules—is not a safe guide under the new procedure.

The only substantial question raised by the recent American authorities touching this point is whether the necessity of evidence in order to establish the amount of damages, when the existence of a cause of action is admitted, entitles the plaintiff to begin, or whether he must, in such case, wait until defendant has adduced evidence in support

of his justification, or other affirmative defense. The latter has been held to be the rule in Illinois, Indiana, New Hampshire, South Carolina, and Kentucky. Chicago, B. & Q. R. Co. v. Bryan, 90 Ill. 126, 134; McLees v. Felt, 11 Ind. 218, 220 (and see above); Seavy v. Dearborn, 19 N. H. 351; Moses v. Gatewood, 5 Rich. L. 234 (but in Burckhalter v. Coward, 16 S. C. 435, 443, there is a *dictum* saying, "It seems that in all actions for unliquidated damages for personal injuries, libel, and slander, the plaintiff opens and replies"); McKenzie v. Milligan, 1 Bay, 248; Goldsberry v. Stuteville, 3 Bibb. 345.

But when the plaintiff has to prove his cause of action as well as his damages he is required to give his evidence on both points while presenting his case in chief, and cannot reserve his evidence as to damages until rebuttal. Where an admission takes the place of evidence as to the cause of action, the rule of convenience in respect to proving damages remains unchanged. It has been said in support of the other view that when a cause of action is admitted, it is then for defendant to attempt to establish his justification or other affirmative defense, and if he fails the case stands as if there were a default, and plaintiff can thereupon give evidence to assess his damages. The fallacy of this is that if defendant gives any substantial evidence in support of his affirmative defense it cannot be known whether he has sustained it or not until the verdict is received. Hence, the most convenient time practically to prove damages is also the most appropriate theoretically,—before defendant opens; and if defendant wishes the right to begin he should be held to admit all that plaintiff has any right to prove under his pleading.

The rule generally accepted for determining the right to open and close is that he upon whom the burden of proof lies, or, as has been said in some cases, he who holds the laboring oar, is entitled to open and close the case, whether he be plaintiff or defendant. Einstein v. Munnerlyn, 32 Fla. 381, 13 So. 926; Fidelity Bkg. & T. Co. v. Kangara Valley Tea Co. 95 Ga. 172, 22 S. E. 50; Cassell v. First Nat. Bank, 169 Ill. 380, 48 N. E. 701; Leib v. Craddock, 87 Ky. 525, 9 S. W. 838; Olds Wagon Co. v. Benedict, 25 Neb. 372, 41 N. W. 254; Hickman v. Layne, 47 Neb. 177, 66 N. W. 298; Staats v. Hausling, 22 Misc. 526, 50 N. Y. Supp. 222; Whitney v. Brownell, 71 Iowa. 251, 32 N. W. 285; Bush v. Wathen, 20 Ky. L. Rep. 731, 47 S. W. 599.

Or, as sometimes stated, the general rule is that the right to open and close belongs to the party who has the burden of proof, and who would be defeated if no evidence were offered. Beal & D. Dry Goods Co. v. Barton, 80 Ark. 326, 97 S. W. 58; Turner v. Elliott, 127 Ga. 338, 56 S. E. 434 (admitting plaintiff's claim and assuming burden of proof); in Re Wharton, 132 Iowa, 714, 109 N. W. 492 (will, execution admitted, contest as to mental capacity); Rich v. Bailey, 123 Ky. 827, 97 S. W. 747 (false imprisonment, arrest admitted and

justified); *Early v. Early*, 75 S. C. 15. 54 S. E. 827 (complaint admitted, affirmative defense).

In *Cortelyou v. Hiatt*, 36 Neb. 584, 54 N. W. 964, Chief Justice Maxwell said: "The rule is this: 'That where the plaintiff has anything to prove in order to get a verdict, whether in an action *ex contractu* or *ex delicto*, and whether to establish his right of action or to fix the amount of his damages, the right to begin and reply belongs to him.' This rule has been generally adopted in this country. The unvarying test furnished by this rule is to consider which party would, in the estate of the pleadings and of the record admissions, get a verdict for substantial damages, if the cause were submitted to the jury without any evidence being offered by either. If the plaintiff would succeed, then there is nothing for him to prove at the outset, and the defendant begins and replies; if the defendant would succeed, then there is something for plaintiff to prove at the outset, and the plaintiff begins and replies."

The test is whether without any proof the plaintiff upon the pleadings is entitled to recover upon all the causes of action alleged in his complaint. If he is, and the defendant alleges any counterclaim controverted by the plaintiff's pleading or any affirmative matter of defense in avoidance of the plaintiff's alleged cause of action and which is the subject of trial the defendant has the right to open and close; otherwise not. *Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367; *Miller v. Meyerhoff*, 79 App. Div. 532, 81 N. Y. Supp. 234.

The test formerly stated, and sometimes repeated even in cases under the new procedure, is that the party against whom judgment would go if no evidence were given has the right to begin. *Addison v. Duncan*, 35 S. C. 165, 14 S. E. 305; *Martin v. Suber*, 39 S. C. 525, 18 S. E. 125; *Finnell v. Bohannon*, 19 Ky. L. Rep. 1587, 44 S. W. 94; *Porter v. Still*, 63 Miss. 357.

But this is not a safe guide under the new procedure, for now partial defenses may be pleaded; and if a partial defense is the only defense, plaintiff would be entitled to judgment if no evidence were given, but, nevertheless, if the partial defense is only a traverse of a part of his complaint or allegations of damage, he is entitled to give evidence, and therefore to open and close, in order that he may recover the full amount claimed.

On a plea of payment of the amount due on a contract, although the letter of the rule would give to the defendant the right to begin and conclude, yet, where his testimony tended to prove that plaintiff maliciously delayed the work and contested the matter as if there had been a plea having the effect of the general issue, the burden is on the plaintiff and entitles him to begin and conclude. *Smaltz v. Ryan*, 112 Pa. 423, 3 Atl. 772.

In a suit brought on a promissory note, when the execution of the note

has been denied under oath, the burden of proving its execution rests on plaintiffs, and they are entitled to open and close the argument. *Bates v. Forecht*, 89 Mo. 121, 1 S. W. 120.

And a city in an action to recover a penalty for the violation of a municipal ordinance has the right to open and conclude argument before the jury. *Columbia v. Johnson*, 72 Mo. App. 232.

In many of the states statutes have been enacted providing rules for the determination of which party shall open and close the case. Distinctions are made in these statutes between those who may open the argument and those who must open the case to the jury and adduce the first evidence. In California (Code Civ. Proc. § 607), Idaho (Rev. Code, § 4383), Louisiana (Garland's Rev. Code, § 485), Montana (Code Civ. Proc. 1895, § 1080), North Dakota (Rev. Codes, § 5431), Oregon (Hill's Anno. Laws, § 196), and Utah (Rev. Stat. § 3147), the plaintiff must open the argument, unless the judge for special reasons otherwise directs, except in Louisiana, where the statute leaves no discretion with the trial court.

In the states of Arizona (Rev. Stat. § 763), Arkansas (Sand. & H. Dig. § 5820; *Mansur & T. Implement Co. v. Davis*, 61 Ark. 627, 33 S. W. 1074), Indiana (3 Horner's Rev. Stat. 1896, § 536; *Shulse v. McWilliams*, 104 Ind. 512, 3 N. E. 243), Iowa (Code 1897, § 3701), Kentucky (Bullitt's Codes of Practice, § 317), Texas (Sayles's Civ. Stat. arts. 1297, 1299; *Hittson v. State Nat. Bank*, — Tex. —, 14 S. W. 780), Washington (2 Hill's Anno. Laws, § 354),—the party having the burden of proof has the right to the opening and closing argument.

In the state of Arizona the provision is that he who has the burden of proof on the whole case shall open and close, but if there be several parties having several claims or defenses the court may prescribe the order of argument. Rev. Stat. § 763.

In Minnesota the defendant commences and the plaintiff concludes the argument. Gen. Stat. 1894, § 5371.

In the states of Nebraska and Ohio the party who would be defeated if no evidence were given has the opening and closing of the argument, unless the court for special reasons otherwise directs. Neb. Comp. Laws 1897, ¶ 5855; *Bates's* (Ohio) Stat. § 5190.

In the states of Arizona (Rev. Stat. § 761), Arkansas, California, Idaho, Kentucky, Louisiana (Garland's Code 1894, § 476), Minnesota (Gen. Stat. § 5371), Nebraska, North Dakota, Ohio, Oregon, Utah, and Washington, the plaintiff opens the case to the jury unless the court shall otherwise direct, except in Louisiana and Washington, where this last phrase is not found. See sections of the statutes of those states cited *supra*. In the states of Indiana (Horner's Rev. Stat. 1896, § 533), Iowa (Code 1897, § 3700), Kansas (Gen. Stat. 1897, § 285), Montana, Oklahoma, Texas, and Wyoming (Rev. Stat. ¶ 2553), the party who has the burden of proof opens the case, unless the court for special

reasons otherwise directs, except in Iowa, where this last phrase is not found. (See sections of those statutes cited *supra*.)

In the states of Arkansas, California, Idaho, Kentucky, Louisiana, Minnesota, North Dakota, Oregon, and Utah, the plaintiff produces his evidence first, unless the court otherwise directs, except in Louisiana, where the court has no discretion. See sections of these statutes cited *supra*.

In the states of Arizona, Indiana (Horner's Rev. Stat. 1896, § 533), Iowa (Code 1897, § 3700), Kansas (Gen. Stat. 1897, § 285), Montana, Oklahoma (Stat. ¶ 4165), Texas, Washington, and Wyoming the party who has the burden of proof must produce his evidence first.

In the states of Nebraska and Ohio the party who would be defeated if no evidence were given must produce his evidence first, unless the court for special reasons otherwise directs.

In Iowa (Code 1897, § 3700), Louisiana (Garland's Code, § 476), and Washington (2 Hill's Anno. Laws, § 354), the phrase "unless the court otherwise directs" is not part of the statutory provision.

And in many of the states the matter is regulated by rules of court.

2. Effect of admissions.

a. In general; sufficiency.—Where the defendant, either in positive terms or by the nature and character of his pleading, absolutely admits the cause of action, thereby absolving the plaintiff from the necessity of making any proof thereof in order to succeed, the burden of proof shifts and rests with the defendant, and he is, therefore, entitled to open and close. But this admission must be unqualified, and, where defendant does not admit the entire demand of plaintiff, and where there are several issues, if the plaintiff is called on to maintain a single one, he retains and has the right to open and close.¹

¹ Beall v. Newton, 1 Cranch, C. C. 404, Fed. Cas. No. 1,164; Henderson v. Casteel, 3 Cranch, C. C. 365, Fed. Cas. No. 6,350; Kitner v. Whitlock, 88 Ill. 513; Carpenter v. First Nat. Bank, 119 Ill. 352, 10 N. E. 18; Razor v. Razor, 42 Ill. App. 504, affirmed in 149 Ill. 621, 36 N. E. 963; Shaw v. Bernhart, 17 Ind. 183; Camp v. Brown, 48 Ind. 575; Lindley v. Sullivan, 133 Ind. 588, 32 N. E. 738, 33 N. E. 361; Milwaukee Harvesting Co. v. Crabtree, 101 Iowa, 526, 70 N. W. 704; Abat v. Sigura, 5 Mart. N. S. 73; Ross v. Gould, 5 Me. 204 (*dictum*); Porter v. Still, 63 Miss. 357; Crapson v. Wallace Bros. 81 Mo. App. 680; Cortelyou v. Hiatt, 36 Neb. 584, 54 N. W. 964; Citizens' State Bank v. Baird, 42 Neb. 219, 60 N. W. 551 (*dictum*); Welsh v. Burr, 56 Neb. 361, 76 N. W. 905; Sorensen v. Sorensen, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455; Belknap v. Wendell, 21

N. H. 175; Buzzell v. Snell, 25 N. H. 474; Bills v. Vose, 27 N. H. 212; Clarkson v. Meyer, 39 N. Y. S. R. 188, 14 N. Y. Supp. 144; Conselyea v. Swift, 103 N. Y. 604, 9 N. E. 489; Redmond v. Tone, 32 N. Y. S. R. 260, 10 N. Y. Supp. 506; Lake Ontario Nat. Bank v. Judson, 122 N. Y. 278, 25 N. E. 367; Tallmadge v. Press Pub. Co. 39 N. Y. S. R. 29, 14 N. Y. Supp. 331; Plenty v. Rendle, 43 Hun, 568; McRae v. Lawrence, 75 N. C. 289; Stillwell v. Archer, 64 Hun, 169, 18 N. Y. Supp. 888; Johnson v. Maxwell, 87 N. C. 18; Lexington Fire, Life & M. Ins. Co. v. Paver, 16 Ohio, 324; Montgomery v. Swindler, 32 Ohio St. 224; Sanders v. Sanders, 30 S. C. 207, 9 S. E. 94; Jones v. Swearingen, 42 S. C. 58, 19 S. E. 947; Beckham v. Southern R. Co. 50 S. C. 25, 27 S. E. 611; Sanders v. Bridges, 67 Tex. 93, 2 S. W. 663; Harris v. Pinckney, — Tex. Civ. App. —, 55 S. W. 38; Steptoe v. Harvey, 7 Leigh, 501; Vuyton v. Brenell, 1 Wash. C. C. 467, Fed. Cas. No. 17,026; Wisconsin Cent. Bank v. St. John, 17 Wis. 157; Edwards v. Murray, 5 Wyo. 153, 38 Pac. 681; Curtis v. Wheeler, Moody & M. 493, 4 Car. & P. 196; James v. Salter, 1 Moody & R. 501; Overbury v. Muggridge, 1 Fost. & F. 137, note; Thompson v. Security Trust & L. Ins. Co. 63 S. C. 290, 41 S. E. 464.

The plaintiff's case must be admitted in its entirety, for otherwise the *onus* is left upon him. Filby v. Turner, 9 Colo. App. 202, 47 Pac. 1037. If the defendant denies even one of the important allegations of the plaintiff's claim, he is not entitled to open and conclude the argument, although he admits the remainder of the allegations of the complaint. Steed v. Petty, 65 Tex. 490; Benedict v. Penfield, 42 Hun, 176.

Thus in an action for goods sold, an admission of the purchase, coupled with an allegation that defendant agreed to pay, not in money but in merchandise, is, though in form new matter, in effect only a denial of the contract as alleged. Bradley v. Clark, 1 Cush. 293; Gilland v. Lawrence, 13 N. Y. Week. Dig. 372.

So, in an action for price of services or goods an allegation of negligence or deficiency in quality, stated as a ground for recoupment, does not admit the cause of action. Fiedelvey v. Reis, 12 Ohio L. J. 77, citing Simmons v. Green, 35 Ohio St. 104; Graham v. Gautier, 21 Tex. 111 (an action for damages for malpractice). This question is still contested. Penhryn Slate Co. v. Meyer, 8 Daly, 61; Howard v. Hayes, 15 Jones & S. 89. But compare Stronach v. Bledsoe, 85 N. C. 473. For other illustrations see Cheesman v. Hart, 42 Fed. 98; Steel v. Stames — Ark. —, 15 S. W. 17; Thompson v. Mills, 39 Ind. 528; Donahoe v. Rich, 2 Ind. App. 540, 28 N. E. 1001; Goodpaster v. Voris, 8 Iowa, 334, 74 Am. Dec. 313; Vance v. Vance, 2 Met. 581; Lafayette County Bank v. Metcalf, 29 Mo. App. 384; Lindsley v. European Petroleum Co. 10 Abb. Pr. N. S. 107, 41 How. Pr. 56; Felts v. Clapper, 69 Hun, 373, 23 N. Y. Supp. 508; Trenkmann v. Schneider, 23 Misc. 336, 51 N. Y. Supp. 232; McDougall v. Walling, 19 Wash. 80, 52 Pac. 530; Edwards v. Murray, 5 Wyo. 153, 38 Pac. 681.

Whether an allegation which is in form new matter, but is in fact inconsistent with a material allegation of the complaint, is to be deemed a denial under the new procedure, is a question on which there is much difference of opinion. Compare with above cases 8 Abb. N. Y. Dig. (new ed. vol. 2 of Supp.) 509, §§ 184, 185.

The better view is that for the purpose of determining the right to begin, the admission of plaintiff's case, which defendant relies on, must be explicit and not obscure; and that if his answer gives an inconsistent version merely, without an express denial, he may be required to make an express admission of plaintiff's version as a condition of claiming the right to begin. Argumentative denials, and affirmative statements which imply a denial, have generally been held to leave the right to begin with plaintiff. *Teller v. Ferguson*, 24 Colo. 432, 51 Pac. 429; *Haines v. Kent*, 11 Ind. 126; *Shulse v. McWilliams*, 104 Ind. 512, 3 N. E. 243; *Robbins v. Spencer*, 121 Ind. 594, 22 N. E. 660; *Samples v. Carnahan*, 21 Ind. App. 55, 51 N. E. 425; *Denny v. Booker*, 2 Bibb. 427; *Thurston v. Kennett*, 22 N. H. 151; *Churchill v. Lee*, 77 N. C. 341; *Beatty v. Hatcher*, 13 Ohio St. 115. But compare *Patton v. Hamilton*, 12 Ind. 256; *Aurora v. Cobb*, 21 Ind. 492; *Hoxie v. Greene*, 37 How. Pr. 97; *DeGraff v. Carmichael*, 13 Hun, 129.

Defendant has the right to open and close in suits for the recovery of money due under a contract to pay, such as a note, bond, or other instrument, on his admissions of the execution of the instrument and its delivery, coupled with averments of failure of consideration, duress, that it was given by mistake. *Graboski v. Gewerz*, 44 N. Y. S. R. 127, 17 N. Y. Supp. 528; *Brown v. Tausick*, 1 Misc. 16, 20 N. Y. Supp. 369; *Addison v. Duncan*, 35 S. C. 165, 14 S. E. 305; *Martin v. Suber*, 39 S. C. 535, 18 S. E. 125; *Montgomery v. Hunt*, 93 Ga. 438, 21 S. E. 59; *Levins v. Smith*, 102 Ga. 480, 31 S. E. 104; *Southern Mut. Bldg. & L. Asso. v. Perry*, 103 Ga. 800, 30 S. E. 658, or setting up other affirmative defenses, such as usury (*Seekel v. Norman*, 78 Iowa, 254, 43 N. W. 190; *Suiter v. Park Nat. Bank*, 35 Neb. 372, 53 N. W. 205), payment or set-off (*Morehead Bkg. Co. v. Walker*, 121 N. C. 115, 28 S. E. 253; *Truesdale Mfg. Co. v. Hoyle*, 39 Ill. App. 532), or counterclaim for damages (*Brower v. Nellis*, 16 Ind. App. 183, 44 N. E. 939; *Fitch v. Parker*, 20 Ky. L. Rep. 842, 47 S. W. 627; *Grant Quarry Co. v. Lyons Constr. Co.* 72 Mo. App. 530; *Harley v. Fitzgerald*, 84 Hun, 305, 32 N. Y. Supp. 414; *Parks v. Young*, 75 Tex. 278, 12 S. W. 986).

If the only issue tried is on a counterclaim the defendant has the right to close. *Fischer v. Frohne*, 51 Misc. 578, 100 N. Y. Supp. 1016.

In a suit on a life insurance policy when the answer admits the execution of the policy, death of the party whose life was insured, proof of loss, etc., but pleads in defense a violation of the condition, the defendant has the right to open and close. *Beller v. Supreme Lodge, K. of P.* 66 Mo. App. 449. Likewise in an action on a policy of fire insurance, where the loss is admitted and the sole question is upon the claim of

defendant that the fire was caused in a certain manner, the defendant bears the burden of proving that cause and takes with it the right to open and close. *Fireman's Ins. Co. v. Schwing*, 10 Ky. L. Rep. 833, 11 S. W. 14.

The same rule prevails in a suit on a judgment, the validity of which is unquestioned, when payment is the defense. *Lofland v. McDaniel*, 1 Penn. (Del.) 416, 41 Atl. 882; *Pinson v. Puckett*, 35 S. C. 178, 14 S. E. 393.

And, under a statute providing that the party who would be defeated if no evidence were given must first produce his evidence and argue the case to the jury, when the answer makes no denial of the allegations of the complaint, that advancements by plaintiff of specific sums had been made for the benefit and at the request of defendant, but averred that they were made to a third party and that the defendant was insane, the defendant will be entitled to open and close. *Rea v. Bishop*, 41 Neb. 202, 59 N. W. 555; Neb. Code Civ. Proc. § 283.

In trespass to try title, when the defendant admits the plaintiff's right to recover unless that right is defeated by reason of a defective acknowledgment to plaintiff's deed, the defendant has the right to open and close, where the plaintiffs had a deed which appeared to be duly acknowledged and this made a prima facie case for them. *Atkinson v. Reed*, — Tex. Civ. App. —, 49 S. W. 260.

Defendant also has this right in an action to recover for libel or slander, if he admits the act complained of, but pleads that it was justified. *Cox v. Strickland*, 101 Ga. 482, 28 S. E. 655; *Palmer v. Adams*, 137 Ind. 72, 36 N. E. 695; *Stith v. Fullinwider*, 40 Kan. 73, 19 Pac. 314; *Hall v. Elgin Dairy Co.* 15 Wash. 542, 46 Pac. 1049. Or if the answer is in mitigation merely. *McCoy v. McCoy*, 106 Ind. 492, 7 N. E. 188. Or if defendant also deny that the publication was malicious or that the words were slanderous when it is unnecessary to prove malice because the words published were of themselves actionable, he bears the burden of proving his plea of justification and has the right to open and conclude. *Louisville Courier Journal Co. v. Weaver*, 13 Ky. L. Rep. 599, 17 S. W. 1018. But see § 2, and cases cited, where it is said that plaintiff shall open and close if he has damages to prove, and, in the same connection, *Burckhalter v. Coward*, 16 S. C. 435, where the court says that the rule seems to be settled in the English courts that although the defendant admits the cause of action and justifies, in actions for personal injuries, libel, and slander, the plaintiff shall open and close if he must prove unliquidated damages.

A like rule obtains in suits to recover for an assault and battery. The plea justifying entitles the defendant to open and close. *Phillips v. Mann*, 19 Ky. L. Rep. 1705, 44 S. W. 379; *Strickland v. Atlanta & W. P. R. Co.* 99 Ga. 124, 24 S. E. 981; *Seymour v. Bailey*, 76 Ga. 338.

A plea of justification in a suit to recover for malicious prosecution and arrest entitles the defendant to open and conclude. *Henderson v. Fran-*

cis, 75 Ga. 178; *Ocean S. S. Co. v. Williams*, 69 Ga. 251; *Rigden v. Jordan*, 81 Ga. 668, 7 S. E. 857; *Johnson v. Bradstreet Co.* 81 Ga. 425, 7 S. E. 867. But see *Horn v. Simms*, 92 Ga. 421, 17 S. E. 670, where it was held that the plea was insufficient in justification and that defendant did not have the right to open and conclude. The same rule obtains in suits for damages for personal injuries when the defendant pleads negligence on the part of the plaintiff contributing to his injury. *Bush v. Wathen*, 20 Ky. L. Rep. 731, 47 S. W. 599.

As to what is a plea of justification, see *Ocean S. S. Co. v. Williams*, 69 Ga. 251; *Central R. Co. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463; *Georgia R. Co. v. Williams*, 74 Ga. 723; *Henderson v. Francis*, 75 Ga. 178; *Seymour v. Bailey*, 76 Ga. 338.

The right of the court where there are several issues to sever the issues, and give the opening and closing to each party accordingly, was recognized in *Wisconsin Central Bank v. St. John*, 17 Wis. 157, and *Vuyton v. Brenell*, 1 Wash. C. C. 467, Fed. Cas. No. 17,026.

The question whether an admission the effect of which is claimed to shift the burden of proof and the incident right to open and close is sufficient, in form and substance, to accomplish what is sought in making it, generally depends in any given case upon the particular circumstances of that case.

In some cases the admission is not made in express terms but by implication or inference, from the nature and character of an affirmative plea or answer which does not deny the allegations of the plaintiff's pleadings, but confesses and avoids them.¹ But where the averment which is claimed to have the effect of an admission, though affirmative in form, is negative in substance, it will not operate to give to the party making it the right to open and close.²

¹ *Mann v. Scott*, 32 Ark. 593; *Fairbanks v. Irwin*, 15 Colo. 366, 25 Pac. 701; *Williams v. Shup*, 12 Ill. App. 454; *Truesdale Mfg. Co. v. Hoyle*, 39 Ill. App. 532; *Indiana State Bd. of Agriculture v. Gray*, 54 Ind. 91; *Oxtoby v. Henley*, 112 Iowa, 697, 84 N. W. 942; *Tipton v. Triplett*, 1 Met. (Ky.) 570; *Gran v. Spangenberg*, 53 Minn. 42, 54 N. W. 933; *Rea v. Bishop*, 41 Neb. 202, 59 N. W. 555; *Woodriff v. Hunter*, 65 App. Div. 404, 73 N. Y. Supp. 210; *Hoxie v. Greene*, 37 How. Pr. 97; *Chicago Cottage Organ Co. v. Biggs*, 22 Ohio C. C. 392, 12 Ohio C. D. 497; *Norris v. Insurance Co. of N. A.* 3 Yeates, 84, 2 Am. Dec. 360; *Blackwell v. Coleman County*, — Tex. Civ. App. —, 60 S. W. 572; *Bonnell v. Jacobs*, 36 Wis. 59.

² *Teller v. Ferguson*, 24 Colo. 432, 51 Pac. 429; *Ryals v. Powell*, 83 Ga. 278, 9 S. E. 613; *Haines v. Kent*, 11 Ind. 126; *Shulse v. McWilliams*.

104 Ind. 512, 3 N. E. 243; *Barker Cedar Co. v. Roberts*, 23 Ky. L. Rep. 1345, 65 S. W. 123; *Chambers v. Hunt*, 18 N. J. L. 339; *Smith v. Frazier*, 53 Pa. 226.

An allegation not essential to the party's recovery of the amount claimed need not be admitted by the other in order to entitle the latter to the right to begin.¹ The fact that a party has alleged what he has not the burden of proving in order to recover does not entitle him to begin.²

¹ *Bush v. Wathen*, 20 Ky. L. Rep. 731, 47 S. W. 599; *Steele v. Hinshaw*, 14 Ind. App. 384, 42 N. E. 1034.

Thus where plaintiffs sued for goods sold by them jointly, their allegation that they were partners, though it is relevant, and, it may be, material, in case plaintiff has to give evidence, is not essential to enable them to recover the amount claimed; and hence, an admission of the sale, though coupled with a denial of the partnership, is a sufficient admission within the rule. *Millerd v. Thorn*, 56 N. Y. 402, 15 Abb. Pr. N. S. 371. See also *Hurliman v. Seckendorf*, 9 Misc. 264, 29 N. Y. Supp. 740; *Trenkmann v. Schneider*, 23 Misc. 336, 51 N. Y. Supp. 232.

So, a demand in the answer for the production of an instrument, a copy of which is annexed to the complaint, coupled with an admission of the genuineness of the original, does not change the rule. *Murray v. New York L. Ins. Co.* 85 N. Y. 236, 9 Abb. N. C. 309, reversing 19 Hun, 350. Nor does defendant's denial of an allegation not essential to recovery, but relevant only as anticipating and avoiding an expected defense. *List v. Kortepeter*, 26 Ind. 27.

But compare *Fry v. Bennett*, 28 N. Y. 324, affirming 3 Bosw. 200, where it was held that an allegation of malice in the publication of an article apparently privileged was one which plaintiff had a right to prove, and had therefore a right to begin for the purpose of proving.

² *Millerd v. Thorn*, 56 N. Y. 402, 15 Abb. Pr. N. S. 371.

Claffin v. Baere, 23 Hun. 204, where the allegation was defendant's allegation, in form as a separate defense, that the goods were sold on a credit which had not expired, for this was in legal effect only a denial of part of plaintiff's case.

b. Necessity of admitting quantum of damages.—Whenever the damages claimed by the plaintiff are ascertainable by computation, an admission of the cause of action by the defendant, coupled with an affirmative defense thereto, will suffice to give him the right to open and close.¹

But, in actions for unliquidated damages, the defendant must not only admit the cause of action, but also the amount of the

damages, in order to obtain the right to open or close; otherwise the right is with the plaintiff.² And plaintiff is entitled to open and close if he has but to prove the amount of attorneys' fees to which he is entitled.³

¹ *Huntington v. Conkey*, 33 Barb. 218; *Brennan v. Security L. Ins. & Annuity Co.* 4 Daly, 296; *Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367.

The reason is that it is a deduction of law, and not a question of fact; but the facts on which the right to interest depend are matter for evidence.

² *Mercer v. Whall*, 5 Q. B. 447, 14 L. J. Q. B. N. S. 267, 9 Jur. 576; *Morris v. Lotan*, 1 Moody & R. 233; *Wood v. Pringle*, 1 Moody & R. 277; *Foley v. Tabor*, 2 Fost. & F. 663; *St. Louis, I. M. & S. R. Co. v. Taylor*, 57 Ark. 136, 20 S. W. 1083; *Brunswick & W. R. Co. v. Wiggins*, 113 Ga. 842, 61 L.R.A. 513, 39 S. E. 557; *Sawyer v. Hopkins*, 22 Me. 276; *Johnson v. Josephs*, 75 Me. 544; *Elder v. Oliver*, 30 Mo. App. 575; *Fry v. Bennett*, 28 N. Y. 324, affirming 3 Bosw. 200; *Parish v. Sun Printing & Pub. Asso.* 6 App. Div. 585, 39 N. Y. Supp. 540; *Huntington v. Conkey*, 33 Barb. 218; *Tallmadge v. Press Pub. Co.* 39 N. Y. S. R. 29, 14 N. Y. Supp. 331; *Littlejohn v. Greeley*, 13 Abb. Pr. 41; *Hecker v. Hopkins*, 16 Abb. Pr. 301, note; *Cunningham v. Gallagher*, 61 Wis. 170, 20 N. W. 925; *Wausau Boom Co. v. Dunbar*, 75 Wis. 133, 43 N. W. 739.

But see *Chicago, B. & Q. R. Co. v. Bryan*, 90 Ill. 126; *Louisville & N. R. Co. v. Brown*, 13 Bush, 475; *Cheesman v. Hart*, 42 Fed. 98, 16 Mor. Min. Rep. 263.

³ *Starnes v. Schofield*, 5 Ind. App. 4, 31 N. E. 480.

c. Necessity of incorporating in pleadings.—The question whether the admission which will transfer to defendant the right to open and close must be found and determined by an inspection of the pleadings, or whether it may be in any other way made upon the record, or whether it may be made in any other manner, either before or at the trial, has been the subject of much discussion in the courts. In the absence of statute or court rules, which in many states govern the matter, the weight of authority would seem to be in favor of the doctrine that the right to open and close must be determined at the commencement of the trial, and from an inspection of the pleadings only; and that matter *aliunde* the pleadings will not be considered in arriving at such a determination.¹

¹ *Dorough v. Johnson*, 108 Ga. 812, 34 S. E. 168; *Goodrich v. Friedersdorff*,

27 Ind. 308; *Woodruff v. Hensley*, 26 Ind. App. 592, 60 N. E. 312; *Kentucky Wagon Mfg. Co. v. Louisville*, 97 Ky. 548, 31 S. W. 130; *Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367; *Kobbe v. Price*, 14 Hun. 55; *Woodruff v. Hunter*, 65 App. Div. 404, 73 N. Y. Supp. 210; *Trenkman v. Schneider*, 23 Misc. 336, 51 N. Y. Supp. 232; *Hollander v. Farber*, 52 Misc. 507, 102 N. Y. Supp. 503; *Clarkson v. Meyer*, 39 N. Y. S. R. 188, 14 N. Y. Supp. 144; *Richards v. Nixon*, 20 Pa. 19; *Brown v. Kirkpatrick*, 5 S. C. 267; *Burckhalter v. Coward*, 16 S. C. 435; *McConnell v. Kitchens*, 20 S. C. 430, 47 Am. Rep. 845; *Dahlman v. Hammel*, 45 Wis. 466. But see *Katz v. Kuhn*, 9 Daly, 166; and *Plenty v. Rendle*, 43 Hun. 568.

d. Admissions offered at the trial.—Defendant has the right to begin, if by leave of court he withdraws or strikes out all denial from his pleading,¹ or if he makes an unqualified,² oral,³ or written admission,⁴ conceding all⁵ that the plaintiff would need to prove to entitle him to recover the amount claimed. In New York the answer must be amended.⁶ Attorney or counsel has implied authority to make such admission.⁷ But it is not enough to admit⁸ that plaintiff has a *prima facie* case, supposing that defendant should fail to establish his affirmative defense. The admission must be of the facts.⁹

¹ *Jackson v. Delaplaine*, 6 Houst. 358; *Harvey v. Ellithorpe*, 26 Ill. 418; *McCloskey v. Davis*, 8 Ind. App. 190, 35 N. E. 187.

² An admission coupled with a contingency is not enough. *Camp v. Brown*, 48 Ind. 575. In this case the action was on a note including reasonable attorney's fee, and an admission that a specified sum would be reasonable, if plaintiff should be found entitled to recover the whole amount of the note, was held insufficient to entitle defendant to begin. See also *Smith v. Wellborn*, 75 Ga. 799.

³ To the contrary was *Johnson v. Wideman*, Dud. L. 325, where it was held that the admission must be of record, before trial. To the same effect was *Gray v. Cottrell*, 1 Hill, L. 38; *Ramsey v. Thomas*, 14 Tex. Civ. App. 431, 33 S. W. 259.

⁴ *Campbell v. Roberts*, 66 Ga. 733; *Aurora v. Cobb*, 21 Ind. 492, 509; *Katz v. Kuhn*, 9 Daly, 166; *Clements v. McCain*, — Tex. Civ. App. —, 49 S. W. 122.

⁵ *Bertrand v. Taylor*, 32 Ark. 470, 476; *Burroughs v. Hunt*, 13 Ind. 178, 180; *Clarkson v. Meyer*, 39 N. Y. S. R. 188, 14 N. Y. Supp. 144; *Sanders v. Bridges*, 67 Tex. 93, 2 S. W. 603. But the right is denied him if he does not admit all. *Western & A. R. Co. v. Brown*, 102 Ga. 13, 29 S. E. 130.

⁶ *Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367.

⁷ See *Oliver v. Bennett*, 65 N. Y. 559; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539. And compare p. 41 of this brief, subd. 34, note 2, with *Arthur v. Homestead F. Ins. Co.* 78 N. Y. 462, 34 Am. Rep. 550.

⁸ *Wigglesworth v. Atkins*, 5 Cush. 212. The rule of court referred to in this last case is to be found in 8 Cush. 603, note.

⁹ It is not enough that plaintiff has obtained an auditor's report in his favor, for he may or may not use it. *Snow v. Batchelder*, 8 Cush. 513. Nor, if he does use it, does it change the right to begin if its conclusion is impugned by defendant. *Chesley v. Chesley*, 37 N. H. 229. It is said in *Sanders v. Johnson*, 6 Blackf. 50, 36 Am. Dec. 564, that if plaintiff has been compelled to keep his witnesses in attendance till after commencing to swear the jury, it is unreasonable to deprive him of the privilege of opening.

In an attachment of real property, when upon the announcement ready for trial, the defendant admits the plaintiff's cause of action in full and only denies that the property levied upon was subject to forced sale, claiming it as his homestead, although the complaint alleges that the defendant was about to transfer his property to defraud his creditors, the defendant need not also admit these allegations in order to be entitled to open and conclude. *Milburn Wagon Co. v. Kennedy*, 75 Tex. 212, 13 S. W. 28. For other instances, see *Dodd v. Norman*, 99 Ga. 319, 25 S. E. 650; *East Tennessee, V. & G. R. Co. v. Fleetwood*, 90 Ga. 23, 15 S. E. 778; *Conselyea v. Swift*, 103 N. Y. 604, 9 N. E. 489; *Munn v. Martin*, — Tex. App. —, 15 S. W. 195.

The plaintiff has the right to reply although the defendant did not call any witness, when the defendant put in evidence certain documents during the cross-examination of plaintiff's witness. *Quintal v. Chalmers*, 12 Manitoba, 231.

Although no issue is raised on a denial, the defendant will not be given the opening and closing unless the denial is disclaimed (*Boehm v. Lies*, 46 N. Y. S. R. 26, 18 N. Y. Supp. 577), nor will he be given the right when the plaintiff has the burden, although he has the burden on certain issues (*Rials v. Powell*, 83 Ga. 278, 9 S. E. 613).

There seems to be some little difference in opinion between the courts of various states concerning the time at which the admissions must be made in order that the defendant may be entitled to open and conclude the argument.

In Georgia the court has declared that it is necessary for the admission to be made before the plaintiff offers any evidence, and an admission after the plaintiff has made out a prima facie case comes too late. *Cook v. Coffey*, 103 Ga. 384, 30 S. E. 27; *Abel v. Jarratt*, 100 Ga. 732, 28 S. E. 543; *Messengale v. Pounds*, 100 Ga. 770, 28 S. E. 510.

In Indiana the admission must be made by the pleadings before the trial commences. *Boyd v. Smith*, 15 Ind. App. 324, 43 N. E. 1056.

In some of the states, however, it is said that the court may permit the defendant to open and close whenever during the trial he assumes the affirmative. *Goetz v. Sona*, 65 Ill. App. 78; *Gardner v. Meeker*, 169 Ill. 40, 48 N. E. 307, affirming 69 Ill. App. 422.

A party who has admitted a fact on the trial and thereby obtained the right to open and close may not thereafter controvert the fact admitted. *Smith v. Wellborn*, 75 Ga. 799.

In Iowa, the admission made after the opening argument and for the purpose of obtaining the right to close came too late. *Fred Miller Brewing Co. v. De France*, 90 Iowa, 395, 57 N. W. 959. And in *Abel v. Jarratt*, 100 Ga. 732, 28 S. E. 453, it was held that an admission after the introduction of any evidence was too late; but in *Names v. Dwell House Ins. Co.* 95 Iowa, 642, 64 N. W. 628, defendant was permitted to open and close the argument by admitting plaintiff's case at the conclusion of the evidence.

e. Several defendants and admissions not made by all.—Where there are several defendants and some of them, expressly or impliedly, admit the plaintiff's case, but one or more of them deny some portion of the case, the plaintiff is entitled to open and close as against all the defendants.¹

¹ *King v. King*, 37 Ga. 205; *Kirkpatrick v. Armstrong*, 79 Ind. 384; *Clodfelter v. Hulett*, 92 Ind. 426; *Lieb v. Craddock*, 87 Ky. 525, 9 S. W. 838; *Simons v. Pearson*, 22 Ky. L. Rep. 1707, 61 S. W. 259; *Boatmen's Sav. Inst. v. Forbes*, 52 Mo. 201.

f. Defendant's failure to introduce evidence.—In England and in some of the states the rule provides that where defendant introduces no evidence, that fact will operate to give him the right to open and close.¹ None of the cases gives, in terms, a reason for this; but it would seem that it must be upon the principle that, by not offering evidence, the defendant virtually admits the plaintiff's case.

¹ *Dover v. Maestaer*, 5 Esp. 92; *Harvey v. Mitchell*, 2 Moody & R. 366; *Moore v. Carey*, 116 Ga. 28, 42 S. E. 258; *Brown v. Southern R. Co.* 140 N. C. 154, 52 S. E. 198. But see *De Maria v. Cramer*, 70 N. J. L. 682, 58 Atl. 341.

g. Time for making admission or request to open and close.—In order to entitle defendant to the opening and conclusion of the argument by virtue of an admission that plaintiff has a prima facie right to recover, defendant must, before the introduction of any evidence, admit facts authorizing, without further proof, a verdict in plaintiff's favor. It is too late, after plaintiff has made out a prima facie case, for defendant to make any admission which will deprive plaintiff of the right to open and conclude.¹ Even if an answer to a petition admits sufficient facts to entitle plaintiff prima facie to a recovery, it is not erroneous to refuse to allow defendant to open and conclude the argument, when no request to do so is presented until after the testimony on both sides has been closed.² And an offer that, if plaintiff should recover judgment on the note in suit, he should be entitled to recover the amount of the attorneys' fees demanded in the complaint, comes too late, when not made until the trial has commenced, to operate to change the burden of proof so as to deprive plaintiff of the right to open and close.³

¹ Abel v. Jarratt, 100 Ga. 732, 28 S. E. 453, citing McKibbin v. Folds, 38 Ga. 235, and distinguishing McCalla v. American Freehold Land Mortg. Co. 90 Ga. 113, 15 S. E. 687; Massengale v. Pounds, 100 Ga. 770, 28 S. E. 510; Cook v. Coffey, 103 Ga. 384, 30 S. E. 27; Central R. Co. v. Morgan, 110 Ga. 168, 35 S. E. 345.

² Southern R. Co. v. Gresham, 114 Ga. 183, 39 S. E. 883.

³ Boyd v. Smith, 15 Ind. App. 324, 43 N. E. 1056.

h. Effect of reply to restore right to plaintiff.—Where defendant would be entitled to begin under the foregoing rules, yet nevertheless if the plaintiff, by a reply admitting and avoiding defendant's allegation of new matter, or by an unqualified oral admission at the trial, concedes all that defendant would have to prove in order to entitle himself to a verdict, or to a reduction of plaintiff's recovery to the full extent which defendant has claimed, then plaintiff has the right to begin.¹

¹ Cripps v. Wells, Car. & M. 489; Mann. v. Scott, 32 Ark. 593; Edwards v. Hushing, 31 Ill. App. 223; French v. Howard, 10 Ind. 339; Kent v. White, 27 Ind. 390; McCloskey v. Davis, 8 Ind. App. 190, 35 N. E. 187; Judah v. Vincennes University, 23 Ind. 272; Viele v. Germania Ins. Co. 26 Iowa, 9, 96 Am. Dec. 83; Wright v. Northwestern Mut. L. Ins. Co. 91 Ky. 208, 15 S. W. 242; Stepp v. Hatcher, 23 Ky. L. Rep. 2441,

67 S. W. 819; *Robinson v. Hitchcock*, 8 Met. 64; *Thornton v. West Feliciana R. Co.* 29 Miss. 143; *Thurston v. Kennett*, 22 N. H. 151; *Love v. Dickerson*, 85 N. C. 5; *Richards v. Nixon*, 20 Pa. 19; *Brown v. Kirkpatrick*, 5 S. C. 267.

But see *Bowen v. Spears*, 20 Ind. 146; *Brower v. Nellis*, 16 Ind. App. 183, 44 N. E. 939.

But the plaintiff may not change after the evidence is in when the defendant has had the initiative until that time. *St. Louis & S. F. R. Co. v. Thomason*, 59 Ark. 140, 26 S. W. 598.

For an extended treatment of the question of the effect of admissions on the right to open and close, with a review of all the authorities, see note in 61 L.R.A. 513.

3. Refusal of the right, error.

An exception lies to the refusal of the right to begin.¹

¹*Tobin v. Jenkins*, 29 Ark. 151; *James v. Kiser*, 65 Ga. 515; *Chapman v. Atlanta & W. P. R. Co.* 74 Ga. 547; *Phelps v. Thurman*, 74 Ga. 837; *Colwell v. Brower*, 75 Ill. 516; *Chicago, B. & Q. R. Co. v. Bryan*, 90 Ill. 126, 134; *Shank v. Fleming*, 9 Ind. 189; *Judah v. Vincennes University*, 23 Ind. 272, 284; *Boyd v. Smith*, 15 Ind. App. 324, 43 N. E. 1056; *Denny v. Booker*, 2 Bibb, 427; *Wright v. Northwestern Mut. L. Ins. Co.* 91 Ky. 208, 15 S. W. 242; *Royal Ins. Co. v. Schwing*, 10 Ky. L. Rep. 380, 9 S. W. 242; *Crabtree v. Atchison*, 13 Ky. L. Rep. 321; *Johnson v. Josephs*, 75 Me. 544; *Porter v. Still*, 63 Miss. 357; *Millerd v. Thorn*, 56 N. Y. 402, 15 Abb. Pr. N. S. 371; *Oppen v. Caillon*, 9 N. Y. Week. Dig. 39, 9 Daly, 157; *Murray v. New York L. Ins. Co.* 9 Abb. N. C. 309, 85 N. Y. 236, reversing 19 Hun, 350; *Conselyea v. Swift*, 103 N. Y. 604, 9 N. E. 489; *Parrish v. Sun Printing & Pub. Asso.* 6 App. Div. 585, 39 N. Y. Supp. 540; *Hudson v. Wetherington*, 79 N. C. 3; *Stronach v. Bledsoe*, 85 N. C. 473; *Ramsey v. Thomas*, 14 Tex. Civ. App. 431, 38 S. W. 259; *Hillboldt v. Waugh*, — Tex. Civ. App. —, 47 S. W. 829. And see 22 Moak, Eng. Rep. 739. Contra, *Day v. Woodworth*, 13 How. 363, 14 L. ed. 181; *Hall v. Weare*, 92 U. S. 728, 23 L. ed. 500; *Goodpaster v. Voris*, 8 Iowa, 334, 74 Am. Dec. 313.

It is not essential to the maintenance of error in a ruling as to the right to open and conclude that the party denied the privilege by a ruling after the jury was sworn should offer to introduce his witness or open and conclude the case. *Fireman's Ins. Co. v. Schwing*, 10 Ky. L. Rep. 883, 11 S. W. 14.

However, a judgment may not be reversed for the mere granting of the privilege to open and close, when it does not appear from the record that the privilege was exercised, and it will not be assumed, for the purpose of impugning the judgment, that the party awarded the right opened and concluded the argument. *St. Louis, A. & T. R. Co. v. Orenbaum*, 4 Tex. App. Civ. Cas. (Willson) 182, 16 S. W. 936.

Abbott, Civ. Jur. T.—10.

While it is undoubtedly the rule in most jurisdictions that an error in awarding the right to open and close will work a reversal of the case if complained of upon appeal, nevertheless in some jurisdictions such is not the rule. And when the order of trial is fixed by statute with the proviso that such shall be the order unless the court for special reasons otherwise directs (See statutes cited under § 1, *supra*), it has been held that the right to open and close rests in the sound judicial discretion of the trial court. *Aultman v. Falkum*, 47 Minn. 414, 50 N. W. 471.

Judge Thompson, although admitting that the rule in Missouri is contrary to that in most jurisdictions, maintains that the right to open and close rests in the sound discretion of the court and that an error committed in that regard will not be sufficient to reverse a cause unless it is plainly made to appear that injury has resulted therefrom. *Elder v. Oliver*, 30 Mo. App. 575. To the same effect, see *Watkins v. Atwell*, — Tex. Civ. App. —, 45 S. W. 404; *Parker v. Kelly*, 61 Wis. 552, 21 N. W. 539.

And in other jurisdictions also it is said that an erroneous permission to open and close will not be ground for reversal unless it plainly appears that injury resulted. *Moore v. Brown*, 81 Ga. 10, 6 S. E. 833; *Seiler v. Economic L. Asso.* 105 Iowa, 87, 43 L.R.A. 537, 74 N. W. 941; *Stith v. Fullinwider*, 40 Kan. 73, 19 Pac. 314.

In other cases it is maintained that a judgment will not be reversed because of error in awarding the right to open and close, unless it is shown that the court abused its discretion. *Carpenter v. First Nat. Bank*, 119 Ill. 352, 10 N. E. 18; *Goetz v. Sona*, 65 Ill. App. 78; *Perry v. Archard*, 1 Ind. Terr. 487, 42 S. W. 421; *Fred Miller Brewing Co. v. De France*, 90 Iowa, 395, 57 N. W. 959; *White v. Adams*, 77 Iowa, 295, 42 N. W. 199; *Coombs Commission Co. v. Block*, 130 Mo. 668, 32 S. W. 1139; *Meredith v. Wilkinson*, 31 Mo. App. 1; *Henry Gaus & Sons Mfg. Co. v. Magee, L. & La. B. Mfg. Co.* 42 Mo. App. 307; *Morehead Bkg. Co. v. Walker*, 121 N. C. 115, 28 S. E. 253.

In yet other jurisdictions the award of the opening and closing is looked upon merely as a matter of practice and is not reviewable on appeal. *Twaddell v. Chester City Traction Co.* 6 Del. Co. Rep. 399; *Overy v. Gordon*, 13 App. D. C. 392; *Shober v. Wheeler*, 113 N. C. 370, 18 S. E. 328; *Blume v. Hartman*, 115 Pa. 32, 8 Atl. 219.

Error of refusal is not cured by allowing the claimant the closing address. *Penhryn Slate Co. v. Meyer*, 8 Daly, 61. But the erroneous ruling may be corrected when discovered after all the evidence has been introduced and the party having the burden of proof be allowed the opening and conclusion of the argument. *McCalla v. American Freehold Land Mortg. Co.* 90 Ga. 113, 15 S. E. 687.

4. Duty to begin.

The party who has the right to begin may be required to do

so; and, if he refuse, the other party may rest on the admission which gave the right to begin, and take a verdict accordingly.¹

¹ *Osborne v. Kline*, 18 Neb. 344, 25 N. W. 360.

5. Waiver of the opening and closing.

The right to open and close may be waived by the party entitled to it, and such waiver will be implied from conduct inconsistent with the assertion of the right.¹

¹ The party entitled to open and close has been held to have waived the right by acquiescing in a ruling of the court permitting the other party to open and conclude. *Frey v. Mathias*, 18 Ky. L. Rep. 913, 38 S. W. 871; *Sherman v. Hale*, 76 Iowa, 383, 41 N. W. 48. Or by not claiming the affirmative at the proper time. *Crawford v. Tyng*, 7 Misc. 239, 27 N. Y. Supp. 424. Or by permitting the other party without objection to assume the right in the absence of a ruling by the court. *Burgess v. Burgess*, 44 Neb. 16, 62 N. W. 242; *Dallas & G. R. Co. v. Chenault*, 4 Tex. App. Civ. Cas. (Willson) 171, 16 S. W. 173.

What amounts to a waiver of right. See *Goodwin v. Hirsh*, 5 Jones & S. 503; *Merrill v. Calcagnimo*, 8 N. Y. Week. Dig. 487; *De Graff v. Carmichael*, 13 Hun, 129; *Ransone v. Christian*, 56 Ga. 351; *Wheatley v. Phelps*, 3 Dana, 302; *Bowen v. Spears*, 20 Ind. 146.

An exception to a ruling awarding the right to open and close will not be deemed to have been waived by the party denied the right asking an instruction that the burden of proof is on the other party. *Fireman's Ins. Co. v. Schwing*, 10 Ky. L. Rep. 883, 11 S. W. 14.

VI.—THE OPENING.

1. Limits of plaintiff's opening.
 - a. In general.
 - b. Rehearsing evidence.
 - c. Irrelevant and impertinent matters.
 - d. Stating the law.
 - e. Exception.
2. Reading the pleadings.
3. Motion to dismiss, or for verdict, on the opening.
4. Defendant's opening.

1. Limits of plaintiff's opening.

a. *In general*—The object of an opening is to state briefly the nature of the action, the substance of the pleadings, the points in issue, the facts, and the substance of the evidence counsel is about to introduce.¹

Plaintiff's counsel in opening may also state the nature of the defense, if it appears upon the record,² and the manner in which he proposes to disprove it,³ though statement of anticipated defense is improper.⁴

¹ *Kley v. Healy*, 127 N. Y. 555, 28 N. E. 593.

Facts in the history of the case showing how it came to be before the jury for trial may be referred to; as, a statement that the case was brought from another county on a change of venue, without stating the ground of the change. *Vawter v. Hultz*, 112 Mo. 633, 20 S. W. 689. And while it is not proper to state the course and result of a former trial, a mere statement that an appeal from a former trial was taken by defendant will not demand a reversal. *Elliott v. Luengene*, 20 Misc. 18, 44 N. Y. Supp. 775. See also *Smith v. Nippert*, 79 Wis. 135, 48 N. W. 253.

If a matter stated be pertinent to an issue, the court cannot exclude it; nor can its action be questioned because counsel subsequently fail to support the statement by offer of proof. So held as to a reference to a defense subsequently abandoned. *Hall v. Needles*, 1 Ind. Terr. 146, 38 S. W. 671.

² *Ayrault v. Chamberlain*, 33 Barb. 229; *Mulligan v. Smith*, 32 Colo. 404, 76 Pac. 1063.

³ *1 Burrill*, Pr. 234.

⁴ The English practice of anticipating the defense does not prevail with us. *Kansas City Southern R. Co. v. Murphy*, 74 Ark. 256, 85 S. W. 428; *Mulligan v. Smith*, 32 Colo. 404, 76 Pac. 1063; *Ayrault v. Chamberlain*, 33 Barb. 229. See also *Elwell v. Chamberlin*, 31 N. Y. 611, 614, citing with approval the *Ayrault-Chamberlain Case*; *Hudson v. Roos*, 76 Mich. 173, 42 N. W. 1099. And see *Baker v. State*, 69 Wis. 32, 33 S. W. 52, excluding statement in opening by prosecution in bastardy case, that defendant would introduce testimony touching the character of prosecutrix, and as to what he tried to prove on a former trial.

b. Rehearsing evidence.—Counsel has not a right to state intended evidence in detail,¹ nor to read documents he proposes to offer, so as to get matter before the jury without opportunity for the court to decide on its admissibility.² But he may state the material facts he relies on,³ and in so doing may refer to documents to refresh his memory; or use a map or diagram to explain those facts.⁴

¹ *Zucker v. Karpeles*, 88 Mich. 413, 50 N. W. 373.

² *Scripps v. Reilly*, 35 Mich. 371, 24 Am. Rep. 575; *McFadden v. Morning Journal Asso.* 28 App. Div. 508, 51 N. Y. Supp. 275.

³ *Giffen v. Lewiston*, 6 Idaho, 231, 55 Pac. 545; *Kley v. Healy*, 127 N. Y. 555, 28 N. E. 593. As, the earning capacity of plaintiff before and since the injury for which damages are sought. *McKormick v. West Bay City*, 110 Mich. 265, 68 N. W. 148.

The opening in fact amounting to little more than an offer to prove certain facts: and he is not restricted to a statement of such facts as would be admissible under the strict rules governing the admission of testimony. *Campbell v. Kalamazoo*, 80 Mich. 655, 45 N. W. 652 (refusing to reverse because counsel stated facts not competent to be proved).

⁴ *Battishill v. Humphreys*, 64 Mich. 494, 31 N. W. 894 (reversing judgment for error in refusing to allow counsel for defendant to so use a diagram). But *Hill v. Watkins Water & Sewer Comrs.* 77 Hun, 491, 28 N. Y. Supp. 805, holds it discretionary with the court to allow counsel to so use a map not then proved or put in evidence.

c. Irrelevant and impertinent matters.—Counsel has not a right to state matters outside of the issues, or matters calculated to prejudice the jury or arouse their sympathy.¹

¹ *Hennies v. Vogel*, 87 Ill. 242; *McKormick v. West Bay City*, 110 Mich. 265, 68 N. W. 148.

But only bad faith or a gross misconception of what is admissible, resulting in bringing to the attention of the jury matters wholly ir-

relevant, or of a nature calculated to create so profound an impression that the charge of the court cannot remove the prejudice created, will warrant reversal on the ground that counsel has violated this rule. *Prentiss v. Bates*, 93 Mich. 234, 17 L.R.A. 494, 53 N. W. 153. So, reversal is not imperative where he was not explicitly cautioned not to refer to the matter, and the court instructed the jury to disregard his remarks. *Young v. Fox*, 26 App. Div. 261, 49 N. Y. Supp. 634. Or the reference was indefinite, and the evidence thereunder was distinctly pronounced by the court to be incompetent and not germane to the issues. *Belle of Nelson Distilling Co. v. Riggs*, 104 Ky. 1, 45 S. W. 99. And especially where the improper statement was withdrawn immediately after an exception, with an acknowledgment that it was not justified under the existing state of the record, though the acknowledgment did not state that words withdrawn were untrue. *Erb v. German-American Ins. Co.* 98 Iowa, 606, 40 L.R.A. 845, 67 N. W. 583.

The statement cannot make a case not included in the complaint. *Douglas v. Marsh*, 141 Mich. 209, 104 N. W. 624.

d. Stating the law.—Though counsel has not a right to read law to the jury or to usurp the province of the court in any way, in this respect,¹ he has the undoubted right to state in good faith so much of the law, as he claims it to be, in so far as it is necessary to give the jury an understanding of his theory of the case, or to enable him to lay before the jury an intelligent idea of the force, effect, and bearing of the testimony on his case.²

¹ *Giffen v. Lewiston*, 6 Idaho, 231, 55 Pac. 545.

² *Fosdick v. Van Arsdale*, 74 Mich. 302, 41 N. W. 931; *Prentiss v. Bates*, 93 Mich. 234, 17 L.R.A. 494, 53 N. W. 153; *San Miguel Consol. Gold Min. Co. v. Bonner*, 33 Colo. 207, 79 Pac. 1025.

e. Exception.—An exception lies to allowing counsel to go beyond the above limits in opening.¹

¹ Such exceptions should be sustained if a verdict is obtained apparently in consequence of the error. *Scripps v. Reilly*, 38 Mich. 10; *Porter v. Throop*, 47 Mich. 313, 11 N. W. 174; *Rickabus v. Gott*, 51 Mich. 227; 16 N. W. 384; *Bendetson v. Moody*, 100 Mich. 553, 59 N. W. 252. And see *Ayrault v. Chamberlain*, 33 Barb. 229.

Otherwise, however, where the error worked no injury. *Phenix Ins. Co. v. Weeks*, 45 Kan. 751, 26 Pac. 410; *Brusie v. Peck Bros. & Co.* 42 N. Y. S. R. 801, 16 N. Y. Supp. 645. Or was waived or cured by action of the parties or court. *Eickhoff v. Eikenbary*, 52 Neb. 332, 72 N. W. 308; *Lamb v. Lippincott*, 115 Mich. 611, 73 N. W. 887; *Welch v.*

Palmer, 85 Mich. 310, 48 N. W. 552; Felch v. Weare, 66 N. H. 582, 27 Atl. 226; McFadden v. Morning Journal Asso. 28 App. Div. 508, 51 N. Y. Supp. 275; Young v. Fox, 26 App. Div. 261, 49 N. Y. Supp. 634; Ruege v. Gates, 71 Wis. 634, 38 N. W. 181. Or where no evidence was offered to sustain the statement. Baumier v. Artiau, 79 Mich. 509, 44 N. W. 939. Or there was no ruling by the trial court upon the question. Chicago Trust & Sav. Bank v. Landfield, 73 Ill. App. 173.

And a judgment should not be reversed because counsel misstated the nature of the cause of action charged, in the absence of apparent prejudice to defendant thereby. Lee v. Campbell, 77 Wis. 340, 46 N. W. 497. Nor because he relied on defendant's liability under a theory not afterward conclusively established, where the liability is conclusively established on another theory equally within the declaration. "It would be technical and unjust to reverse the judgment, and put the plaintiffs to the expense of a new trial, for no other reason than that counsel did not state their case as broadly as they might." Clark v. O'Rourke, 111 Mich. 108, 69 N. W. 147.

2. Reading the pleadings.

It is not error to allow counsel, in opening, to read the pleadings of the adverse party as far as to show what is the issue to be tried.¹ Subject to this rule, it is a matter of discretion with the judge whether he will allow the pleadings to be read to the jury,² except so far as they have first been put in evidence. If they contain irrelevant allegations raising issues improper for the jury's consideration it is proper to prohibit them from being read,³ unless put in evidence.

¹ Tisdale v. Delaware & H. Canal Co. 116 N. Y. 416, 22 N. E. 700. This case does not necessarily imply that on the trial of an issue as to one cause of action, admissions contained in a defense in the answer relating only to a separate cause of action could be thus used until formally received in evidence.

² It is within the discretion of the court to permit counsel to read them to the jury, or not, as he pleases. Hackman v. Maguire, 20 Mo. App. 286. And because they were not so read is no reason for excluding testimony offered to prove allegations contained in them. Allen v. Hogan, 4 Tex. App. Civ. Cas. (Willson) 136, 16 S. W. 176.

³ The reason is that the pleadings are for the court; the counsel may be required to read them or state their substance, if necessary, to enable the court to understand the issues raised or the materiality of evidence offered; but the facts stated in them, except so far as admitted, cannot be considered by the jury until put in evidence. Willis v. Forrest, 2 Duer, 310, S. P. Drew v. Andrews, 8 Hun, 23. Compare Garfield v. Knight's Ferry & Table Mountain Water Co. 14 Cal. 35.

The right to read the adverse party's pleading in evidence against him is another matter. See chapter xiv.

3. Motion to dismiss, or for verdict, on the opening.

If counsel's opening discloses a fatal objection to his action or defense, or if he expressly puts his case solely on a ground untenable in point of law, the court may refuse to hear evidence in support of it, and dismiss the complaint or direct a verdict.¹ To justify granting such a motion the admission must be one which is necessarily fatal to the case.² It is not good practice to grant such a motion unless the opening has been taken down by the stenographer, or the statements relied on are noted in writing.

¹ Familiar practice, and sustained more or less expressly in *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Ward v. Jewett*, 4 Robt. 714; *Garrison v. McCullough*, 28 App. Div. 467, 51 N. Y. Supp. 128; *Crisup v. Grosslight*, 79 Mich. 380, 44 N. W. 621.

The reason is, that the court ought not to spend time in hearing evidence of facts that will not sustain an action. *Garrison v. McCullough*, 28 App. Div. 467, 51 N. Y. Supp. 128. If the court is one in which a nonsuit cannot be ordered without plaintiff's consent, a verdict may be directed. *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539.

But it is held not good practice in *Leonard v. Beaudry*, 68 Mich. 312, 36 N. W. 88. Unless on a clear opening statement, it is plainly evident therefrom that no case can be made out. *Emmerson v. Weeks*, 58 Cal. 382. And is not allowed in Wisconsin. *Smith v. Commonwealth Ins. Co.* 49 Wis. 322, 5 N. W. 804; *Haley v. Western Transit Co.* 76 Wis. 344, 45 N. W. 16.

A verdict cannot be directed against a defendant on the opening of counsel, unless it appears that, giving such statements the effect of evidence, a verdict for defendant could not be sustained. *Carr v. Delaware, L. & W. R. Co.* 78 N. J. L. 692, 75 Atl. 928.

The court cannot direct a verdict on plaintiff's opening, as insufficient, in a cause not founded on a corrupt cause of action. *Martin v. Emerich Outfitting Co. v. Siegel, C. & Co.* 108 Ill. App. 364.

² *Stewart v. Hamilton*, 3 Robt. 672, 18 Abb. Pr. 298, 28 How. Pr. 265; *Wilson v. Press Pub. Co.* 14 Misc. 514, 36 N. Y. Supp. 12; *Emmerson v. Weeks*, 58 Cal. 382; *Noble v. Frack*, 5 Kan. App. 786, 48 Pac. 1004; *Lindley v. Atchison, T. & S. F. R. Co.* 47 Kan. 432, 28 Pac. 201. Mere incompleteness of the statement not being enough when the incompleteness is supplied by the allegations of a good pleading. *Noble v. Frack*, supra. And, upon conflict of opinion between court and counsel as to what was in fact stated, counsel assures the court that

his statement corresponded with the allegations of his pleading, under which the proffered evidence is clearly admissible. *Butler v. National Home for Disabled Volunteer Soldiers*, 144 U. S. 64, 36 L. ed. 346, 12 Sup. Ct. Rep. 581.

On motion to dismiss on the opening, all the facts alleged in the complaint, and those referred to in the opening as expected to be proved, are to be considered, in the absence of specific objection that they are not admissible under the pleadings. *Clews v. Bank of New York Nat. Bkg. Asso.* 105 N. Y. 398, 42 Am. Rep. 303, 11 N. E. 814; *Roblee v. Indian Lake*, 11 App. Div. 435, 42 N. Y. Supp. 326. And this even though the facts stated in the opening are not stated in the complaint. *Scott v. New York*, 27 App. Div. 240, 50 N. Y. Supp. 191. And *Kley v. Healy*, 127 N. Y. 555, 28 N. E. 593, holds that on appeal from a dismissal on plaintiff's opening, on the ground of insufficiency, plaintiff's opening, if it does not appear in the appeal book, will be presumed to comprise the substance of the complaint; and any offer to prove, made in connection with the opening, unless objected to as inadmissible under the pleadings, will be regarded as part thereof. But *Steele v. Wells*, 49 N. Y. S. R. 646, 20 N. Y. Supp. 736, holds that dismissal on such motion after plaintiff's opening should not be on the merits.

Omitting facts in the opening essential to plaintiff's case, as well as defects in proof on resting, are immaterial if supplied by proof subsequently adduced by either party. *Fulton v. Metropolitan L. Ins. Co.* 4 Misc. 76, 23 N. Y. Supp. 598.

4. Defendant's opening.

Generally, both at common law and under the Codes, counsel for defendant does not open his defense until plaintiff's evidence has been heard and plaintiff has rested.¹

¹This is the usual practice. But in Illinois it is generally the practice to require defendant to open immediately after plaintiff has opened; and whether defendant may reserve his opening until plaintiff has rested his case, or follow the usual practice of that state, is discretionary with the trial judge. *Sands v. Potter*, 165 Ill. 397, 46 N. E. 282; *D. Sinclair Co. v. Waddill*, 200 Ill. 17, 65 N. E. 437.

In New York the General Rules of Practice were amended in 1910 by including the following provision: "In the trial of civil causes, unless the justice presiding or the referee shall otherwise direct, each party shall open his case before any evidence is introduced, and, except by special permission of the court, no other opening by either party shall thereafter be permitted."

VII.—ORDER OF PROOF.

1. In general; discretion of the court.
2. Order as between the two parties to the case.
 - a. Each side in turn must exhaust his case.
 - b. Anticipatory rebuttal.
 - c. Right of rebuttal.
 - d. Defendant's right of reply.
 - e. Recalling witnesses.
 - f. Cross-examination.
 - (1) Limits of, generally.
 - (2) Of party testifying in his own behalf.
 - (3) Cross-examination at large in discretion of court.
 - g. Several defendants.
 - h. Counterclaim.
 - i. Reopening.
3. Order as between different items of each party's evidence in chief.
 - a. In general.
 - b. Where competency of evidence depends on proof of other facts.

1. In general; discretion of the court.

In treating the question of the order in which evidence is to be presented, it is necessary to consider first the whole mass of evidence, the order of proof as between the two parties to the action, and second the order of presenting the various items of testimony in each party's case. Generally the order of proof, whether as between the two parties or with reference to the different items of evidence in each party's case, rests in the sound discretion of the trial court,¹ and the exercise of this discretion is no reviewable² except for manifest abuse.³ Statutes controlling the order of proof almost uniformly permit the statutory order to be varied in the court's discretion.⁴

¹ *Nutter v. O'Donnell*, 6 Colo. 253; *San Miguel Consol. Gold Min. Co. v. Bonner*, 33 Colo. 207, 79 Pac. 1025; *Doane v. Cummins*, 11 Conn. 152; *Hazleton v. LeDuc*, 10 App. D. C. 379; *Cook County Comrs. v. Harley*, 174 Ill. 412, 51 N. E. 754, affirming 75 Ill. App. 218; *Miller v. Dill*, 149 Ind. 326, 49 N. E. 272; *Wells v. Kavanagh*, 74 Iowa, 372, 37 N. W. 780; *Wellersburg & W. N. Pl. Road Co. v. Bruce*, 6 Md. 457; *Watson v. Watson*, 53 Mich. 168, 51 Am. Rep. 111, 18 N. W. 605; *Me-*

Donald v. Peacock, 37 Minn. 512, 35 N. W. 370; Consaul v. Sheldon, 35 Neb. 248, 52 N. W. 1104; Kent v. Tyson, 20 N. H. 121; Trade Ins. Co. v. Barracliff, 45 N. J. L. 543, 46 Am. Rep. 792; Morris v. Wadsworth, 17 Wend. 103; Staring v. Bowen, 6 Barb. 109; Ripley v. Arledge, 94 N. C. 467; Bowman v. Eppinger, 1 N. D. 21, 44 N. W. 1000; Bean v. Green, 33 Ohio St. 444; Helfrich v. Stem, 17 Pa. 143; Dodge v. Goodell, 16 R. I. 48, 12 Atl. 236; Stephens v. Union Assur. Soc. 16 Utah, 22, 50 Pac. 626; State v. Magoon, 50 Vt. 333; Schultz v. Catlin, 78 Wis. 611, 47 N. W. 946; Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. 553; Maurice v. Hunt, 80 Ark. 476, 97 S. W. 664; Nolan v. Newtown Street R. Co. 206 Mass. 384, 92 N. E. 505; Braydon v. Goulman, 1 T. B. Mon. 116; Hocker v. Davis, 2 T. B. Mon. 119; Ponca v. Crawford, 18 Neb. 551, 26 N. W. 365.

But the discretion of the trial court with respect to the order of proof will not authorize it to exclude legal evidence offered in its proper order. McManus v. Mason, 43 W. Va. 196, 27 S. E. 293.

² Drum v. Harrison, 83 Ala. 384, 3 So. 715; Dubuque v. Coman, 64 Conn. 475, 30 Atl. 777; Bannon v. Warfield, 42 Md. 22; Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; Territory v. O'Donnell, 4 N. M. 196, 12 Pac. 743.

This rule seems also to obtain in the Federal courts and in Illinois. Philadelphia & T. R. Co. v. Stimpson, 14 Pet. 448, 463, 10 L. ed. 535, 543; Johnston v. Jones, 1 Black, 210, 227, 17 L. ed. 117, 122; First Unitarian Soc. v. Faulkner, 91 U. S. 415, 23 L. ed. 283; Turner v. United States, 13 C. C. A. 436, 30 U. S. App. 90, 66 Fed. 280; Lansburgh v. Wimsatt, 7 App. D. C. 271; Birmingham v. Pettit, 21 D. C. 209; Wickenkamp v. Wickenkamp, 77 Ill. 92; First Nat. Bank v. Lake Erie & W. R. Co. 174 Ill. 36, 50 N. E. 1023, affirming 65 Ill. App. 21. But see, as intimating that the discretion may be revised for abuse, Golbsby v. United States, 160 U. S. 70, 40 L. ed. 343, 16 Sup. Ct. Rep. 216; Throckmorton v. Holt, 12 App. D. C. 552; Olmstead v. Webb, 5 App. D. C. 38; Washington Ice Co. v. Bradley, 171 Ill. 255, 49 N. E. 519, affirming 70 Ill. App. 313.

³ Barkly v. Copeland, 74 Cal. 1, 15 Pac. 307; Robert E. Lee Silver Min. Co. v. Englebach, 18 Colo. 106, 31 Pac. 771; Walker v. Walker, 14 Ga. 242; Western U. Teleg. Co. v. Buskirk, 107 Ind. 549, 8 N. E. 557; Donaldson v. Mississippi & M. R. Co. 18 Iowa, 280, 87 Am. Dec. 391; Majer v. Massachusetts Den. Asso. 107 Mich. 687, 65 N. W. 552; Winterton v. Illinois C. R. Co. 73 Miss. 831, 20 So. 157; Bell v. Jamison, 102 Mo. 71, 14 S. W. 714; McCleneghan v. Reid, 34 Neb. 472, 51 N. W. 1037; Dosch v. Diem, 176 Pa. 603, 35 Atl. 207; San Antonia & A. P. R. Co. v. Robinson, 79 Tex. 608, 15 S. W. 584; Lewis v. Alkire, 32 W. Va. 504, 9 S. E. 890; Cogswell v. West Street & N. E. Electric R. Co. 5 Wash. 46, 31 Pac. 411; McGowan v. Chicago & N. W. R. Co. 91 Wis. 147, 64 N. W. 891.

But a party is entitled to a decision in the exercise of this discretion, and it is error for the court to reject *suo sponte* on an illegal ground evi-

dence which it had the discretion to reject as offered out of the regular order. *French v. Hall*, 119 U. S. 152, 30 L. ed. 375, 7 Sup. Ct. Rep. 170.

⁴ *Lowenstein v. Finney*, 54 Ark. 124, 15 S. W. 153; *Matts v. Borba*, — Cal. —, 37 Pac. 159; *Denver v. Dunsmore*, 7 Colo. 329, 3 Pac. 705; *McNichols v. Wilson*, 42 Iowa, 385; *Gandy v. Early*, 30 Neb. 183, 46 N. W. 418; *Morris v. Faurot*, 21 Ohio St. 155, 8 Am. Rep. 45; *Davis v. Emmons*, 32 Or. 389, 51 Pac. 652. Similar statutes exist in a number of other states.

In *Barkley v. Bradford*, 100 Ky. 304, 38 S. W. 432, a peculiar Code provision that "no person shall testify for himself in chief in an ordinary action after introducing other testimony for himself in chief" is held to be merely a rule of practice, and its violation is not cause for reversal where the appellant has not been prejudiced.

2. Order as between the two parties to the case.

a. Each side in turn must exhaust his case.—While, as has been stated in the preceding paragraph, the whole question of the order of proof rests in the discretion of the court, yet it is manifest that to avoid confusion there should be some regular method for the introduction of evidence and the examination of witnesses, and, therefore, as a general rule he who has the opening ought to introduce all his evidence to make out his side of the issue, except that which merely serves to answer the adversary's case; then the evidence of the adversary is heard, and, finally, the party who had the opening may introduce rebutting evidence which merely serves to answer or qualify his adversary's case.¹ Rebutting evidence within this rule means not all evidence whatever which contradicts defendant's witnesses and corroborates plaintiff's, but evidence in denial of some affirmative case or fact which defendant has attempted to prove.² Neither side ought to be permitted to give evidence by piecemeal.³

This rule does not prevent a party who has closed his case from supporting it further by the cross-examination of his adversary's witnesses,⁴ nor from using parts of documents which the adversary has put in for the purpose of using other parts against him. And the judge has discretionary power to receive evidence in chief during the rebuttal.⁵

¹ 3 Wigmore, Ev. § 1866; *Sandwich v. Dolan*, 42 Ill. App. 53; *Braydon v. Goulman*, 171 B. Mon. 116; *Silverman v. Foreman*, 3 E. D. Smith, 322; *Pettibone v. Derringer*, 4 Wash. C. C. 215, Fed. Cas. No. 11,043.

Gilpins v. Consequa, Pet. C. C. 85, 3 Wash. C. C. 184. Fed. Cas. No. 5,452; Robinson v. Parker, 11 App. D. C. 132; Macullar v. Wall, 6 Gray, 507; Hathaway v. Hemingway, 20 Conn. 195; Belden v. Allen, 61 Conn. 173, 23 Atl. 963; Bannon v. Warfield, 42 Md. 22, 39; Walker v. Walker, 14 Ga. 242, 250; Graham v. Davis, 4 Ohio St. 362, 62 Am. Dec. 285; Babcock v. Babcock, 46 Mo. 243; Ludden v. Sumter, 47 S. C. 335, 25 S. E. 150; State v. Fox, 25 N. J. L. 566; Hastings v. Palmer, 20 Wend. 225; Ford v. Niles, 1 Hill. 300; Marshall v. Davies, 78 N. Y. 414, 420; reversing 16 Hun, 606; Agate v. Morrison, 84 N. Y. 672; Duffy v. Hickey, 68 Wis. 380, 32 N. W. 54.

Plaintiff has no right to withhold a part of his testimony until he ascertains to what extent it will be contradicted by defendant, and then introduce the remainder of his testimony on rebuttal; but the action of the trial judge in reopening the case to permit evidence in rebuttal is within his discretion, and not subject to review on appeal. Barson v. Mulligan, 77 App. Div. 192, 79 N. Y. Supp. 31.

In Maine it appears to be of course to allow the party to give cumulative evidence after closing, unless notified then by the judge that he will not be allowed to do so. Dane v. Treat, 35 Me. 198. The rule is not strictly applied in New Hampshire. Pierce v. Wood, 23 N. H. 519. And it has been held that the order in which a party shall offer his evidence is for his counsel to determine, unless it is made to appear to the court that some undue advantage is attempted. McDanel v. Logi, 143 Ill. 487, 32 N. E. 423. And that evidence, whenever received, is, unless objected to, properly before the court. Alling v. Forbes, 68 Conn. 575, 37 Atl. 390.

But where the witnesses are numerous a rule announced in advance, that merely cumulative testimony will not be received in rebuttal, may be enforced unless it clearly prejudices the complaining party. Snow v. Starr, 75 Tex. 411, 12 S. W. 673.

In some of the states plaintiff having rested with a prima facie case is allowed to support it further during rebuttal. Claves v. Ferris, 10 Vt. 112; Snow v. Starr, 75 Tex. 411, 12 S. W. 673; Mayer v. Walker, 82 Tex. 222, 17 S. W. 505. Unless defendant gave no contrary evidence. Pingry v. Washburn, 1 Aik. (Vt.) 264, 15 Am. Dec. 676; Ayers v. Harris, 77 Tex. 108, 13 S. W. 768. So, in Iowa, plaintiff in an action on a policy of fire insurance may first introduce evidence of the value of the insured property in rebuttal of defendant's evidence upon that point, the policy being made by statute prima facie evidence of such value. Martin v. Capital Ins. Co. 85 Iowa, 643, 52 N. W. 534. And in Georgia a widow who has rested with a prima facie case, in an action against a railway company for her husband's death, by proving the injury and his freedom from negligence, may show that the company's defense that it was not negligent is not true. Central R. & Bkg. Co. v. Nash, 81 Ga. 580, 7 S. E. 808. And facts confirmatory of a prima facie case cannot be withheld and offered in rebuttal unless

they do in fact rebut the defendant's case. *Toledo & O. C. R. Co. v. Wales*, 11 Ohio C. C. 371, 5 Ohio C. D. 168.

- ² *Silverman v. Foreman*, 3 E. D. Smith, 322 (opinion by Woodruff, J.), approved in *Marshall v. Davies*, 78 N. Y. 414, 420, reversing 16 Hun, 606; *Watkins v. Rist*, 68 Vt. 486, 35 Atl. 431; *Thompson v. Clay*, 60 Mich. 627, 27 S. W. 699; *Longino v. Shreveport Traction Co.* 120 La. 803, 45 So. 732. And see reasoning in *Goss v. Turner*, 21 Vt. 437.

But rebutting testimony to that of a specified witness is any evidence which bears against the truth or accuracy of his testimony. *Davis v. Covington & M. R. Co.* 77 Ga. 322, 2 S. E. 555.

- ³ *Sandwich v. Dolan*, 141 Ill. 430, 31 N. E. 416; *Braydon v. Goulman*, 1 T. B. Mon. 116; *Bannon v. Warfield*, 42 Md. 22, 39.

- ⁴ It is competent for a party, after having closed his case so far as relates to the evidence, to introduce additional evidence by the cross-examination of the witnesses on the other side, for the purpose of more fully proving his case. *Com. v. Eastman*, 1 Cush, 189, 48 Am. Dec. 596. So, a party may introduce in evidence a document in support of his claim which is proved after the close of his case by cross-examination of the attesting witness called by his adversary for other purposes. *Carruth v. Bayley*, 14 Allen, 532. And a party may, in the discretion of the court, support his case by eliciting from his adversary's witnesses on cross-examination evidence which would be legitimate in rebuttal. *Ranney v. St. Johnsbury & L. C. R. Co.* 67 Vt. 594, 32 Atl. 810.

But plaintiff cannot, after he has closed his case, cross-examine defendant's witness on a subject not a part of his examination in chief and upon which plaintiff has offered no evidence, although, if material, it was part of his opening case. *Carey v. Hart*, 63 Vt. 424, 21 Atl. 537.

- ⁵ *Buckingham v. Harris*, 10 Colo. 455, 15 Pac. 817; *State v. Alford*, 31 Conn. 40; *Morehouse v. Morehouse*, 70 Conn. 420, 30 Atl. 516; *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 17 L.R.A. 33, 9 So. 661; *Walker v. Walker*, 14 Ga. 242; *Augusta & S. R. Co. v. Randall*, 85 Ga. 297, 11 S. E. 706; *Miller v. Preble*, 142 Ind. 632, 42 N. E. 220; *Braydon v. Goulman*, 1 T. B. Mon. 116; *Rosquist v. D. M. Gilmore Furniture Co.* 50 Minn. 192, 52 N. W. 385; *McClellan v. Hein*, 56 Neb. 600, 77 N. W. 120.

b. Anticipatory rebuttal.—A party may properly be allowed as part of his case in chief to give evidence to rebut matter which is foreshadowed by the defense or which his adversary avows an intention of relying on.¹ But he is not required to do so.² If he does so he makes it part of his case and further evidence on the point is not of right allowable in rebuttal.³

¹ *Dimick v. Downs*, 82 Ill. 570, 572; *Hintz v. Graupner*, 138 Ill. 158, 27 N.

E. 935; Williams v. Dewitt, 12 Ind. 309; York v. Pease, 2 Gray, 282; Violet v. Rose, 39 Neb. 660, 58 N. W. 216; Bancroft v. Sheehan, 21 Hun, 550; Dunn v. People, 29 N. Y. 523, 86 Am. Dec. 319 (the avowal here was in answer to a question put by the judge); Jones v. New York, N. H. & H. R. Co. 20 R. I. 210, 37 Atl. 1033; Neilson v. Nebo Brown Stone Co. 25 Utah, 37, 69 Pac. 289; *dictum* to contrary in States v. Holmes, 1 Cliff. 98, Fed. Cas. No. 15,382.

In some jurisdictions the admission of such evidence is an irregularity, but not prejudicial error where the other party afterwards adduces evidence which would have made the admitted evidence relevant in rebuttal. East Tennessee, V. & G. R. Co. v. Hesters, 90 Ga. 11, 15 S. E. 828; Easley v. Missouri P. R. Co. 113 Mo. 236, 20 S. W. 1073.

But plaintiff cannot properly give evidence of his residence, although defendant has pleaded a judgment in garnishment rendered in another state, until defendant has introduced some evidence of the judgment. Terre Haute & I. R. Co. v. Baker, 122 Ind. 433, 24 N. E. 83. So, evidence of improvements set up by plaintiff in an action to determine the title to real property as a claim under the Minnesota occupying claimants' act, in reply to defendant's answer in the nature of a complaint in ejectment, is no part of the plaintiff's case in chief. Mueller v. Jackson, 39 Minn. 431, 40 N. W. 565.

² Dodge v. Dunham, 41 Ind. 186; Bancroft v. Sheehan, 21 Hun, 550; Laubenheimer v. Bach, 19 Mont. 177, 47 Pac. 803; Blaut v. Gross, 47 Misc. 685, 94 N. Y. Supp. 324.

Plaintiff in a civil action for slander is not called upon to prove a good character until defendant by his testimony has attempted to cast suspicion upon it. Cooper v. Francis, 37 Tex. 445.

A party is not bound to prove payment of a claim set off against his cause of action until his adversary has concluded his proof tending to establish it. Luke v. Bruner, 15 Iowa, 3.

Plaintiff in an action on a note cannot be compelled to give evidence on the question of the defense of no consideration, in advance of the defendant's evidence. Andrews v. Hayden, 10 Ky. L. Rep. 1049, 11 S. W. 428.

³ Casey v. Le Roy, 38 Cal. 697; Williams v. Dewitt, 12 Ind. 309 (where it was held error to allow it, citing Browne v. Murray, Ryan & M. 254); Dugan v. Anderson, 36 Md. 567, 588, 11 Am. Rep. 509; Herrick v. Swomley, 56 Md. 439; Holbrook v. McBride, 4 Gray, 215.

c. Right of rebuttal.—A party has a right in rebuttal to give evidence which tends to meet the affirmative case, if any, sought to be established by his adversary,¹ and it is error to refuse it;² and it is no objection to such evidence that it incidentally tends

also to corroborate the party's case in chief³ nor that it may necessitate allowing the adverse party a surrebuttal.⁴

¹ *Louisville Underwriters v. Durland*, 123 Ind. 544, 7 L.R.A. 399, 24 N. E. 221; *Sebastian May Co. v. Codd*, 77 Md. 293, 26 Atl. 316. *Bounds v. Little*, 79 Tex. 128, 15 S. W. 225; *St. Paul Plow Works v. Starling*, 140 U. S. 184, 35 L. ed. 404, 11 Sup. Ct. Rep. 803; *Hallam v. Post Pub. Co.* 55 Fed. 456; *Manhattan L. Ins. Co. v. O'Neil*, 33 C. C. A. 607, 61 U. S. App. 470, 90 Fed. 463; *Lanning v. Chicago, B. & Q. R. Co.* 68 Iowa, 502, 27 N. W. 478.

Evidence is admissible in rebuttal of a defense set up in the pleadings and supported by testimony, notwithstanding the withdrawal of such defense by consent of court and counsel. *Bullbuan v. North British & M. Ins. Co.* 159 Mass. 118, 34 N. E. 169.

A party need not rely upon the general evidence of his opening case to overcome a specific point developed by the defense, but may give such point a direct specific denial in rebuttal. *Stillwell v. Farewell*, 64 Vt. 286, 24 Atl. 243. A party may in the discretion of the court give testimony in rebuttal contradictory of that which he gave in chief. *Warden v. Nolan*, 10 Ind. App. 334, 37 N. E. 821; *De Remer v. Parker*, 19 Colo. 242, 34 Pac. 980.

² *Tucker v. Tucker*, 113 Ind. 272, 13 N. E. 710; *Chase v. Lee*, 59 Mich. 237, 26 N. W. 483; *Jennings v. Gorman*, 19 Mont. 545, 48 Pac. 1111; *Bancroft v. Sheehan*, 21 Hun, 550; *Odell v. McGrath*, 21 App. Div. 252 (judgment reversed in each case for exclusion of such evidence); *Pokriefka v. Mackurat*, 91 Mich. 399, 51 N. W. 1059; *Blaut v. Gross*, 47 Misc. 685, 94 N. Y. Supp. 324.

Pleadings in a former case introduced by defendant as admissions by the plaintiffs after the latter have closed their direct evidence constitute new matter which is properly subject to rebuttal, and the exclusion of the rebutting evidence is ground for reversal. *Robinson v. Parker*, 11 App. D. C. 132.

³ *State v. Hartigan*, 19 N. H. 248; *Chadbourn v. Franklin*, 5 Gray, 312; (opinion by Shaw, Ch. J.); *Brown v. Swanton*, 69 Vt. 53, 37 Atl. 280.

But evidence essential to plaintiff's recovery cannot be withheld and presented for the first time on rebuttal, even though it tends in some degree to rebut the defendant's evidence. *Moehn v. Moehn*, 105 Iowa. 710, 75 N. W. 521.

⁴ *Scott v. Woodward*, 2 McCord, L. 161.

d. Defendant's right of reply.—After plaintiff's rebuttal defendant has a right in reply to give evidence which tends to meet the affirmative case, if any, or any new and distinct fact sought to be established by plaintiff's rebuttal which defendant had no

opportunity of meeting in his case in chief; and it is error to refuse it.¹

¹ *Clayes v. Ferris*, 10 Vt. 112; *Kent v. Lincoln*, 32 Vt. 591; *National Ben. Asso. v. Harding*, 7 Ohio C. C. 438, 4 Ohio C. D. 668.

Asay v. Hay, 89 Pa. 77. The court says: "Had it been competent for the defendant to prove, in chief, what he offered in rebuttal, the court might have refused a re-examination of the witness. As to matters that require explanation or as to new matter introduced by the opposing interest, a party has a right, in rebuttal, to re-examine his witnesses." So held where the evidence was, incidentally at least, cumulative, but the plaintiff could not have been prejudiced. *Walker v. Fields*, 28 Ga. 237.

A party may offer evidence in reply to deny, modify, or explain evidence admitted on rebuttal which should have been given in chief. *Gandy v. Early*, 30 Neb. 183, 46 N. W. 418; *Woody v. Dean*, 24 S. C. 499. The rule in Vermont, however, strictly excludes evidence in reply on any point defendant has already had full opportunity to meet. *Thayer v. Davis*, 38 Vt. 163.

Evidence properly admissible in chief to sustain the defense will generally be excluded where offered on surrebuttal. *Brown v. Hiatt*, 16 Ind. App. 340, 45 N. E. 481; *Arnold v. Pfoutz*, 117 Pa. 103, 11 Atl. 871; *Howes v. Colburn*, 165 Mass. 385, 43 N. E. 125. Even though defendant did not discover the existence of such evidence until after resting its defense. *Hale v. Life Indemnity & Invest. Co.* 65 Minn. 548, 63 N. W. 182. The right of defendant to introduce testimony in reply is limited to the new matters brought out in the rebuttal. *Chateaugay Ore & Iron Co. v. Blake*, 144 U. S. 476, 36 L. ed. 510, 12 Sup. Ct. Rep. 731. Therefore he is without the right to reply where plaintiff's evidence in rebuttal is confined to counter-evidence to defendant's testimony. *Walker v. Columbia & G. R. Co.* 25 S. C. 141.

In contradicting the adversary's evidence that a particular interview was had, testimony that no such interview ever occurred does not let in evidence in rebuttal that such an interview was had at another time. *Marshall v. Davies*, 78 N. Y. 414, 420.

c. Recalling witnesses.—It is within the court's discretion to require a party calling a witness to complete his examination exhaustively before calling another;¹ but it is error to refuse to allow a witness whose examination has been closed to be recalled for a rebuttal which involves a new subject or a contradiction of what there was not opportunity to contradict on the verdict.²

Subject to this rule it is not improper to require a party advancing evidence upon a subject to exhaust all his evidence as to
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that subject before proceeding to another;³ and whether, after giving evidence on another part of his case, he shall be permitted to return and resume the former subject, is in the discretion of the court.

¹ It is generally discretionary with the trial court to grant or refuse an application for leave to recall a witness who has been examined and dismissed from the stand. *Morningstar v. State*, 59 Ala. 30; *Phelps v. McGloan*, 42 Cal. 298; *Rea v. Wood*, 105 Cal. 314, 38 Pac. 899, citing Cal. Code Civ. Proc. § 2050; *Hollingsworth v. State*, 79 Ga. 605, 4 S. E. 560; *State v. Anthony*, 6 Idaho, 383, 55 Pac. 884, citing Id. Rev. Stat. § 6081; *Anderson Transfer Co. v. Fuller*, 174 Ill. 221, 51 N. E. 251, affirming 73 Ill. App. 48; *Nixon v. Beard*, 111 Ind. 137, 12 N. E. 131; *Samuels v. Griffith*, 13 Iowa, 103; *Fowler v. Strawberry Hill*, 74 Iowa, 644, 38 N. W. 521; *Brown v. State*, 72 Md. 468, 20 Atl. 186; *Girault v. Adams*, 61 Md. 1, 9; *Beaulieu v. Parsons*, 2 Minn. 37, Gil. 26; *Cummings v. Taylor*, 24 Minn. 24; *Johnston v. Mason*, 27 Mo. 511; *People v. Mather*, 4 Wend. 229, 249, 21 Am. Dec. 122; *Treadwell v. Stebbins*, 6 Bosw. 538, 549; *Lindheim v. Duys*, 11 Misc. 16, 31 N. Y. Supp. 870; *Brandon v. Lake Shore & M. S. R. Co.* 8 Ohio C. D. 642; *State v. Robinson*, 32 Or. 43, 48 Pac. 357; *Huff v. Latimer*, 33 S. C. 598, 11 S. E. 758.

A witness may be recalled to supply omissions in testimony (*French v. Canton*, A. & N. R. Co. 74 Miss. 542, 21 So. 299; *Woolsey v. Ellen-ville*, 84 Hun, 236, 32 N. Y. Supp. 543; *Gulf, C. & S. F. R. Co. v. Johnson*, 83 Tex. 628, 19 S. W. 151), and to correct or explain his testimony (*Walker v. Walker*, 14 Ga. 242; *Miller v. Hartford F. Ins. Co.* 70 Iowa, 704, 29 N. W. 411; *Williams v. Sargeant*, 46 N. Y. 481; *Gulf, C. & S. F. R. Co. v. Pool*, 70 Tex. 713, 8 S. W. 535), and to restate his testimony where a difference of opinion arises on the argument as to what he has testified. *Hayes v. State*, 36 Tex. Crim. Rep. 146, 35 S. W. 983. Or if the witness is not at hand the judge may refer to his notes or the stenographer's minutes. *Long v. State*, 12 Ga. 293 (so held where the judge's notes were kept pursuant to direction of statute). And upon a request by the jury after retiring a witness may be recalled to repeat testimony as to which they are in doubt. *Bennefield v. State*, 62 Ark. 365, 35 S. W. 790; *Blackley v. Sheldon*, 7 Johns. 32; *Warner v. New York C. R. Co.* 52 N. Y. 437, 441, 11 Am. Rep. 724 (per Folger, J.); *Virginia v. Zimmerman*, 1 Cranch, C. C. 47, Fed. Cas. No. 16,968. But where a document not at hand is needed to settle a dispute between counsel arising during the argument, time to search for the paper or to establish a copy may be denied. *McLendon v. Frost*, 57 Ga. 448, 459.

² *Mississippi & T. R. Co. v. Gill*, 66 Miss. 39, 5 So. 393; *Jones v. Smith*, 64 N. Y. 180, 184. Otherwise where the evidence sought to be contradicted is immaterial. *Layton v. Kirkendall*, 20 Colo. 236, 38 Pac. 55.

³ *Rowe v. Brenton*, 3 Mann. & R. 133, 139, 8 Barn. & C. 737, 5 L. J. K. B. 137.

f. Cross-examination. (1) *Limits of, generally.*—A party has no right, before his adversary's case is closed, to introduce his own case to the jury by cross-examining the witness of his adversary on matters beyond the limit of the direct examination of such witness.¹

¹ *Bowman v. White*, 110 Cal. 23, 42 Pac. 470; *Wheeler & W. Mfg. Co. v. Barrett*, 172 Ill. 610, 50 N. E. 325, affirming 70 Ill. App. 222; *Britton v. State ex rel. Rowe*, 115 Ind. 55, 17 N. E. 254; *Bulliss v. Chicago, M. & St. P. R. Co.* 76 Iowa, 680, 39 N. W. 245; *Delissa v. Fuller Coal & Min. Co.* 59 Kan. 319, 52 Pac. 886; *Sterling v. Bock*, 37 Minn. 29, 32 N. W. 865; *Schmidt v. Schmidt*, 47 Minn. 451, 50 N. W. 598; *Neil v. Thorn*, 88 N. Y. 270; *Ernst v. Estey Wire Works Co.* 21 Misc. 68, 46 N. Y. Supp. 918; *Olive v. Olive*, 95 N. C. 485; *Ellmaker v. Buckley*, 16 Serg. & R. 72; *Denniston v. Philadelphia Co.* 161 Pa. 41, 28 Atl. 1007; *First Nat. Bank v. Smith*, 8 S. D. 101, 65 N. W. 439, affirming on rehearing 8 S. D. 7, 65 N. W. 437; *Wendt v. Chicago, St. P. M. & O. R. Co.* 4 S. D. 476, 57 N. W. 226; *Bishop v. Averill*, 17 Wash. 209, 49 Pac. 237, 50 Pac. 1024; *Welcome v. Mitchell*, 81 Wis. 566, 51 N. W. 1080; *Goddard v. Crefeld Mills*, 21 C. C. A. 530, 45 U. S. App. 84, 75 Fed. 818. *Contra*, *Dillard v. Samuels*, 25 S. C. 318. But the fact that evidence called forth by a legitimate cross-examination tends to sustain a cross action or counterclaim affords no reason for its exclusion. *Rush v. French*, 1 Ariz. 139, 25 Pac. 816.

Defendants cannot put a paper in proof as substantive evidence for themselves on cross-examination of plaintiff's witness. *Weeks v. McPhail*, 128 N. C. 130, 38 S. E. 472.

For the limit of a strict cross-examination within the meaning of this rule, see chapter VII., § 16, c.

(2) *Of party testifying in own behalf.*—A greater latitude is allowable in the cross-examination of a party who testifies on his own behalf;¹ but even there the limits of the cross-examination beyond the scope of the direct are in the discretion of the judge.²

¹ See chapter VIII., § 16, c.

² *Rea v. Missouri*, 17 Wall. 542, 21 L. ed. 709; *Lange v. Manhattan R. Co.* 46 N. Y. S. R. 868, 19 N. Y. Supp. 1022 (refusing to permit the defense to be proved upon the cross-examination of the plaintiff before he rests).

(3) *Cross-examination at large in discretion of court.*—It is in the discretion of the court, in controlling the order of proof, to allow cross-examining counsel to go beyond the limits of strict cross-examination, and introduce matters in support of his own case.¹

¹ *Huntsville Belt Line & M. S. R. Co. v. Corpening*, 97 Ala. 681, 12 So. 295; *Thornton v. Hook*, 36 Cal. 223; *Harrington v. Butte & B. Min. Co.* 19 Mont. 411, 48 Pac. 758; *Neil v. Thorn*, 88 N. Y. 270, 276 (*dictum*); *American Encaustic Tiling Co. v. Reich*, 35 N. Y. S. R. 579, 12 N. Y. Supp. 927; *Pollatschek v. Goodwin*, 17 Misc. 587, 40 N. Y. Supp. 682, affirming 16 Misc. 686, 38 N. Y. Supp. 971; *McGuire v. Hartford F. Ins. Co.* 7 App. Div. 575, 40 N. Y. Supp. 300. *Contra*, *Bell v. Prewitt*, 62 Ill. 361 (reversing judgment for allowing cross-examination at large).

Defendant could not suspend the cross-examination of plaintiff's witness for the purpose of introducing documents as part of defendant's case. *Armour Packing Co. v. Vietch-Young Produce Co.* — Ala. —, 39 So. 680.

g. Several defendants.—Where there are several defendants having separate defenses it is in the discretion of the judge in what order they shall cross-examine, present their case, and sum up. If their interests are identical they may be confined to one counsel in so doing for all, as if their defense was joint.²

¹ *Fletcher v. Crosbie*, 2 Moody & R. 417.

"If several defendants having separate defenses appear by different counsel the court must determine their relative order in the evidence and argument." Cal. Code Civ. Proc. § 607. Similar statutory provisions exist in several other states.

² *Chippendale v. Masson*, 4 Campb. 174; *Mason v. Ditchbourne*, 1 Moody & R. 462, note.

h. Counterclaim.—Where a counterclaim is interposed, beside denials or other defenses to the cause of action, it is in the discretion of the court to try both together, or to postpone defendant's evidence as to his counterclaim, including his examination of plaintiff thereon, until after the close of plaintiff's case.¹

¹ *Thompson v. Woodfine*, 38 L. T. N. S. 753, 26 Week. Rep. 678, 47 L. J. Ch. N. S. 832.

1. *Reopening*.—After either¹ or both² parties have rested, the admission or exclusion of further evidence is in the discretion of the judge; and this discretion extends to evidence offered during³ and after⁴ the argument and even after the cause has been submitted to the jury,⁵ but an exception may be taken, and if the ruling be an abuse of discretion relief may be had.⁶ On reopening the case the court may prescribe the extent and limits thereof;⁷ and after taking further evidence has been commenced a party has a right to complete it⁸ but not to go beyond the limits prescribed.⁹

¹ *Hoey v. Fletcher*, 39 Fla. 325, 22 So. 716; *Consolidated Coal Co. v. Jones & A. Co.* 120 Ill. App. 139; *Giffen v. Lewiston*, 6 Idaho, 231, 55 Pac. 545; *Corkery v. Security F. Ins. Co.* 99 Iowa, 382, 68 N. W. 792, citing *McClain's (Iowa) Code*, § 4006; *Hill v. Miller*, 50 Kan. 659, 32 Pac. 354; *Chicago, B. & Q. R. Co. v. Goracke*, 32 Neb. 90, 48 N. W. 879; *Carradine v. Hotchkiss*, 120 N. Y. 608, 24 N. E. 1020; *Myers v. Maverick*, — Tex. Civ. App. —, 27 S. W. 1083; affirming on rehearing 27 S. W. 950.

The court in its discretion may grant or refuse plaintiff permission to introduce further testimony after a motion for nonsuit has been interposed (*Kelly v. E. F. Hallack Lumber & Mfg. Co.* 22 Colo. 221, 43 Pac. 1003; *Trumbull v. O'Hara*, 68 Conn. 33, 35 Atl. 764; *Pitts v. Florida C. & P. R. Co.* 115 Ga. 1013, 42 S. E. 383; *Brooke v. Lowe*, 122 Ga. 358, 50 S. E. 146; *Alderson v. Marshall*, 7 Mont. 288, 16 Pac. 576; *Featherston v. Wilson*, 123 N. C. 623, 31 S. E. 843; *Anderton v. Blais*, 28 R. I. 78, 65 Atl. 602; *Gesas v. Oregon Short Line R. Co.* 33 Utah, 156, 13 L.R.A.(N.S.) 1074, 93 Pac. 274); and after the motion has been argued (*Cushman v. Coleman*, 92 Ga. 772, 19 S. E. 46; *Wingo v. Caldwell*, 35 S. C. 609, 14 S. E. 827) and denied. *Garber v. Gianella*, 98 Cal. 527, 33 Pac. 458, reversing on rehearing 30 Pac. 841. So the court may permit plaintiff to introduce further testimony after defendant's request for a peremptory instruction or directed verdict has been made (*Ballowe v. Hillman*, 18 Ky. L. Rep. 677, 37 S. W. 950), and decided (*Illinois C. R. Co. v. Griffin*, 25 C. C. A. 413, 53 U. S. App. 22, 80 Fed. 278; *Dorr Cattle Co. v. Chicago & G. W. R. Co.* 128 Iowa, 359, 103 N. W. 103; *Bridger v. Exchange Bank*, 126 Ga. 821, 8 L.R.A.(N.S.) 463, 115 Am. St. Rep. 118, 56 S. E. 97; *Union P. R. Co. v. Edmondson*, 77 Neb. 682, 110 N. W. 650), and while defendant's demurrer to the evidence is argued (*Oberlander v. Confrey*, 38 Kan. 462, 17 Pac. 88), and after the demurrer has been sustained (*Farmers' & M. Bank v. Bank of Glen Elder*, 46 Kan. 376, 26 Pac. 680); and may reject cumulative evidence offered by plaintiff after he has closed his case and a verdict has been directed for defendant. *American Eagle Tobacco Co. v. Peirce*, 70 Mich. 633, 38 N. W. 605.

Even where the plaintiff has rested and the court has decided to direct a verdict for defendant, the case should be reopened if the plaintiff offers to produce competent evidence sufficient to sustain his case. *Pittsburg Plate Glass Co. v. Roquemore*, — Tex. Civ. App. —, 88 S. W. 449.

² *Kansas City Southern R. Co. v. Henrie*, 87 Ark. 443, 112 S. W. 967; *Miller v. Sharp*, 49 Cal. 233; *Plummer v. Struby-Estabrooke Mercantile Co.* 23 Colo. 190, 47 Pac. 294; *Macon v. Harris*, 75 Ga. 761; *Willard v. Pettitt*, 153 Ill. 663, 39 N. E. 991, affirming 54 Ill. App. 257; *McNutt v. McNutt*, 116 Ind. 545, 2 L.R.A. 372, 19 N. E. 115; *Hartley State Bank v. McCorkell*, 91 Iowa, 660, 60 N. W. 197; *Witt v. Latimer*, 139 Iowa, 273, 117 N. W. 680; *State v. Bussey*, 58 Kan. 679, 50 Pac. 891; *Vicksburg Liquor & Tobacco Co. v. Jeffries*, 45 La. Ann. 621, 12 So. 743; *Morena v. Winston*, 194 Mass. 378, 80 N. E. 473; *Minkley v. Springwells Twp.* 113 Mich. 347, 71 N. W. 649; *Nelson v. Finseth*, 55 Minn. 417, 57 N. W. 141; *Sweeney v. Hjul*, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169; *Caldwell v. New Jersey S. B. Co.* 47 N. Y. 282, affirming 56 Barb. 425; *Williams v. Hayes*, 20 N. Y. 58; *Standard Supply & Equipment Co. v. Merritt*, 48 Misc. 498, 96 N. Y. Supp. 181; *Jarvis v. New York House Wrecking Co.* 84 N. Y. Supp. 191; *Gregg v. Mallett*, 111 N. C. 74, 15 S. E. 936; *Davis v. Emmons*, 32 Or. 389, 51 Pac. 652, citing *Hill's (Or.) Anno. Laws*, §§ 196, 830; *Hampson v. Taylor*, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732; *Calkins v. Seabury-Calkins Consol. Min. Co.* 5 S. D. 299, 58 N. W. 797; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869; *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, 10 L. ed. 535; *Consaul v. Cummings*, 30 App. D. C. 540; *Gray v. Good*, 44 Ind. App. 476, 89 N. E. 498; *Bartlett v. Illinois Surety Co.* 142 Iowa, 538, 119 N. W. 729; *Moreland v. Newberger Cotton Co.* 94 Miss. 572, 48 So. 187; *Penn. v. Georgia S. & F. R. Co.* 129 Ga. 856, 60 S. E. 172; *St. Louis, I. M. & S. R. Co. v. Cassidy Southwestern Commission Co.* 48 Tex. Civ. App. 484, 107 S. W. 628. Even if the further testimony be the re-examination of a witness who has once been examined. *People v. Rector*, 19 Wend. 569.

The English rule, which is somewhat more strict than the American, still allows that if a party is taken by surprise at the statements made by the other side, on a point that is relevant and which he has had no opportunity of meeting, and on which there has been no cross-examination, the court has power to reopen the case, and even a witness already examined may be recalled. *Rogers v. Manley*, 42 L. T. N. S. 585, citing *Taylor*, Ev. 6th ed. ¶ 359, p. 392.

³ *Lowenstein v. Finney*, 54 Ark. 124, 15 S. W. 153; *Hilburn v. Hilburn*, 105 Ga. 471, 30 S. E. 656; *McDonald v. Fairbanks, M. & Co.* 161 Ill. 124, 43 N. E. 783, affirming 58 Ill. App. 384; *Henry County Comrs. v. Slatter*, 52 Ind. 171; *McComb v. Council Bluffs Co.* 83 Iowa, 247, 48 N. W. 1038, citing Iowa Code, § 2799; *Lake v. Weaver*, 20 R. I. 46, 37 Atl. 302; *Dobson v. Cothran*, 34 S. C. 518, 13 S. E. 679; *Phoenix*

- Ins. Co. v. Swann, — Tex. Civ. App. —, 41 S. W. 519; Buchanan v. Cook, 70 Vt. 168, 40 Atl. 102; State v. Powell, 40 La. Ann. 241, 4 So. 447; Cincinnati, N. O. & T. R. Co. v. Cox, 74 C. C. A. 304, 143 Fed. 110.
- ⁴ Seeckel v. Norman, 78 Iowa, 254, 43 N. W. 190; State v. Martin, 89 Me. 117, 35 Atl. 1023; Case v. Dodge, 18 R. I. 661, 29 Atl. 785; Sisler v. Shaffer, 43 W. Va. 769, 28 S. E. 721; Everman v. Menomonie, 81 Wis. 624, 51 N. W. 1013; Thomas v. Chicago, M. & St. P. R. Co. 114 Iowa, 169, 86 N. W. 259; Harper v. Marion County, 33 Tex. Civ. App. 653, 77 S. W. 1044; Greer v. Bringham, 23 Tex. Civ. App. 582, 56 S. W. 947. If admitted, the adverse party should be allowed to rebut it. George v. Pilcher, 28 Gratt. 299, 26 Am. Rep. 350.
- ⁵ Cook v. Ottawa University, 14 Kan. 548; Com. v. Ricketson, 5 Met. 412 (*dictum*, sanctioning course of judge in allowing a witness to be called to testify on a point as to which the jury inquired); Henlow v. Leonard, 7 Johns. 200; Royston v. Illinois C. R. Co. 67 Miss. 376, 7 So. 320; Keeveny v. Ottman, 26 Ohio L. J. 65; Wilson v. Johnson, 51 Fla. 370, 41 So. 395. Contra, Wait v. Krewson, 59 N. J. L. 71, 35 Atl. 742; Lueders v. Tenino, 49 Wash. 521, 95 Pac. 1089.
- Even after verdict it is discretionary to admit further evidence. West v. Ela, 42 Kan. 334, 21 Pac. 1043; Meserve v. Folsom, 62 Vt. 504, 20 Atl. 926. Contra, Re Thompson, 9 Mont. 381, 23 Pac. 933.
- ⁶ St. Louis, A. & T. R. Co. v. Fire Asso. of Philadelphia, 55 Ark. 163, 18 S. W. 43; Smith v. State Ins. Co. 58 Iowa, 487, 12 N. W. 542; Wagar v. Bowley, 104 Mich. 38, 62 N. W. 293; Stein v. Roeller, 66 Minn. 283, 68 N. W. 1087; Meacham v. Moore, 59 Miss. 561; Owen v. O'Reilly, 20 Mo. 603; Meyer v. Cullen, 54 N. Y. 392. But see Wright v. Reusens, 133 N. Y. 298, 31 N. E. 215; Fort Worth & D. C. R. Co. v. Johnson, 5 Tex. Civ. App. 24, 23 S. W. 827. Compare as to remedy 1 Graham, Pr. 3d ed. 740. Contra, Kelly v. E. F. Hallack Lumber & Mfg. Co. 22 Colo. 221, 43 Pac. 1003; Sandwich v. Dolan, 141 Ill. 430, 31 N. E. 416; State v. Martin, 89 Me. 117, 35 Atl. 1023; Ohlendorf v. Kanne, 66 Md. 495, 8 Atl. 351; Case v. Dodge, 18 R. I. 661, 29 Atl. 785.
- ⁷ State v. Harris, 63 N. C. 1.
- ⁸ Mobile Fire Dept. Ins. Co. v. Parsons, 11 N. Y. Week. Dig. 414.
- ⁹ Stephens v. Fox, 83 N. Y. 313, affirming 17 Hun, 435; Omaha Real Estate & T. Co. v. Kragseow, 47 Neb. 592, 66 N. W. 658.

3. Order as between different items of each party's evidence in chief.

a. In general.—For the order of proof in a party's case in chief no specific rules exist. While the court may exercise its discretion in the matter,¹ as a general rule it will not interfere to control a party as to the order in which he shall introduce his evidence, but will allow him to prove the various facts in his

case in the order which he prefers,² unless it is made to appear to the court that some undue advantage will thereby be taken of the opposite party.³

¹ See *supra*, § 1.

² 3 Wigmore, Ev. §§ 1869, 1871; *Spears v. Cross*, 7 Port. (Ala.) 437; *Palmer v. McCafferty*, 15 Cal. 334; *McCurdy v. Terry*, 33 Ga. 49; *Rogers v. Brent*, 10 Ill. 573, 50 Am. Dec. 422; *Mix v. Osby*, 62 Ill. 193; *McDaneld v. Logi*, 143 Ill. 487, 32 N. E. 423; *Throgmorton v. Davis*, 4 Blackf. 174; *Hadden v. Johnson*, 7 Ind. 394; *Cook v. Robinson*, 42 Iowa, 474; *Cotton v. Haskins*, Litt. Sel. Cas. (Ky.) 151; *Doyle v. Estornet*, 13 La. Ann. 318; *Gordon v. Millaudon*, 16 La. Ann. 347; *Caton v. Carter*, 9 Gill & J. 476; *Wellersburg & W. N. Pl. Road Co. v. Bruce*, 6 Md. 457; *Pegram v. Newman*, 54 Miss. 612; *Lusk v. Colvin*, 8 N. J. L. 62; *Johnson v. Brown*, 25 Tex. Supp. 120; *Jenne v. Joslyn*, 41 Vt. 478; *Winkler v. Chesapeake & O. R. Co.* 12 W. Va. 699.

³ *McDaneld v. Logi*, 143 Ill. 487, 32 N. E. 423.

b. Where competency of evidence depends on proof of other facts.—If, however, the competency of any matter as testimony depends upon proof of certain facts, evidence of such facts must be offered before or with the testimony.¹

But, if evidence apparently incompetent only because its relevancy is not apparent, or because it is not the best evidence, is offered, the court may receive it conditionally, if counsel gives assurance that he will supply the necessary foundation afterwards.²

¹ *San Miguel Consol. Gold Min. Co. v. Bowner*, 33 Colo. 207, 79 Pac. 1025; *Nordyke v. Shearon*, 12 Ind. 346; *Goings v. Chapman*, 18 Ind. 194; *Johnson v. Brown*, 25 Tex. Supp. 120; *Winkler v. Chesapeake & O. R. Co.* 12 W. Va. 699.

² *United States v. Flowery*, 1 Sprague, 109, Fed. Cas. No. 15,122; *Deery v. Cray*, 10 Wall. 263, 19 L. ed. 887; *First Unitarian Soc. v. Faulkner*, 91 U. S. 415, 23 L. ed. 283; *Louisville & N. R. Co. v. Hill*, 115 Ala. 334, 22 So. 163; *Crosett v. Whelan*, 44 Cal. 200; *Kenniff v. Caulfield*, 140 Cal. 34, 73 Pac. 803; *Dougherty v. Welch*, 53 Conn. 558, 5 Atl. 704; *Italian-Swiss Agri. Colony v. Pease*, 194 Ill. 98, 62 N. E. 317; *Haller v. Gibson*, 30 Ind. App. 10, 65 N. E. 293; *Cramer v. Burlington*, 42 Iowa, 315; *Martin v. Williams*, 40 Kan. 153, 19 Pac. 551; *Pasquier's Succession*, 12 La. Ann. 758; *Morse v. Woodworth*, 155 Mass. 233, 29 N. E. 525; *Ober v. Carson*, 62 Mo. 209; *Place v. Minster*, 65 N. Y. 89 (conspiracy); *McDougald v. Coward*, 95 N. C. 368; *Diehl v. Emig*, 65 Pa. 429; *Deitz v. Providence Washington Ins. Co.* 33 W. Va. 526, 11 S. E. 50.

But the practice is not to be commended (*Buist v. Guice*, 96 Ala. 255, 11 So. 280; *Central Pennsylvania Teleph. & S. Co. v. Thompson*, 112 Pa. 118, 3 Atl. 439; *Gould v. Dwellinghouse Ins. Co.* 134 Pa. 570, 19 Atl. 793), and is a matter of favor, not of right. *Woollen v. Wire*, 110 Ind. 251, 11 N. E. 236.

In some instances such evidence has been so admitted where no promise to connect seems to have been made. *Foley v. Tipton Hotel Asso.* 102 Iowa, 272, 71 N. W. 236; *Brady v. Finn*, 162 Mass. 260, 38 N. E. 506; *McDermott v. Juddy*, 67 Mo. App. 647; *Starr v. Gregory Consol. Min. Co.* 6 Mont. 485, 13 Pac. 195; *Merchants' Exchange Nat. Bank v. Wallach*, 20 Misc. 309, 45 N. Y. Supp. 885; *Shahan v. Swan*, 48 Ohio St. 25, 26 N. E. 222; *Chamberlin v. Fuller*, 59 Vt. 247, 9 Atl. 832. But see as to the necessity of a promise, *Cheatham v. Wilber*, 1 Dak. 321, 46 N. W. 580; *Ward v. Montgomery*, 57 Ind. 278; *Baker v. Swan*, 32 Md. 355; *Pier v. Heinrichoffen*, 52 Mo. 333; *Cass v. New York & N. H. R. Co.* 1 E. D. Smith, 522.

If the evidence does not prove relevant the judge's instructions may, perhaps, not cure the error; but the error, if any, in admitting irrelevant evidence, is cured by the subsequent introduction of testimony rendering it relevant. *Bell v. Chambers*, 38 Ala. 660; *McCoy v. Watson*, 51 Ala. 466; *Barkly v. Copeland*, 74 Cal. 1, 15 Pac. 307; *Roux v. Blodgett & D. Lumber Co.* 94 Mich. 607, 54 N. W. 492; *Lyons v. Davis*, 30 N. J. L. 301.

Where evidence is admitted conditionally, defects to be supplied, and the condition is not available, the evidence so admitted cannot be available for any purpose. *Manufacturers' Commercial Co. v. Rochester R. Co.* 123 N. Y. Supp. 1128.

In *Wellersburg & W. N. Pl. Road Co. v. Bruce*, 6 Md. 457, it was held that the court is not justified in excluding evidence *prima facie* relevant and material, until assurances are given that other evidence will be given which the court may think necessary to enable the party to recover.

Where an instrument is lost and secondary evidence of its contents is sought to be introduced, there is some difference of opinion as to the order in which these proofs shall be received.¹ The natural order of proof in such cases is: (1) To prove the existence of the original; (2) its execution; (3) its loss; (4) its contents.² But in many instances it would be impossible to observe this order, and, as in all other questions as to order of proof, the court may exercise its discretion.³

¹ *Groff v. Ramsey*, 19 Minn. 44, Gil. 24; *Bateman v. Bateman*, 21 Tex. 432.

² *Allen v. Parish*, 3 Ohio, 107; *State v. McCoy*, 2 Speers, L. 711.

³ *Groff v. Ramsey*, 19 Minn. 44, Gil. 24, holding that contents of lost in-

strument may first be proved where it is more convenient to do so and assurance is given that other proof will be put in later.

And the fact that evidence of the loss of an original patent was not given until after a copy of the patent was introduced in evidence was held immaterial in *Stephenson v. Doe*, 8 Blackf. 508, 46 Am. Dec. 489.

So proof of loss was permitted before proof of existence or execution, in *Fitch v. Bogue*, 19 Conn. 285; and *Bateman v. Bateman*, 21 Tex. 432.

And in *Stowe v. Querner*, L. R. 5 Exch. 155, 39 L. J. Exch. N. S. 60, 22 L. T. N. S. 29, 18 Week. Rep. 476, it was held that where the execution of the instrument is itself the main issue, proof of contents may be first received.

VIII.—EXAMINATION OF WITNESSES.

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15. Direct examination; adverse party.
16. Right to cross-examination and the extent thereof.
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 - c. How far limited to direct.
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- e. Witnesses to character or reputation.
- f. To discredit witness.
- 17. Redirect examination.
- 18. Re-cross examination.
- 19. Interpreters; deaf and dumb witnesses.

1. Examination to test competency.

Under the old practice objections to the competency of a witness could only be taken by either examining him on his *voir dire*¹ or by calling other witnesses to establish the fact on which the objection rested.² A resort to one method precluded the use of the other.³ The strictness of this rule has been somewhat relaxed, so that, while the objection should, if known, be made before the witness has testified in chief, a party may permit the witness to be sworn in chief, and raise the objection to his competency at any time during his examination,⁴ subject to the qualification that such objection be made as soon as the incompetency is discovered.⁵

Before a witness can be permitted to give his opinion as an expert, his competency must be established by a preliminary examination,⁶ and the court may, in its discretion, allow a preliminary cross-examination with respect to his qualifications before permitting him to testify.⁷

¹ The right of the party against whom a witness has been called to have the witness sworn on his *voir dire* and examined touching his competency before he is sworn in chief, when insisted upon, cannot be denied. Seeley v. Engell, 13 N. Y. 542, reversing 17 Barb. 530. But a request that a witness be sworn and examined touching his competency after he has been sworn in chief and his interrogation as a witness actually commenced is properly refused, where the right is accorded to assail his credibility on cross-examination. State v. Downes, 50 La. Ann. 694, 23 So. 456. The right to swear a witness on his *voir dire* belongs exclusively to the party objecting to his competency. Foley v. Mason, 6 Md. 37; Wright v. Mathews, 2 Blackf. 187. But the party offering the witness may cross-examine him for the purpose of removing the disqualification. Tarleton v. Johnson, 25 Ala. 300, 60 Am. Dec. 515; Beach v. Covillaud, 2 Cal. 237; Weigel's Succession, 18 La. Ann. 49; Fifield v. Smith, 21 Me. 383. A witness may be examined on his *voir dire* with reference to the contents of writings not produced, notwithstanding an objection that parol evidence of their contents is inadmissible. Herndon v. Givens, 16 Ala. 261; Babcock v. Smith, 31 Ill. 57; Fifield v. Smith, 21 Me. 383.

² Where the incompetency of a witness is established *aliunde*, and not by his own testimony, he cannot be examined himself to remove the objection. *Dent v. Portwood*, 17 Ala. 246; *Hiscox v. Hendree*, 27 Ala. 216; *Diversy v. Will*, 28 Ill. 218; *Robinson v. Turner*, 3 G. Greene, 540.

³ *Bridge v. Wellington*, 1 Mass. 219; *Walker v. Collier*, 37 Ill. 362; *Stuart v. Lake*, 33 Me. 87; *Dora v. Osgood*, 2 Tyler (Vt.) 28; *Mifflin v. Bingham*, 1 Dall. 273, 1 L. ed. 133; *Chance v. Hine*, 6 Conn. 231. Otherwise when the inquiry of interest arises at different times and on distinct grounds. *Stebbins v. Sackett*, 5 Conn. 258.

But in *Hooker v. Johnson*, 6 Fla. 730, the fact that a witness answered on his examination *voir dire* that he had no interest was held not to prevent further inquiry. So, after an unsuccessful attempt to exclude a witness on his *voir dire*, his testimony in chief may be stricken out of the case upon subsequent discovery of his incompetency. *Le Barron v. Redman*, 30 Me. 536. And overruling a preliminary objection to the competency of a witness will not prevent his testimony from being struck out on objection when his incompetency subsequently appears. *Heely v. Barnes*, 4 Denio, 73, *dictum*; *Schillinger v. McCann*, 6 Me. 364.

⁴ *Fisher v. Willard*, 13 Mass. 379; *Shurtleff v. Willard*, 19 Pick. 202; *Carter v. Graves*, 7 How. (Miss.) 9; *Hill v. Postley*, 90 Va. 200, 17 S. E. 946.

⁵ *Hudson v. Crow*, 26 Ala. 515; *Brooks v. Crosby*, 22 Cal. 42; *State v. Crab*, 121 Mo. 554, 26 S. W. 548; *Lewis v. Morse*, 20 Conn. 211; *Kingsbury v. Buchanan*, 11 Iowa, 387; *Groshon v. Thomas*, 20 Md. 234; *Donelson v. Taylor*, 8 Pick. 389; *Heely v. Barnes*, 4 Denio, 73; *Patterson v. Wallace*, 44 Pa. 88; *Inglebright v. Hammond*, 19 Ohio, 337, 53 Am. Dec. 430; *Hord v. Colbert*, 28 Gratt. 49. In Georgia a Code provision expressly requires an objection to competency, if known, to be made before examination. *Brunswick & W. R. Co. v. Clem*, 80 Ga. 534, 7 S. E. 84.

The rule is the same where the testimony of a witness is taken by deposition. *Hudson v. Crow*, 26 Ala. 515; *United States v. One Case of Hair Pencils*, 1 Paine, 400, Fed. Cas. No. 15,924. *Contra*, *Talbot v. Clark*, 8 Pick. 51; *Angell v. Rosenbury*, 12 Mich. 241 (by statute). But is not applicable where the examination of the witness commences under a reservation of the right to object. *Andre v. Bodman*, 13 Md. 241, 71 Am. Dec. 628.

⁶ *Polk v. State*, 36 Ark. 117; *Fairbank v. Hughson*, 58 Cal. 314; *Tyler v. Todd*, 36 Conn. 218; *Sandwich Mfg. Co. v. Nicholson*, 32 Kan. 666, 5 Pac. 164; *Lincoln v. Barre*, 5 Cush. 590; *State v. Secrest*, 80 N. C. 450; *Koons v. State*, 36 Ohio St. 195; *Delaware & C. Steam Towboat Co. v. Starrs*, 69 Pa. 36; *Buffum v. New York & B. R. Co.* 4 R. I. 221; *Carpenter v. Corinth*, 58 Vt. 214, 2 Atl. 170.

The court may itself question the witness. *Keith v. Wells*, 14 Colo. 321, 23 Pac. 991. And other witnesses may be called to testify with respect

to his competency (*Mendum v. Com.* 6 Rand. [Va.] 704; *State v. Maynes*, 61 Iowa, 119, 15 N. W. 864; *Martin v. Courtney*, 75 Minn. 255, 77 N. W. 813), but not after the witness has been permitted to testify as an expert. *Tullis v. Kidd*, 12 Ala. 648; *Washington v. Cole*, 6 Ala. 212; *Brabo v. Martin*, 5 La. 275. Contra, *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510; *Mason v. Phelps*, 48 Mich. 126, 11 N. W. 413, 837. One expert may testify to the skill of another who has already testified, where his knowledge of such skill is derived from personal observation. *Laros v. Com.* 84 Pa. 200.

A witness cannot be asked whether he has sufficient skill or experience to give an opinion, but should be required to state the facts, from which the court may determine his competency. *McCutchen v. Loggins*, 109 Ala. 457, 19 So. 810; *Eggart v. State*, 40 Fla. 527, 25 So. 144.

⁷ *Sarle v. Arnold*, 7 R. I. 582; *Fort Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 743; *Finch v. Chicago, M. & St. P. R. Co.* 46 Minn. 250, 48 N. W. 915; *Re Gorkow*, 20 Wash. 563, 56 Pac. 385.

The refusal of such preliminary cross-examination was held error in *First Nat. Bank v. Wirebach*, 12 W. N. C. 150; but though held to be a right in *Woodworth v. Brooklyn Elev. R. Co.* 22 App. Div. 501, 48 N. Y. Supp. 80, its denial is not error where the party entitled to it has not been prejudiced thereby.

Cross-examination of an expert bearing upon his credibility as a witness, and not his competency as an expert, need not be allowed before permitting him to testify. *Smyth v. Caswell*, 67 Tex. 567, 4 S. W. 848.

2. Oath or affirmation.

Without express or implied consent,¹ no evidence can be permitted to go to the jury unless under the sanction of an oath, and it is the duty of counsel offering a witness to see that he is sworn.² A witness who is competent in chief must be sworn generally, although his examination be confined to a particular or incidental fact.³ One oath is sufficient, although the witness be examined on different days and the matters in issue be varied during the trial.⁴

In some jurisdictions an oath administered with the uplifted hand is substituted for the usual practice of laying the hand upon and kissing the Gospels.⁵ A variation from the strict statutory procedure is not fatal where no objection is made at the time;⁶ and the fact that the oath is more comprehensive than the statute is no objection to its validity.⁷ The common law and the statutes of some states recognize any mode of swearing a witness which he holds to be binding on his conscience, and which is sanctified by the usage of his country or the sect to

which he belongs;⁸ and witnesses who have conscientious scruples against taking an oath are generally permitted to affirm.⁹

¹ Acquiescence in the omission to swear a witness will be inferred from a failure to object upon discovery of the neglect. *Slauter v. Whitelock*, 12 Ind. 338; *Trammell v. Mount*, 68 Tex. 210, 4 S. W. 377. An objection is too late when first taken after verdict or judgment (*Cady v. Norton*, 14 Pick. 236; *Nesbitt v. Dallam*, 7 Gill & J. 494, 28 Am. Dec. 236; *Goldsmith v. State*, 32 Tex. Crim. Rep. 112, 22 S. W. 405), but not where the witness supposed he had been sworn until after the testimony closed, and the parties and counsel remained unacquainted with the omission until after verdict. *Hawks v. Baker*, 6 Me. 72, 19 Am. Dec. 191.

² *Hawks v. Baker*, 6 Me. 72, 19 Am. Dec. 191.

That a witness was not sworn before his examination commenced is immaterial where he was subsequently sworn, his testimony repeated, and no portion of it taken prior to the administration of the oath was admitted in evidence. *Com. v. Keck*, 148 Pa. 639, 24 Atl. 161.

As to the necessity of swearing children before permitting them to testify and the duty of the court to instruct a child who, on being called to testify, proves to be ignorant of the nature and obligation of an oath, see note to *State v. Michael*, 19 L.R.A. 605.

³ *Jackson ex dem. Lowell v. Parkhurst*, 4 Wend. 369.

⁴ *Bullock v. Koon*, 9 Cow. 30.

⁵ *Doss v. Birks*, 11 Humph. 431; *Jackson v. State*, 1 Ind. 184.

Even where the usual method of administering the oath requires the witness to kiss the Bible, she may be sworn by merely laying her hand upon the book where she says that she had never kissed it and had been told it was not necessary. *Pullen v. Pullen*, 41 N. J. Eq. 136, 5 Atl. 658.

⁶ *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451 (using hymn book by mistake).

An oath administered with the uplifted hand without objection is valid although the witness does not declare as required by statute that he has conscientious scruples against being sworn on the Gospels. *McKinney v. People*, 7 Ill. 540, 43 Am. Dec. 65.

⁷ *Ballance v. Underhill*, 4 Ill. 453.

⁸ *Central Military Tract R. Co. v. Rockafellow*, 17 Ill. 541. For instances, see *Fryatt v. Lindo*, 3 Edw. Ch. 239, note; *Rex v. Morgan*, 1 Leach C. L. 54 (swearing a Mahometan upon the Koran); *Mildrone's Case*, 1 Leach C. L. 412, 3 Revised Rep. 708; *Walker's Case*, 1 Leach C. L. 498, 3 Revised Rep. 717 (swearing a Scotch covenanter without kissing the Book); *Edmonds v. Rowe*, Ryan & M. 77 (swearing a Christian on the Old Testament); *Omychund v. Barker*, 1 Atk. 21, Willes, 538, 11 Eng. Rul. Cas. 126 (swearing a Gentoo by touching the foot of a

Brahmin). In *Reg. v. Entremam*, Car. & M. 248, a Chinese witness was sworn by kneeling down and breaking a saucer, the oath being administered through an interpreter in these words: "You shall tell the truth, the whole truth; the saucer is cracked, and if you do not tell the truth your soul will be cracked like the saucer."

A witness who believes in a religion other than the Christian may take the usual oath where no objection is made and he testifies that he considers the oath binding (*Territory v. Nichols*, 3 N. M. 103, 2 Pac. 78), and an objection to such proceeding is too late when first made after verdict. *Sells v. Hoare*, 7 J. B. Moore, 36, 3 Brod. & B. 232. But he cannot take the usual oath against objection where he does not deny that he still retains the religion of his country nor state that he regards the form of oath taken as binding. *State v. Chyo Chiagk*, 92 Mo. 395, 4 S. W. 704. Where an oath has been administered to a Chinese witness according to the custom and religion of his country it is not error to subsequently administer to him an oath in the statutory form. *State v. Gin Pon*, 16 Wash. 425, 47 Pac. 961.

A witness who without objection takes the oath in the usual form may be afterwards asked whether he considers the oath he has taken binding upon his conscience; but if he answers in the affirmative he cannot then be further asked whether he considers any other form of oath more binding. *Queen's Case*, 2 Brod. & B. 284, 22 Revised Rep. 662, 11 Eng. Rul. Cas. 183.

⁹ *Atcheson v. Everitt*, Cowp. pt. 1, p. 389.

Under a statute permitting witnesses who have conscientious scruples against taking an oath, to affirm, it was held in *Williamson v. Carroll*, 16 N. J. L. 217, that a witness who has no objection to being sworn cannot be allowed to affirm. And in *United States v. Coolidge*, 2 Gall. 364, Fed. Cas. No. 14,858, one not a Quaker, who stated that he had conscientious scruples against taking an oath, was not permitted to affirm.

3. Control of court over examination.

a. In general.—The trial court, in the exercise of its control over the examination of witnesses,¹ may permit testimony to be given in narrative form,² or may require the investigation to proceed by questions and answers.³

The trial judge should protect a witness from needless insinuations and attacks of counsel,⁴ and should see that unnecessarily indecent questions be not asked,⁵ and that some indulgence be granted a witness who is overcome with emotion.⁶ He may properly see that the witness is given a fair opportunity to answer the questions asked him, and in so doing to make any appropriate explanation of his testimony,⁷ and may stop his exami-

nation for a time where it seems calculated rather to confuse the witness than to elicit the truth.⁸

The trial court may permit the examination of a witness commenced by one counsel to be continued by another, notwithstanding a court rule providing otherwise,⁹ and may allow a witness to be called from the stand during his examination for consultation with his counsel,¹⁰ and may require counsel to disclose what they expect to prove by a witness before permitting him to testify.¹¹

¹ "The manner of examining a witness is entirely within the discretion of the court before whom the witness is produced, and that discretion must be governed in a great measure by a knowledge of the character of the witness and by his demeanor during his examination." *Brown v. Burrus*, 8 Mo. 26.

² *Northern P. R. Co. v. Charless*, 2 C. C. A. 380, 7 U. S. App. 359, 51 Fed. 562.

³ *Clark v. Field*, 42 Mich. 342, 4 N. W. 19.

But an attorney trying his own case cannot be required, as a condition of testifying in his own behalf, to give his testimony by question and answer. *Thresher v. Stonington Sav. Bank*, 68 Conn. 201, 36 Atl. 38.

If counsel object to the narration of testimony by a witness, he has the right to insist that the testimony be given by questions and answers. *Altkrug v. Horowitz*, 111 App. Div. 420, 97 N. Y. Supp. 716.

⁴ *State v. Taylor*, 118 Mo. 153, 24 S. W. 449; *Cling v. Gunn*, 90 Mich. 135, 51 N. W. 193; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *Heffernan v. O'Neill*, 1 Neb. (Unof.) 363, 96 N. W. 244.

It is alike the duty of the court to protect a witness unduly dealt by, and to abstain from interference when an examination is properly conducted. *Carney v. State*, 79 Ala. 14. And it is the duty of the court to exercise such restraining authority over counsel when interrogating witnesses to test their truthfulness that unseemly scenes between them and counsel will be avoided. *Baldwin v. St. Louis, K. & N. W. R. Co.* 75 Iowa, 297, 39 N. W. 507.

⁵ Vulgar words should never be required of a witness when the truth can be conveyed with equal clearness and accuracy in becoming language. *State v. Laxton*, 78 N. C. 564. The court should not permit a young child to be asked indecent questions, but if a competent witness there is no impropriety in asking him as to the social intimacy of parties. *People v. White*, 53 Mich. 537, 19 N. W. 174.

⁶ *State v. Laxton*, 78 N. C. 564.

⁷ *Smalls v. State*, 102 Ga. 31, 20 S. E. 153; *Giffen v. Lewiston*, 6 Idaho, 231, 55 Pac. 545.

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The court may properly interpose to prevent the unreasonable interruption of a witness by counsel, and permit her to complete an unfinished sentence. *State v. Scott*, 80 N. C. 365.

⁸ *Weldon v. Third Ave. R. Co.* 3 App. Div. 370, 38 N. Y. Supp. 206.

⁹ *Malone v. Gates*, 87 Mich. 332, 49 N. W. 638.

¹⁰ *Huston v. Regn*, 184 Pa. 419, 39 Atl. 208.

A party may, in the court's discretion, be called by his counsel from the witness stand during cross-examination, and be immediately recalled after a consultation with such counsel. *Schloss v. Estey*, 114 Mich. 429, 72 N. W. 264.

¹¹ *People v. White*, 14 Wend. 111; *Contra, Force v. Smith*, 1 Dana, 151.

b. Over extent of examination.—The court may refuse to allow questions to be repeated which have been fully answered,¹ or to permit further examination upon matters which have already been covered,² and may arrest an examination which is needlessly protracted.³

¹ *Gutsch v. McIlhargey*, 69 Mich. 377, 37 N. W. 303; *Hughes v. Ward*, 38 Kan. 452, 16 Pac. 810; *Waterbury v. Chicago, M. & St. P. R. Co.* 104 Iowa, 32, 73 N. W. 341; *Aurora v. Hillman*, 90 Ill. 61; *Buck v. Maddock*, 167 Ill. 219, 47 N. E. 208, affirming 67 Ill. App. 466; *Brown v. State*, 72 Md. 468, 20 Atl. 140; *Plew v. State*, — Tex. Crim. Rep. —, 35 S. W. 366; *White v. McLean*, 47 How. Pr. 193; *Middlesex Bkg. Co. v. Smith*, 27 C. C. A. 485, 52 U. S. App. 406. 83 Fed. 133; *Gilliam v. Davis*, 14 Wash. 183, 44 Pac. 152.

² *Pigg v. State*, 145 Ind. 560, 43 N. E. 309; *Gulf, C. & S. F. R. Co. v. Pool*, 70 Tex. 713, 8 S. W. 535; *Joslin v. Grand Rapids Ice & Coal Co.* 53 Mich. 322, 19 N. W. 17; *Hamilton v. Hulett*, 51 Minn. 208. 53 N. W. 364; *Simon v. Home Ins. Co.* 58 Mich. 278, 25 N. W. 190; *McGuire v. Lawrence Mfg. Co.* 156 Mass. 324, 31 N. E. 3; *State v. Brown*, 100 Iowa, 50, 69 N. W. 277; *Peterson v. Johnson-Wentworth Co.* 70 Minn. 538, 73 N. W. 510; *Couts v. Neer*, 70 Tex. 468, 9 S. W. 40; *People v. Harrison*, 93 Mich. 594, 53 N. W. 725; *Stillwell v. Patton*, 108 Mo. 352, 18 S. W. 1075.

³ *State v. Miller*, 93 Mo. 263, 6 S. W. 57; *McPhail v. Johnson*, 115 N. C. 298, 20 S. E. 373; *Mulhollin v. State ex rel. Ward*, 7 Ind. 646; *State v. McGee*, 36 La. Ann. 206; *State v. Southern*, 48 La. Ann. 628, 19 So. 668.

But this power should be cautiously and soundly exercised. *Morein v. Solomons*, 7 Rich. L. 97; *Peck v. Richmond*, 2 E. D. Smith, 380.

4. Examination by the court.

The court may interrogate witnesses to elicit material facts

suggested by the evidence,¹—especially where the witnesses are reluctant or evasive,² and in so doing may ask leading questions,³ but generally has no more right to ask improper questions than counsel.⁴ The court may ask a witness to repeat his testimony on a particular point,⁵ may recall a witness to supply a material fact overlooked by counsel,⁶ and may even call and examine witnesses not called by either party.⁷ The judge should not, however, take charge of the examination of a witness unless the occasion demands it,⁸ and should be careful, in so doing, not to indicate his own opinion of the witness's testimony.⁹ He should not privately confer with a witness, and then ask questions to elicit the facts as to which he has made inquiry.¹⁰

¹ *De Ford v. Painter*, 3 Okla. 80, 30 L.R.A. 722, 41 Pac. 96; *Huffman v. Cauble*, 86 Ind. 591; *State v. Pagels*, 92 Mo. 300, 4 S. W. 931; *Schaefer v. St. Louis & S. R. Co.* 128 Mo. 64, 30 S. W. 331; *Wilson v. Ohio River & C. R. Co.* 52 S. C. 537, 30 S. E. 400; *Lefever v. Johnson*, 79 Ind. 554. It may even be his duty to do so. *Bowden v. Achor*, 95 Ga. 243, 22 S. E. 254; *Cobb v. State*, — Miss. —, 23 So. 1015; *Sparks v. State*, 59 Ala. 82.

It is the duty and province of the trial judge to see that a witness comprehends the questions asked in order that they may be answered understandingly, and he may interrogate a witness for that purpose. *Scroggin v. Johnston*, 45 Neb. 714, 64 N. W. 236.

² *State v. Spiers*, 103 Iowa, 711, 73 N. W. 343; *Lockhart v. State*, 92 Ind. 452.

It is not only the privilege, but the duty, of the court to propound such questions to reluctant witnesses as will strip them of the subterfuges to which they resort to evade telling the truth. *Varnedoe v. State*, 75 Ga. 181, 58 Am. Rep. 465.

³ *State v. Marshall*, 105 Iowa, 38, 74 N. W. 763; *Com. v. Galavan*, 9 Allen, 271; *Long v. State*, 95 Ind. 487. Contra, *Hopperwood v. State*, 39 Tex. Crim. Rep. 15, 44 S. W. 841.

⁴ *People ex rel. Lauchantin v. Lacoste*, 37 N. Y. 192; *State v. Marshall*, 105 Iowa, 38, 74 N. W. 763.

⁵ *Sanders v. Bagwell*, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770.

⁶ *State v. Lee*, 80 N. C. 483.

⁷ *Coulson v. Disborough* [1894] 2 Q. B. 316, 9 Reports, 390, 70 L. T. N. S. 617, 42 Week. Rep. 449, 58 J. P. 784; *Sheets v. Bray*, 125 Ind. 33, 24 N. E. 357.

⁸ *Hopperwood v. State*, 39 Tex. Crim. Rep. 15, 44 S. W. 841.

⁹ *Gordon v. Irvine*, 105 Ga. 144, 31 S. E. 151; *McDonald v. State*, 89 Tenn. 164, 14 S. W. 487.

¹⁰ *Sparks v. State*, 59 Ala. 82.

5. Exclusion of witnesses.

A motion to require the witnesses to be examined out of the hearing of each other, or, as it is sometimes called, to "put the witnesses under the rule," is generally addressed to the sound discretion of the court.¹ Parties to the cause² and officers of the court³ will generally be exempted from the operation of an order excluding the witnesses, but other exceptions rest in the court's discretion.⁴

Whether or not the court may refuse to permit a witness to testify who has wilfully violated such an order is not free from doubt.⁵ The better rule, and the one seemingly supported by the weight of authority, prevents the court from depriving the party offering the witness of his testimony, where the party has not himself participated in the witness's disobedience.⁶

A witness should not be rejected because he was not placed with the others under the "rule," where the value of his testimony was not known to the party offering it until immediately before he was called,⁷ nor where he has heard none of the evidence in the case.⁸

¹ *Hubbell v. Ream*, 31 Iowa, 289; *Purnell v. Purnell*, 89 N. C. 42; *Hey v. Com.* 32 Gratt. 946, 34 Am. Rep. 799; *Zoldoske v. State*, 82 Wis. 580, 52 N. W. 778; *People v. McCarty*, 117 Cal. 65, 48 Pac. 984; *Gulf, C. & S. F. R. Co. v. West*, — Tex. Civ. App. —, 36 S. W. 101; *Harrison v. Green*, 157 Mich. 690, 122 N. W. 205. Contra, *Rainwater v. Elmore*, 1 Heisk. 363 (held error to refuse to put the witnesses under the rule when asked upon affidavit of its necessity); *Gregg v. State*, 3 W. Va. 705.

A statute providing "that if either party requires it the judge may exclude from the courtroom any witness of the adverse party not at the time under examination" was construed, in *Johnson v. Clem*, 82 Ky. 84, to leave the question to the exercise of a sound judicial discretion. The exercise of this discretion is not reviewable (*Errissman v. Errissman*, 25 Ill. 136; *Ryan v. Couch*, 66 Ala. 244) except for manifest abuse. *Chicago, B. & Q. R. Co. v. Kellogg*, 54 Neb. 138, 74 N. W. 403; *First Nat. Bank v. Knoll*, 7 Kan. App. 352, 52 Pac. 619. It is not an abuse of discretion to exclude from the courtroom, under a rule theretofore made, a witness who has testified and is not to be again put on the stand, as announced after the witnesses were

put under the rule. *Com. v. Phillips*, 12 Ky. L. Rep. 410, 14 S. W. 378. But the denial of a motion to put the witnesses under the rule in a suit to establish a nuncupative will is an abuse of discretion. *Watts v. Holland*, 56 Tex. 54.

- ² *Bernheim v. Dibrell*, 66 Miss. 199, 5 So. 693; *Larue v. Russell*, 26 Ind. 386; *Tift v. Jones*, 52 Ga. 538. *St. Paul F. & M. Ins. Co. v. Brunswick Grocery Co.* 113 Ga. 786, 39 S. E. 483; *Georgia R. & Bkg. Co. v. Tice*, 124 Ga. 459, 52 S. E. 916, 4 A. & E. Ann. Cas. 200; *Trotter v. Stayton*, 45 Or. 301, 77 Pac. 395; *Rotan Grocery Co. v. Martin*, — Tex. Civ. App. —, 57 S. W. 706; *Colbert v. Garrett*, — Tex. Civ. App. —, 57 S. W. 853.

An officer of a corporation charged with the duty of looking after its interests in a pending trial is a party within the meaning of a Code provision exempting parties from the operation of the rule (*Lenoir Car Co. v. Smith*, 100 Tenn. 127, 42 S. W. 879); so also is a proponent of a will who is the principal beneficiary. *Heaton v. Dennis* (Tenn.) 52 S. W. 175. A party in interest, though not a party to the record, should be so exempted (*Chester v. Bower*, 55 Cal. 46), and so should the guardian of a minor defendant. *Cottrell v. Cottrell*, 81 Ind. 87. But a party may be placed under the rule where he refuses to testify first as a condition of not being excluded from the courtroom. *French v. Sale*, 63 Miss. 386.

The president of the corporation was permitted to remain, though other witnesses were excluded. *Warden v. Madisonville, H. & E. R. Co.* 125 Ky. 644, 101 S. W. 914.

- ³ *State v. Hopkins*, 50 Vt. 316; *State v. Ward*, 61 Vt. 153, 17 Atl. 483; *Dement v. State*, 39 Tex. Crim. Rep. 271, 45 S. W. 917; *Allen v. Com.* 10 Ky. L. Rep. 582, 9 S. W. 703; *Gregg v. State*, 3 W. Va. 705.

- ⁴ *Vance v. State*, 56 Ark. 402, 19 S. W. 1066; *Roberts v. State*, 122 Ala. 47, 25 So. 238 (expert witnesses); *Barnes v. State*, 88 Ala. 204, 7 So. 38; *Central R. Co. v. Phillips*, 91 Ga. 526, 17 S. E. 952; *Johnston v. Farmers' F. Ins. Co.* 106 Mich. 96, 64 N. W. 5; *Xenia Real-Estate Co. v. Macy*, 147 Ind. 568, 47 N. E. 147.

A witness who has acquired such an intimate knowledge of the facts by having acted as the authorized agent of either of the parties, that his services are required by counsel in the management of the cause, ought not, especially in the absence of his principal, to be placed under the rule; but the trial court's discretion in not exempting him from the operation of the rule will not be revised on appeal. *Ryan v. Couch*, 66 Ala. 244; *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085; *Paul v. Omaha & St. L. R. Co.* 82 Mo. App. 500.

Whether, after an order excluding witnesses, one witness is permitted to remain to assist in the trial, is within the discretion of the court. *Matthews v. Louisville & N. R. Co.* 130 Ky. 551, 113 S. W. 459.

⁵ In some jurisdictions it is discretionary with the court to allow a witness to testify or not after his disobedience. *Sloss-Sheffield Steel & I. Co. v. Smith*, — Ala. —, 40 So. 91; *Behrman v. Terry*, 31 Colo. 155, 71 Pac. 1118; *Kelly v. Askins*, 14 Colo. App. 208, 59 Pac. 841; *Illinois C. R. Co. v. Taylor*, 24 Ky. L. Rep. 1169, 70 S. W. 825; *Sharpton v. Augusta & A. R. Co.* 72 S. C. 162, 51 S. E. 553; *Adolff v. Irby*, 110 Tenn. 222, 75 S. W. 710; *Purnell v. Purnell*, 89 N. C. 42; *Thorn v. Kemp*, 98 Ala. 417, 13 So. 749; *Hennessey v. Barnett*, 12 Colo. App. 254, 55 Pac. 197; *Goon Bow v. People*, 160 Ill. 438, 43 N. E. 593; *Garlington v. McIntosh*, — Tex. Civ. App. —, 33 S. W. 389. In others his disobedience may affect his credibility, but not his competency. *Gregg v. State*, 3 W. Va. 705; *Ferguson v. Brown*, 75 Miss. 214, 21 So. 603; *Rooks v. State*, 65 Ga. 330; *Grimes v. Martin*, 10 Iowa, 347; *Friedman v. Myers*, 39 N. Y. S. R. 192, 14 N. Y. Supp. 142. If the evidence in chief by a witness who has violated the rule is contradicted, it is error to refuse to permit him to testify in rebuttal. *Illinois C. R. Co. v. Ely*, 83 Miss. 519, 35 So. 873.

⁶ *People v. Boscovitch*, 20 Cal. 436; *Davis v. Byrd*, 94 Ind. 525; *State ex rel. Steigerwald v. Thomas*, 111 Ind. 515, 13 N. E. 35; *Davenport v. Ogg*, 15 Kan. 364; *Keith v. Wilson*, 6 Mo. 435; *State v. Gesell*, 124 Mo. 531, 27 S. W. 1101; *Gran v. Houston*, 45 Neb. 813, 64 N. W. 245; *State v. Salge*, 2 Nev. 321; *Dickson v. State*, 39 Ohio St. 73; *Hey v. Com.* 32 Gratt. 946, 34 Am. Rep. 799; *Mangold v. Oft*, 63 Neb. 397, 88 N. W. 507; *Clemmons v. Clemmons*, 1 Neb. (Unof.) 880, 96 N. W. 404; *Murray v. Allerton*, 3 Neb. (Unof.) 291, 91 N. W. 518; *Hendelman v. Kahan*, 50 Wash. 247, 97 Pac. 109.

In *Record v. Chickasaw Cooperage Co.* 108 Tenn. 657, 69 S. W. 334, a person not included in the list of witnesses, who had been put under the rule and who was present and listened to the testimony, was not permitted to testify when he was afterwards called.

But in Texas such a witness might be sworn in the discretion of the court. *Colbert v. Garrett*, — Tex. Civ. App. —, 57 S. W. 853.

⁷ *State v. Jones*, 47 La. Ann. 1524, 18 So. 515; *Gulf, C. & S. F. R. Co. v. Burleson*, — Tex. Civ. App. —, 26 S. W. 1107; *Woods v. McPheran*, Peck (Tenn.) 371.

⁸ *Timberlake v. Thayer*, 76 Miss. 76, 23 So. 767; *King v. State*, 34 Tex. Crim. Rep. 228, 29 S. W. 1086.

6. Limiting number of witnesses.

A reasonable limitation of the number of witnesses to be called to testify to a particular fact in a cause is within the discretion of the trial court,¹ but this discretion should not be so exercised as to place an arbitrary limit upon the number of witnesses

who may be called to establish a vital issue,² nor to prevent a party from testifying in his own behalf.³

¹ *Detroit City R. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007; *Minton v. Lewis*, 78 Iowa, 620, 43 N. W. 465; *Hupp v. Boring*, 8 Ohio C. C. 259, 4 Ohio C. D. 560; *Skeen v. Mooney*, 8 Utah, 157, 30 Pac. 363; *Meier v. Morgan*, 82 Wis. 289, 52 N. W. 174; *Austin v. Smith*, — Iowa, —, 109 N. W. 289.

This rule applies to experts. *Sixth Ave. R. Co. v. Metropolitan Elev. R. Co.* 138 N. Y. 548, 34 N. E. 400; *Powers v. McKenzie*, 90 Tenn. 167, 16 S. W. 559; *Hilliard v. Beattie*, 59 N. H. 462; *Huett v. Clark*, 4 Colo. App. 231, 35 Pac. 671.

This discretion may be exercised after each party has called a number of witnesses to testify to such fact (*Larson v. Eau Claire*, 92 Wis. 86, 65 N. W. 731; *Outcalt v. Johnston*, 9 Colo. App. 519, 49 Pac. 1058), but not after the permitted number of witnesses has been examined by one of the parties. *Green v. Phoenix Mut. L. Ins. Co.* 134 Ill. 310, 10 L.R.A. 576, 25 N. E. 583.

In limiting the number of witnesses, the court must so exercise its discretion as not to impair the rights of parties. *Campbell v. Campbell*, 30 R. I. 63, 73 Atl. 354.

It is not an abuse of discretion to limit the witnesses of each party upon the value of real property to five (*Everett v. Union P. R. Co.* 59 Iowa, 243, 13 N. W. 109), or six (*Riggs v. Sterling*, 60 Mich. 643, 27 N. W. 705; *State ex rel. Barrett v. Pratt County Comrs.* 42 Kan. 641, 22 Pac. 722), or to eleven witnesses upon the question of damages (*Union R. Transfer & Stock-Yard Co. v. Moore*, 80 Ind. 458); nor to five witnesses upon the character of a witness sought to be impeached (*State v. Beabout*, 100 Iowa, 155, 69 N. W. 429). But it is error to limit to three witnesses defendant's evidence as to plaintiff's reputation set up in mitigation of damages in an action for slander of chastity. *Nelson v. Wallace*, 57 Mo. App. 397. And it is error to enforce a rule made before any testimony is introduced, limiting the number of witnesses offered to impeach or sustain the character of the parties to six on each side. *Williams v. McKee*, 98 Tenn. 139, 38 S. W. 730.

In the following cases it was held error for the court to limit the number of witnesses: *Sanitary Dist. v. Curran*, 132 Ill. App. 241 (against defendant's protest where witness called by him appeared to be hostile); *Ellis v. St. Louis, I. M. & S. R. Co.* 131 Mo. App. 395, 111 S. W. 839 (against defendant's protest on question of value of property in action for obstructing an alley); *St. Louis, M. & S. E. R. Co. v. Aubuchon*, 199 Mo. 352, 9 L.R.A.(N.S.) 426, 116 Am. St. Rep. 499, 97 S. W. 867, 8 A. & E. Ann. Cas. 822 (limiting to four in condemnation proceedings was error).

For various questions relating to rule fixing number of witnesses, see:

Giordano v. Brandywine Granite Co. 3 Penn. (Del.) 423, 52 Atl. 332 (witness counted who said he knew nothing about the case); *Doe ex dem. Pritchard v. Henderson*, 3 Penn. (Del.) 128, 50 Atl. 217 (rule not applicable to question of mental condition of testatrix); *Love v. Barnesville Mfg. Co.* 3 Penn. (Del.) 152, 50 Atl. 536 (number not enlarged to admit expert as to actual observation); *Chicago Terminal Transfer R. Co. v. Bugbee*, 184 Ill. 353, 56 N. E. 386 (number not enlarged to admit expert as to value); *Dowie v. Priddle*, 216 Ill. 553, 75 N. E. 243, 3 A. & E. Ann. Cas. 526 (libel, rule applied to witnesses to reputation); *Chicago City R. Co. v. Wall*, 93 Ill. App. 411 (requiring party to pay costs of witness in excess of number fixed); *Cooke Brewing Co. v. Ryan*, 98 Ill. App. 444 (action for injuries, number of witnesses not limited as to surrounding circumstances); *Covington v. Taffee*, 24 Ky. L. Rep. 373, 68 S. W. 629 (error to limit number to three); *Burt & B. Lumber Co. v. Crawford*, 27 Ky. L. Rep. 798, 86 S. W. 702 (damages to land by hauling logs); *White v. Boston*, 186 Mass. 65, 71 N. E. 75 (number of experts cannot be enlarged on cross-examination); *Weeks v. Boston Elev. R. Co.* 190 Mass. 563, 77 N. E. 654 (effect of statute relative to declaration of deceased persons); *Brady v. Shirley*, 18 S. D. 608, 101 N. W. 886, 5 A. & E. Ann. Cas. 972 (not error for court to enlarge original number); *Swope v. Seattle*, 36 Wash. 113, 78 Pac. 607 (changing street grade, experts as to value of premises, rule limiting to three on each side); *J. H. Clark Co. v. Rice*, 127 Wis. 451, 106 N. W. 231, 7 A. & E. Ann. Cas. 505 (patent, each party limited to fifteen witnesses as to utility).

² *Green v. Phoenix Mut. L. Ins. Co.* 134 Ill. 310, 10 L.R.A. 576, 25 N. E. 583; *White v. Hermann*, 51 Ill. 243; *Hubble v. Osborn*, 31 Ind. 249; *Reynolds v. Port Jervis Boot & Shoe Factory*, 32 Hun, 64.

³ *Fisher v. Conway*, 21 Kan. 18, 30 Am. Rep. 419.

7. Privilege of witness.

a. In general.—It is the privilege of a witness to refuse to answer any question where his answer will expose him to a criminal charge,¹ or will subject him to a penalty or forfeiture,² or will furnish an essential link in the chain of evidence establishing his liability.³ The privilege extends to protection from a disclosure of a trade secret the effect of which might ruin the business of the witness,⁴ but will not sustain him in his refusal to answer a question because his answer will expose him to a civil suit or liability;⁵ nor because his answer will degrade or disgrace him, unless the evidence sought is immaterial to the issue.⁶

A witness cannot claim his privilege as an excuse for his re-

fusal to be sworn, but can only avail himself of it when the objectionable question is asked.⁷

- ¹ *Burger v. State*, 83 Ala. 36, 3 So. 319; *Ex parte Clarke*, 103 Cal. 352, 37 Pac. 230; *Grannis v. Branden*, 5 Day, 260, 5 Am. Dec. 143; *Short v. State*, 4 Harr. (Del.) 568; *Ex parte Senior*, 37 Fla. 1, 32 L.R.A. 133, 19 So. 652; *Clifton v. Granger*, 86 Iowa, 573, 53 N. W. 316; *Re Nickell*, 47 Kan. 734, 28 Pac. 1076; *State v. Crittenden*, 38 La. Ann. 448; *Simmons v. Holster*, 13 Minn. 249, Gil. 232; *State v. Albert*, 73 Mo. 357; *Southard v. Rexford*, 6 Cow. 254; *Fries v. Brugler*, 12 N. J. L. 79, 21 Am. Dec. 52; *Reed v. Williams*, 5 Sneed, 580, 73 Am. Dec. 157; *Chamberlain v. Willson*, 12 Vt. 491, 36 Am. Dec. 356; *United States v. Moses*, 1 Cranch, C. C. 170, Fed. Cas. No. 15,824.

That the witness will be subjected to a criminal charge, however punishable, is clearly a sufficient ground for claiming the protection, see note to *Cooper v. State*, 4 L.R.A. 766.

- ² *Henry v. Bank of Salina*, 1 N. Y. 83; *Johnson v. Donaldson*, 18 Blatchf. 287, 3 Fed. 22; *Com. v. Willard*, 22 Pick. 476; *Poindexter v. Davis*, 6 Gratt. 481.

- ³ *Minters v. People*, 139 Ill. 363, 29 N. E. 45; *Printz v. Cheeney*, 11 Iowa, 469; *Stevens v. State*, 50 Kan. 712, 32 Pac. 350; *Janvrin v. Scammon*, 29 N. H. 280; *People v. Mather*, 4 Wend. 229; *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303; *Smith v. Smith*, 116 N. C. 386, 21 S. E. 196.

That a witness may refuse an answer to every incidental fact which might form a link in the chain of evidence establishing his liability to punishment, penalty, or forfeiture, see note to *Rice v. Rice*, 11 L.R.A. 591.

- ⁴ Plaintiff in an action to restrain the use of his trademark will not be compelled to disclose the ingredients of his manufactures, although the answer alleges the product to be injurious. *Tetlow v. Savournin*, 15 Phila. 170, cited with approval in *Moxie Nerve Food Co. v. Beach*, 35 Fed. 465. In *Burnett v. Phalon*, 21 How. Pr. 100, a question calling for the ingredients of a manufactured article was allowed on cross-examination, on the ground that the examination in chief had opened the subject.

- ⁵ *Com. v. Thurston*, 7 J. J. Marsh. 62; *Hays v. Richardson*, 1 Gill & J. 366; *Lowney v. Parham*, 20 Me. 235; *Bull v. Loveland*, 10 Pick. 9; *Copp v. Upham*, 3 N. H. 159; *Re Kip*, 1 Paige, 601; *Harper v. Burrow*, 28 N. C. (6 Ired. L.) 30; *Baird v. Cochran*, 4 Serg. & R. 397; *Zollicoffer v. Turney*, 6 Yerg. 297; *Ward v. Sharp*, 15 Vt. 115. Contra, *Benjamin v. Hathaway*, 3 Conn. 528; *Starr v. Tracey*, 2 Root, 528; *Storrs v. Wetmore*, Kirby, 203.

See also note in 29 L.R.A. 811, in which the question is discussed at length.

⁶ Ex parte Rowe, 7 Cal. 184; Weldon v. Burch, 12 Ill. 374; South Bend v. Hardy, 98 Ind. 577; State v. Pugsley, 75 Iowa, 742, 38 N. W. 498; McCampbell v. McCampbell, 20 Ky. L. Rep. 552, 46 S. W. 18; Jennings v. Prentice, 39 Mich. 421; Clementine v. State, 14 Mo. 112; Lohman v. People, 1 N. Y. 385, 49 Am. Dec. 340; Conway v. Clinton, 1 Utah, 215; Howel v. Com. 5 Gratt. 664; Brown v. Walker, 161 U. S. 591, 40 L. ed. 819, 16 Sup. Ct. Rep. 644. Contra, Taylor v. State, 83 Ga. 647, 10 S. E. 442; Vaughn v. Perine, 3 N. J. L. 728; Respublica v. Gibbs, 3 Yeates, 429.

Under a Code provision excusing a witness from answers which will expose him to public ignominy, it must reasonably appear, not only that they would disclose acts which might justify public censure, but those which would tend to expose him to public hatred or detestation or dishonor. Mahanke v. Cleland, 76 Iowa, 401, 41 N. W. 53.

In Texas the irrelevancy of the question does not justify the refusal of the witness to answer. Crockett v. State, 40 Tex. Crim. Rep. 173, 49 S. W. 392.

⁷ Ex parte Stice, 70 Cal. 51, 11 Pac. 459; Re Eckstein, 148 Pa. 509, 24 Atl. 63. Contra, Neale v. Coningham, 1 Cranch, C. C. 76, Fed. Cas. No. 10,067.

b. Privilege personal to witness; waiver.—The privilege is personal to the witness¹ unless the question is not pertinent,² and may be waived by failure to claim it,³ and a party cannot avail himself of the court's erroneous refusal to allow it to a witness.⁴

¹ Lothrop v. Roberts, 16 Colo. 250, 27 Pac. 697; Ex parte Senior, 37 Fla. 1, 32 L.R.A. 133, 19 So. 652; Eggers v. Fox, 177 Ill. 185, 52 N. E. 269; Mitchell v. Com. 12 Ky. L. Rep. 458, 14 S. W. 489; State v. Wentworth, 65 Me. 234, 20 Am. Rep. 688; Roddy v. Finnegan, 43 Md. 490; Com. v. Shaw, 4 Cush. 594, 50 Am. Dec. 813; State v. Foster, 23 N. H. 348, 55 Am. Dec. 191; Fries v. Brugler, 12 N. J. L. 79, 21 Am. Dec. 52; Southard v. Rexford, 6 Cow. 254; State v. Butler, 47 S. C. 25, 24 S. E. 991; San Antonio Street R. Co. v. Muth, 7 Tex. Civ. App. 443, 27 S. W. 752; State v. Coella, 3 Wash. 99, 28 Pac. 28; Ingalls v. State, 48 Wis. 647, 4 N. W. 785; Morgan v. Halberstadt, 9 C. C. A. 147, 20 U. S. App. 417, 60 Fed. 592.

The privilege may be claimed by counsel where the witness is a party. Clifton v. Granger, 86 Iowa, 573, 53 N. W. 316; People v. Brown, 72 N. Y. 571, 28 Am. Rep. 183. Contra, State v. Kent, 5 N. D. 516, sub nom. State v. Pancoast, 35 L.R.A. 518, 67 N. W. 1052.

² Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; South Bend v. Hardy, 98 Ind. 583, 49 Am. Rep. 792.

³ Reg. v. Sloggett, 7 Cox C. C. 144, Dears. C. C. 656, 25 L. J. Mag. Cas.

N. S. 93, 2 Jur. N. S. 764, 4 Week. Rep. 487; *Smith v. Beadnell*, 1 Campb. 33; *People v. King*, 28 Cal. 265; *People v. Wieger*, 100 Cal. 352, 34 Pac. 826; *Jenkins v. State*, 35 Fla. 737, 48 Am. St. Rep. 267, 18 So. 182; *Ex parte Senior*, 37 Fla. 1, 32 L.R.A. 133, 19 So. 652; *State v. Comer*, 157 Ind. 611, 62 N. E. 452; *People v. Lauder*, 82 Mich. 109, 46 N. W. 956; *State v. Burrell*, 27 Mont. 282, 70 Pac. 982; *People v. Cahill*, 193 N. Y. 232, 20 L.R.A. (N.S.) 1084, 86 N. E. 39; *State v. Broughton*, 29 N. C. (7 Ired. L.) 96, 45 Am. Dec. 507; *State v. Duncan*, 78 Vt. 364, 4 L.R.A. (N.S.) 1144, 112 Am. St. Rep. 922, 63 Atl. 225, 6 A. & E. Ann. Cas. 602.

Where by statute it is provided that a witness may be compelled to answer, but that his testimony shall not be used against him, he is not required to claim his exemption. *Reg. v. Hendershott*, 26 Ont. Rep. 678, 10 Am. Crim. Rep. 292; *Reg. v. Hammond*, 29 Ont. Rep. 211; *People v. Sharp*, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319; *Barber v. People*, 17 Hun, 366. *Contra*, *Reg. v. Williams*, 28 Ont. Rep. 583.

A witness who discloses part of the transaction with which he was criminally concerned, without claiming his privilege, must disclose the whole. *People v. Freshour*, 55 Cal. 375; *State v. Fay*, 43 Iowa, 651; *Norfolk v. Gaylord*, 28 Conn. 309; *Com. v. Pratt*, 126 Mass. 462; *State v. Foster*, 23 N. H. 348, 55 Am. Dec. 191; *Foster v. People*, 18 Mich. 276; *Lockett v. State*, 63 Ala. 5; *Ex parte Senior*, 37 Fla. 1, 32 L.R.A. 133, 19 So. 652; *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269; *State v. Hall*, 20 Mo. App. 397; *Chamberlain v. Willson*, 12 Vt. 491, 36 Am. Dec. 356. But he does not thereby waive his privilege of refusing to reveal other unlawful acts wholly unconnected with the one of which he has spoken, even though they may be material to the issue. *Low v. Mitchell*, 18 Me. 372; *Evans v. O'Connor*, 174 Mass. 287, 75 Am. St. Rep. 316, 54 N. E. 557.

It is not necessary that the witness claim his privilege, where the question is so framed that a responsive answer *prima facie* tends to criminate him. *Alston v. State*, 109 Ala. 51, 20 So. 81.

A waiver is not binding upon the witness on a subsequent trial. *Georgia R. & Bkg. Co. v. Lybren*, 99 Ga. 421, 27 S. E. 794; *Emery v. State*, 101 Wis. 627, 78 N. W. 145. And a disclosure made long before the trial cannot be relied upon as a waiver. *Samuel v. People*, 164 Ill. 379, 45 N. E. 728.

For a discussion of the question of the necessity of claiming privilege against being compelled to give incriminating evidence, with a full review of the authorities, see note in 4 L.R.A. (N.S.) 1144.

* *Clark v. Reese*, 35 Cal. 89; *Samuel v. People*, 164 Ill. 379, 45 N. E. 728; *Cloyes v. Thayer*, 3 Hill, 564; *Morgan v. Halberstadt*, 9 C. C. A. 147, 20 U. S. 417, 60 Fed. 592. *Dictum* to the contrary in *Com. v. Kimball*, 24 Pick. 366, 35 Am. Dec. 326; *State ex rel. Hopkins v. Olin*, 23 Wis. 309.

c. Instructing witness as to privilege.—While the court or examiner may properly instruct the witness as to his privilege where he appears to be in need of such instruction,¹ and it is sometimes held that it is even his duty to do so,² the fact that the witness may be ignorant of his privilege and that he is not advised of it seems generally not to be considered important, especially in the modern cases, since it is said that everyone must be deemed to know the law.³

¹ Janvrin v. Scammon, 29 N. H. 280; New v. Fisher, 11 Daly, 313; Emery v. State, 101 Wis. 627, 78 N. W. 145; Mayo v. Mayo, 119 Mass. 290.

² United States v. Bell (C. C. W. D. Tenn.) 81 Fed. 830; Friess v. New York C. & H. R. R. Co. 67 Hun, 205, 22 N. Y. Supp. 104; Taylor v. Wood, 2 Edw. Ch. 94; Ralph v. Brown, 3 Watts & S. 395; Lea v. Henderson, 1 Coldw. 146.

³ Smith v. Crane, 12 Vt. 491, the court says that the witness ought to be told either by his counsel or the court, at the suggestion of counsel, that he is not obliged to testify if the matter will tend to criminate him.

³ Note in 4 L.R.A. (N.S.) 1144; Wigmore, Ev. § 2269.

The court is not bound to so instruct a witness upon the interposition of a party and independently of any objection taken by the witness himself. Com. v. Shaw, 4 Cush. 594.

And the failure of the court to caution a witness is not cause for setting aside a verdict against one upon whose trial the witness testified. Dunn v. State, 99 Ga. 211, 25 S. E. 448.

d. When protected from effect of disclosure.—A witness cannot claim his privilege where the prosecution to which his answers will expose him is barred by the statute of limitations;¹ nor where he has been pardoned,² or acquitted³ of the offense. But neither a promise of the attorney general not to prosecute,⁴ nor an equitable right to executive pardon,⁵ if the witness states fully and fairly the truth, will deprive him of his privilege.

¹ Calhoun v. Thompson, 56 Ala. 166, 28 Am. Rep. 754; Weldon v. Burch, 12 Ill. 374; Mahanke v. Cleland, 76 Iowa, 401, 41 N. W. 53; Close v. Olney, 1 Denio, 319; Druggist Cases, 85 Tenn. 449, 3 S. W. 490; Floyd v. State, 7 Tex. 215; Childs v. Merrill, 66 Vt. 302, 29 Atl. 532. Contra McFadden v. Reynolds, 9 Sadler (Pa.) 105, 20 W. N. C. 312, 11 Atl. 638.

But it must affirmatively appear that no prosecution is pending against the witness. *Lamson v. Boyden*, 160 Ill. 613, 43 N. E. 781; *Southern Railway News Co. v. Russell*, 91 Ga. 808, 18 S. E. 40.

² *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 16 Sup. Ct. Rep. 644.

³ *Lathrop v. Roberts*, 16 Colo. 250, 27 Pac. 698.

⁴ *Muller v. State*, 11 Lea, 18.

⁵ *Ex parte Irvine*, 74 Fed. 954.

The question whether or not a witness may be deprived by statute of his constitutional privilege of silence depends upon the extent of the protection which the statute affords him. If the statute affords complete immunity from prosecution, the witness may be deprived of his privilege. But a number of the early cases declared that a witness might be compelled to testify where the statute did not insure him such complete immunity, but simply prohibited the subsequent use of his testimony in any case against him.¹

But the better rule, which is now sustained by the great weight of authority, declares that before the constitutional privilege of silence can be taken away by the legislature there must be absolute indemnity provided; that nothing short of a complete amnesty to the witness—an absolute wiping out of the offense, so that he can no longer be prosecuted for it—will furnish that indemnity; and that a provision merely that the testimony of a witness shall not be used in evidence against him does not secure such absolute immunity.²

¹ *State v. Quarles*, 13 Ark. 307; *Higdon v. Heard*, 14 Ga. 255; *Wilkins v. Malone*, 14 Ind. 153; *Ex parte Buskett*, 106 Mo. 602, 14 L.R.A. 407, 27 Am. St. Rep. 378, 17 S. W. 753, 9 Am. Crim. Rep. 754; *La Fontaine v. Southern Underwriters' Asso.* 83 N. C. 132.

People ex rel. Hackley v. Kelly, 24 N. Y. 74, even went so far as to decide that the constitutional provision that no person should "be compelled in any criminal case to be a witness against himself" applied only in a criminal case in which the person sought to be made a witness was also a party defendant, and that therefore a statute making the giving of testimony compulsory, but providing that the testimony should not be used in any prosecution or proceeding, civil or criminal, against the witness, was sufficient protection. But this was overruled in *People ex rel. Lewisohn v. O'Brien*, 176 N. Y. 253, 68 N. E. 353, 15 Am. Crim. Rep. 97.

² *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *Ex parte Clarke*, 103 Cal. 352, 37

Pac. 230; *People ex rel. Akin v. Butler Street Foundry & Iron Co.* 201 Ill. 236, 66 N. E. 349; *Lamson v. Boyden*, 160 Ill. 613, 43 N. E. 781; *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22; *Ex parte Carter*, 166 Mo. 604, 57 L.R.A. 654, 66 S. W. 540; *State v. Nowell*, 58 N. H. 314; *People ex rel. Lewisohn v. O'Brien*, 176 N. Y. 253, 68 N. E. 353, 15 Am. Crim. Rep. 97; *Cullen v. Com.* 24 Gratt. 624.

The rule declared in *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195, in which the question is considered at length, with an extensive review of the earlier authorities, is, of course, binding on the Federal courts, which have since followed it, except in the case of *Mackel v. Rochester*, 42 C. C. A. 427, 102 Fed. 314, where it was held that § 7 of the bankruptcy act July 1, 1898, providing that no testimony given by a witness should be offered in evidence against him in any criminal proceeding, was sufficient to satisfy the constitutional guaranty against self-crimination. But this decision seems to be based on a misconception of the case of *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644, in which it was held that exempting a witness from any prosecution or any penalty or forfeiture on account of any transaction to which he may testify sufficiently satisfied the guaranty against self-crimination, and adds that the fact that the witness cannot be shielded from the personal disgrace or opprobrium attaching to exposure does not render the statutory protection insufficient to satisfy the constitutional guaranty. The latter case is followed in *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563.

For cases in which various statutes have been considered and held sufficient to satisfy the constitutional guaranty against self-crimination, see *People v. Sharp*, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319; *People v. Cahill*, 193 N. Y. 232, 20 L.R.A.(N.S.) 1084, 86 N. E. 39; *Re Briggs*, 135 N. C. 118, 47 S. E. 403; *State v. Newell*, 58 N. H. 314; *Kendrick v. Com.* 78 Va. 493; *People ex rel. Akin v. Butler Street Foundry & Iron Co.* 201 Ill. 236, 66 N. E. 349; *Ex parte Cohen*, 104 Cal. 524, 26 L.R.A. 423, 43 Am. St. Rep. 127, 38 Pac. 364; *State v. Jack*, 69 Kan. 387, 76 Pac. 911, 2 A. & E. Ann. Cas. 171, with note in 1 L.R.A.(N.S.) 167, reviewing all the authorities on this question.

A few statutes expressly provide that testimony so secured shall not be used, even in a civil proceeding, against the witness.¹ But where such express provision has not been made, a statute granting immunity from "being prosecuted or subjected to any penalty or forfeiture" because of testimony thus elicited re-

lates only to criminal prosecutions and not to civil proceedings.²

¹ People ex rel. Hackley v. Kelly, 24 N. Y. 74.

² Re Biggers, 24 Okla. 842, 25 L.R.A.(N.S.) 622, 104 Pac. 1083. That there is considerable indirect authority supporting this decision is shown by the note accompanying the L.R.A. report of the case.

e. Conclusiveness of witness's statement that answer will tend to criminate him.—While there is, perhaps a little authority to the contrary, it is now well settled that it is not sufficient to excuse the witness from answering, that he may think his answer might possibly lead to some criminal charge against him, or tend to convict him of it if made. The court must be able to perceive that there is reasonable ground to apprehend danger to the witness from his being compelled to answer.¹ And it is for the judge before whom the question arises, to decide whether an answer to the question put may reasonably have a tendency to criminate the witness, or to furnish proof of a link in the chain of evidence necessary to convict him of a crime; and in determining this question the court may look at all the circumstances of the case.²

But the privilege should be recognized and protected where it is not clearly manifest that the answer called for can have no incriminating tendency.³ If the fact that the witness is in danger appears, great latitude should be allowed to him in judging for himself of the effect of any particular question.⁴ So the court, in the application of these principles, cannot properly anticipate the answer of the witness, or assume that it would be such as to have no tendency to incriminate him, if a different answer responsive to the question might have that effect.⁵ And the court cannot deny the privilege to a witness who claims it under oath, unless satisfied that the witness is mistaken or acts in bad faith.⁶

Neither can a witness be required to show how an answer will criminate him, otherwise the purpose of the privilege would be frustrated.⁷

¹ United States v. McCarthy, 21 Blatchf. 469, 18 Fed. 87; Wyckoff, Seamans & Benedict v. Wagner Typewriter Co. 99 Fed. 158; United States v. Collins, 145 Fed. 709; Re Rogers, 129 Cal. 468, 62 Pac. 47; Brad-

ley v. Clark, 133 Cal. 196, 65 Pac. 395; Ex parte Senior, 37 Fla. 1, 32 L.R.A. 133, 19 So. 652; People ex rel. Akin v. Butler Street Foundry & Iron Co. 201 Ill. 236, 66 N. E. 349; Manning v. Mercantile Securities Co. 242 Ill. 584, 30 L.R.A.(N.S.) 725, 90 N. E. 238; Richman v. State, 2 G. Greene, 532; Mahanke v. Cleland, 76 Iowa, 401, 41 N. W. 53; Re Moser, 138 Mich. 302, 101 N. W. 589, 5 A. & E. Ann. Cas. 32; State v. Thaden, 43 Minn. 253, 45 N. W. 447; Ex parte Stice, 70 Cal. 53, 11 Pac. 459; Chesapeake Club v. State, 63 Md. 446; Ex parte Gfeller, 178 Mo. 248, 77 S. W. 552; Territory v. Nugent, 1 Mart. (La.) 108; Com. v. Braynard, Thatcher, Crim. Cas. 146; Forbes v. Willard, 37 How. Pr. 193; LaFontaine v. Southern Underwriters' Asso. 83 N. C. 132; Friess v. New York C. & H. R. R. Co. 67 Hun, 205, 22 N. Y. Supp. 104, affirmed in 55 N. Y. S. R. 931; Com. v. Bell, 145 Pa. 374, 22 Atl. 641, 644 (also statutory rule); Floyd v. State, 7 Tex. 215; Kirschner v. State, 9 Wis. 140; Rudolph v. State, 128 Wis. 222, 116 Am. St. Rep. 32, 107 N. W. 466; Mis-kimmins v. Shaver, 8 Wyo. 392, 49 L.R.A. 831, 58 Pac. 411; Ex parte Reynolds, L. R. 20 Ch. Div. 294, 51 L. J. Ch. N. S. 756, 46 L. T. N. S. 508, 39 Week. Rep. 651, 46 J. P. 533; National Asso. v. Smithies [1906] A. C. 434, 75 L. J. K. B. N. S. 861, 95 L. T. N. S. 71, 22 Times L. R. 678, 5 A. & E. Ann. Cas. 738; Ex parte Maguire, 14 Quebec L. R. 359; Reg. v. Boyes, 1 Best & S. 311, 2 Fost. & F. 157, 30 L. J. K. B. N. S. 301, 7 Jur. N. S. 1158, 5 L. T. N. S. 147, 9 Week. Rep. 690, 9 Cox, C. C. 32; Ex parte Fernandez, 10 C. B. N. S. 3, 30 L. J. C. P. N. S. 321, 7 Jur. N. S. 571, 4 L. T. N. S. 324, 9 Week. Rep. 832, 15 Eng. Rul. Cas. 1; Doe ex dem. Rowcliffe v. Egremont, 2 Moody & R. 386; Ex parte Schofield. L. R. 6 Ch. Div. 230, 46 L. J. Bankr. N. S. 112, 37 L. T. N. S. 281, 26 Week. Rep. 9; Reg. v. Garbett, 2 Car. & K. 474, 1 Den. C. C. 236, 2 Cox, C. C. 448.

The party calling the witness may show by other testimony that the answer cannot possibly criminally implicate him. Ford v. State ex rel. Hilton, 29 Ind. 541, 91 Am. Dec. 658.

² Ex parte Irvine, 74 Fed. 954; Foot v. Buchanan, 113 Fed. 156; Re Hess, 134 Fed. 109, s. c. subsequent appeal in 136 Fed. 988; United States v. Burr, Fed. Cas. No. 14,692e; Overend v. Superior Ct. 131 Cal. 280, 63 Pac. 372; State v. Duffy, 15 Iowa, 425; Stevens v. State, 50 Kan. 712, 32 Pac. 350; Coburn v. Odell, 30 N. H. 540; Janvrin v. Scammon, 29 N. H. 280; State ex rel. Eaton v. Farmer, 46 N. H. 200; People v. Priori, 164 N. Y. 459, 58 N. E. 668; Fellows v. Wilson, 31 Barb. 162; Byass v. Smith, 4 Bosw. 679; Friess v. New York C. & H. R. R. Co. 67 Hun, 205, 22 N. Y. Supp. 104; McGorray v. Sutter, 80 Ohio St. 400, 24 L.R.A.(N.S.) 165, 131 Am. St. Rep. 715, 89 N. E. 10; Ex parte Park, 37 Tex. Crim. Rep. 590, 66 Am. St. Rep. 835, 40 S. W. 300; Ex parte Andrews, 51 Tex. Crim. Rep. 79, 100 S. W. 376; Sidebottom v. Adkins, 3 Jur. N. S. 631, 5 Week. Rep. 743.

- ³ *Wyckoff, Seamans & Benedict v. Wagner Typewriter Co.* 99 Fed. 158; *Ex parte Senior*, 37 Fla. 1, 32 L.R.A. 133, 19 So. 652; *Minters v. People*, 139 Ill. 363, 29 N. E. 45; *Printz v. Cheeney*, 11 Iowa, 469; *Stevens v. State*, 50 Kan. 712, 32 Pac. 350; *Ward v. State*, 2 Mo. 120, 22 Am. Dec. 449; *Janvrin v. Scammon*, 29 N. H. 280; *State ex rel. Eaton v. Farmer*, 46 N. H. 200; *Com. v. Braynard, Thacher, Crim. Cas.* 146; *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122; *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303; *Re Van Tine*, 12 How. Pr. 507; *Chappell v. Chappell*, 116 App. Div. 573, 101 N. Y. Supp. 846; *Re Lowe*, 3 Ohio N. P. N. S. 641, 16 Ohio S. & C. P. Dec. 254; *Ex parte Andrews*, 51 Tex. Crim. Rep. 79, 100 S. W. 376; *Ex parte Reynolds*, L. R. 20 Ch. Div. 294, 51 L. J. Ch. N. S. 756, 46 L. T. N. S. 508, 30 Week. Rep. 651, 46 J. P. 533; *Short v. Mercier*, 3 Macn. & G. 205, 20 L. J. Ch. N. S. 289, 15 Jur. 93; *Fisher v. Ronalds*, 12 C. B. 762, 22 L. J. C. P. N. S. 62, 17 Jur. 393, 1 Week. Rep. 54; *D'Ivry v. World Newspaper Co.* 17 Ont. Pr. Rep. 387; *Paxton v. Douglas*, 19 Ves. Jr. 225.
- ⁴ *Foot v. Buchanan*, 113 Fed. 156; *Re Hess*, 134 Fed. 109; *Ex parte Boscowitz*, 84 Ala. 463, 5 Am. St. Rep. 384, 4 So. 279; *Ex parte Maguire*, 14 Quebec L. R. 359; *Reg. v. Boyes*, 1 Best & S. 311, 2 Fost. & F. 157, 30 L. J. Q. B. N. S. 301, 7 Jur. N. S. 1158, 5 L. T. N. S. 147, 9 Week. Rep. 690, 9 Cox, C. C. 32.
- ⁵ *United States v. Burr*, Fed. Cas. No. 14,692e; *Ex parte Butt*, 78 Ark. 262, 93 S. W. 992; *Re Rosser*, 96 Fed. 305; *Wilson v. Ohio Farmers' Ins. Co.* 164 Ind. 462, 73 N. E. 892; *Howard v. Com.* 118 Ky. 1, 80 S. W. 211, 81 S. W. 704; *Janvrin v. Scammon*, 29 N. H. 280; *Coburn v. Odell*, 30 N. H. 540; *People v. Priori*, 164 N. Y. 459, 58 N. E. 668; *Fellows v. Wilson*, 31 Barb. 162; *Curtis v. Knox*, 2 Denio, 341.
- ⁶ *Re Allison*, 156 Mich. 34, 120 N. W. 19; *Chamberlain v. Willson*, 12 Vt. 491, 36 Am. Dec. 356; *Temple v. Com.* 75 Va. 892. But see *State v. Duffy*, 15 Iowa, 425.
- ⁷ *Ex parte Irvine*, 74 Fed. 954; *Ex parte Butt*, 78 Ark. 262, 93 S. W. 992; *Ex parte Senior*, 37 Fla. 1, 32 L.R.A. 133, 19 So. 652; *Wallace v. State*, 41 Fla. 547, 26 So. 713; *Printz v. Cheeney*, 11 Iowa, 469; *State v. Duffy*, 15 Iowa, 425; *Howard v. Com.* 118 Ky. 1, 80 S. W. 211, 81 S. W. 704; *Merluzzi v. Gleeson*, 59 Md. 214; *State v. Thaden*, 43 Minn. 253, 45 N. W. 447; *Janvrin v. Scammon*, 29 N. H. 280; *Coburn v. Odell*, 30 N. H. 540; *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122; *Friess v. New York C. & H. R. R. Co.* 67 Hun, 205, 22 N. Y. Supp. 104; *Kirschner v. State*, 9 Wis. 140; *Miskimins v. Shaver*, 8 Wyo. 392, 49 L.R.A. 831, 58 Pac. 411; *Short v. Mercier*, 3 Macn. & G. 205, 20 L. J. Ch. N. S. 289, 15 Jur. 93.

For a more extended discussion of the question of conclusiveness of witness's statement that his answer will incriminate him, with a full review of the authorities, see note in 24 L.R.A.(N.S.) 165.

8. Expert's refusal to testify unless specially compensated.

It has been held that an expert cannot be compelled to testify as such unless specially compensated.¹ But the weight of authority is to the effect that, while he cannot be compelled to make any preliminary preparation without extra compensation, he cannot for that reason refuse to give such information as he already possesses.²

¹ Webb v. Page, 1 Car. & K. 23; Buchman v. State, 59 Ind. 1; United States v. Howe, 12 Cent. L. J. 193, Fed. Cas. No. 15,404a. *Dictum* to same effect in People v. Montgomery, 13 Abb. Pr. N. S. 207; Re Roelker, Sprague, 276, Fed. Cas. No. 11,995.

The effect of the decision in Buchman v. State, 59 Ind. 1, has been nullified in Indiana by a legislative enactment evidently intended to meet this decision. See Horner's Ind. Stat. 1896, § 504. And for an extended discussion of the compensation of expert witnesses, see notes to Flinn v. Prairie County, 27 L.R.A. 669; and to Philler v. Waukesha County, 25 L.R.A.(N.S.) 1040. And as to the right of the state to require service of witnesses without compensation, see note to Dixon v. People, 39 L.R.A. 116.

² Ex parte Dement, 53 Ala. 389, 25 Am. Rep. 611; Flinn v. Prairie County, 60 Ark. 204, 27 L.R.A. 669, 46 Am. St. Rep. 168, 29 S. W. 459; Lorimer County v. Lee, 3 Colo. App. 177, 32 Pac. 841; Schofield v. Little, 2 Ga. App. 286, 58 S. E. 666; Dixon v. People, 168 Ill. 179, 39 L.R.A. 116, 48 N. E. 108; Walker v. Cook, 33 Ill. App. 561; North Chicago Street R. Co. v. Zeiger, 182 Ill. 9, 74 Am. St. Rep. 157, 54 N. E. 1006; Keller v. Harrison, — Iowa, —, 128 N. W. 851; State v. Teipner, 36 Minn. 535, 32 N. W. 678; Burnett v. Freeman, 125 Mo. App. 683, 103 S. W. 121 (on subsequent appeal, 134 Mo. App. 709, 115 S. W. 488); Main v. Sherman County, 74 Neb. 155, 103 N. W. 1038; Com. ex rel. Shawley v. Lucas, 24 Pa. Co. Ct. 126; Summers v. State, 5 Tex. App. 365, 32 Am. Rep. 573; Philler v. Waukesha County, 139 Wis. 211, 25 L.R.A.(N.S.) 1040, 131 Am. St. Rep. 1055, 120 N. W. 829, 17 A. & E. Ann. Cas. 712.

In Bathgate v. Irvine, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442, it was held that expert witnesses were not entitled to fees as such, nor even for expenses incurred by them in making surveys or preparing maps, where it appeared that they were not acting under direction of the court.

And the right to allow the fees of an expert witness as costs is denied in Re Bender, 86 Hun, 570, 33 N. Y. Supp. 907, and in Randall v. Morning Journal Asso. 22 Misc. 715, 49 N. Y. Supp. 1064.

That there is a sufficient consideration for a promise to pay an expert witness a reasonable compensation in addition to statutory fees, when

he is engaged in advance of trial to testify as an expert, is declared in *Barrus v. Phaneuf*, 166 Mass. 123, 32 L.R.A. 619, 44 N. E. 141.

And physicians employed without an agreement as to compensation, by a plaintiff in an action to recover for personal injuries, to make a personal examination of his condition in order to qualify as experts, and then to attend court to testify as such experts and assist counsel in meeting expert evidence from the other side, may recover from him reasonable compensation for their time, and are not limited to the regular witness fees, where they were not summoned, but appeared voluntarily under the agreement. *Gordon v. Conley*, — Me. —, 33 L.R.A. (N.S.) 336, 78 Atl. 365.

It has also been held that a district attorney is authorized to contract for services of experts. *People ex rel. Tripp v. Cayuga County*, 22 Misc. 616, 50 N. Y. Supp. 16.

But a county is not bound to pay an expert witness hired by the district attorney a sum which is unreasonable and extravagant. *People ex rel. Hamilton v. Jefferson County*, 35 App. Div. 239, 54 N. Y. Supp. 782.

9. Questions generally.

a. In general.—Each question put to a witness need not be so comprehensive that the answer when taken alone shall be evidence of some issue in the cause. That the answer will be a link in the chain of proof is sufficient to render the question relevant.¹ The relevancy of preliminary questions need not to be apparent when asked, where the answers lead up to or connect with testimony subsequently introduced.²

General questions touching a cause and the various issues involved are not objectionable,³ unless asked in such a general way that no intelligent answer can be given.⁴

A compound question, only a part of which is proper, may rightfully be excluded as a whole;⁵ and the court may, in its discretion, refuse to allow questions which are argumentative and apparently intended more to affect the jury by the form of the question than by the answer of the witness,⁶ or which are so skilfully framed as to call out certain facts and exclude others connected with the same transaction.⁷

The admission of a proper question is not error because the witness misunderstood it or gave an improper answer,⁸ and if no improper testimony is in fact given, the allowance of improper questions is immaterial.⁹

¹ *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 302;
Schuchardt v. Allen, 1 Wall. 359, 17 L. ed. 642.

But to render a question, in itself apparently irrelevant, proper to be asked as a link in a chain of evidence, it must be accompanied with a proposal to follow it up at the proper time by proof of other facts, which, if true, will make the question relevant. *Wygert v. Norton*, 4 Mich. 286.

² *State v. Kent*, 5 N. D. 516, sub nom. *State v. Pancoast*, 35 L.R.A. 518, 67 N. W. 1052.

³ *Mann v. State*, 23 Fla. 610, 3 So. 207; *Northern P. R. Co. v. Charless*, 2 C. C. A. 380, 7 U. S. App. 359, 51 Fed. 562; *Van Winkle v. Wilkins*, 81 Ga. 93, 7 S. E. 644; *Hicks v. Riverside Fruit Co.* 72 Cal. 303, 13 Pac. 873; *Angell v. Rosenbury*, 12 Mich. 241.

⁴ *Ferguson v. Moore*, 98 Tenn. 342, 39 S. W. 341.

A question directing a witness to "state to the jury the various conversations which led up to the making of this contract" is properly rejected as too general. *Hinds v. Backus*, 45 Minn. 170, 47 N. W. 655.

⁵ *George v. Norris*, 23 Ark. 121; *Wyman v. Gould*, 47 Me. 159; *Whitford v. Burekmyer*, 1 Gill, 127, 39 Am. Dec. 640; *United States Sugar Refinery v. Providence Steam & Gas Pipe Co.* 10 C. C. A. 422, 18 U. S. App. 603, 62 Fed. 375.

⁶ *State v. Leuth*, 5 Ohio C. C. 94, 3 Ohio C. D. 48.

⁷ *Tyler v. Waddingham*, 58 Conn. 375, 8 L.R.A. 657, 20 Atl. 335.

⁸ *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253.

⁹ *State v. Tippet*, 94 Iowa, 646, 63 N. W. 445; *Deane v. Denver & R. G. R. Co.* 77 Ill. App. 242; *Miller v. Cook*, 127 Ind. 339, 26 N. E. 1072; *State v. Merriman*, 34 S. C. 16, 12 S. E. 619; *Kalbus v. Abbot*, 77 Wis. 621, 46 N. W. 810; *Cochran v. United States*, 157 U. S. 286, 39 L. ed. 704, 15 Sup. Ct. Rep. 628; *King v. Second Ave. R. Co.* 75 Hun, 17, 26 N. Y. Supp. 973.

b. Assuming facts not proved.—It is no objection to a question that it assumes facts as true which are not in dispute,¹ but a question which assumes the existence of a fact not shown by any evidence,² or which erroneously assumes a statement to have been made by the witness,³ is properly excluded. After a witness has testified positively to a fact there is no reason why counsel should not formulate questions to be propounded to him on the theory that his testimony already given is true.⁴

¹ *Robinson v. Craver*, 88 Iowa, 381, 55 N. W. 492; *Wiley v. Portsmouth*, 35 N. H. 303; *Hardcastle v. Heine*, 25 Misc. 146, 54 N. Y. Supp. 169; *Hays v. State*, — Tex. Crim. Rep. —, 20 S. W. 361.

² *Bushnell v. Simpson*, 119 Cal. 658, 51 Pac. 1080; *Hine's Appeal*, 68 Conn. 551, 37 Atl. 384; *Chattanooga, R. & C. R. Co. v. Huggins*, 89 Ga.

494, 15 S. E. 848; *Carpenter v. Amberson*, 20 Ill. 172; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860; *Baltimore & O. R. Co. v. Thompson*, 10 Md. 76; *People v. Lange*, 90 Mich. 454, 51 N. W. 534; *Drake v. State*, 53 N. J. L. 23, 20 Atl. 747; *People v. Mather*, 4 Wend. 229; *Klock v. State*, 60 Wis. 574, 19 N. W. 543.

A question which assumes a fact may be allowed when asked for the sole purpose of calling a witness's attention to the subject of his testimony. *Boothby v. Brown*, 40 Iowa, 104.

³ *People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323; *Fengar v. Brown*, 57 Conn. 60, 17 Atl. 321; *Sanderlin v. Sanderlin*, 24 Ga. 583; *People v. Brown*, 90 Hun, 509, 35 N. Y. Supp. 1009.

⁴ *Barndt v. Frederick*, 78 Wis. 1, 11 L.R.A. 199, 47 N. W. 6.

c. Calling for expert opinions.—While some discretion as to the form of questions to be asked of an expert witness on direct examination¹ is confided to the trial judge,² any question being proper which will elicit an opinion as to the matter or skill or science in controversy, and at the same time exclude any opinion as to the effect of the evidence in establishing controverted facts,³ such questions must be framed hypothetically unless the facts are admitted or undisputed, or the witness is personally acquainted with them.⁴

It is generally deemed improper to request an expert to give his opinion based upon his recollection of the testimony without incorporating the testimony in the question,⁵—especially if the evidence is conflicting.⁶ But where the evidence is brief, clear, and uncontroverted it is not improper to require the expert to give his opinion based on the assumption that such evidence is true.⁷ And where a witness testified to the particular facts on which the expert, who follows the witness while the facts are fresh in the minds of the jury, is to base his opinion, these facts need not be again stated in the question unless there is doubt whether they were understood.⁸

¹ For cross-examination of experts, see *infra*, § 16, d.

² *Roraback v. Pennsylvania Co.* 58 Conn. 292, 20 Atl. 465.

³ *Hunt v. Lowell Gaslight Co.* 8 Allen, 169, 85 Am. Dec. 697.

⁴ *Craig v. Noblesville & S. C. Gravel Road Co.* 98 Ind. 109; *Chicago & A. R. Co. v. Glenny*, 175 Ill. 238, 51 N. E. 896; *State v. Maier*, 36 W. Va. 757, 15 S. E. 991.

When the facts are admitted or undisputed the witness may be asked as to the conclusions to be drawn from them. *M'Naughten's Case*, 10

Clark & F. 200, 8 Scott, N. R. 595, 1 Car. & K. 130, note; Coyle v. Com. 104 Pa. 117; Ft. Worth & D. C. R. Co. v. Thompson, 75 Tex. 501, 12 S. W. 742; Page v. State, 61 Ala. 16; State v. Klinger, 46 Mo. 224.

The question need not be framed hypothetically where the witness is personally acquainted with the facts. Brown v. Hufard, 69 Mo. 305; Bellefontaine & I. R. Co. v. Bailey, 11 Ohio St. 333; Mercer v. Vose, 67 N. Y. 56; Nicendorff v. Manhattan R. Co. 4 App. Div. 46, 38 N. Y. Supp. 690; Boardman v. Woodman, 47 N. H. 120. But the witness must state to the jury all the facts within his own knowledge upon which his opinion is based. Burns v. Barenfield, 84 Ind. 43; Dickinson v. Barber, 9 Mass. 227, 6 Am. Dec. 58; Hitchcock v. Burgett, 38 Mich. 501; People v. Strait, 148 N. Y. 566, 42 N. E. 1045.

⁵ The only safe rule in allowing an expert witness to give his opinion based upon testimony of others is to require the assumed facts upon which the opinion is desired to be stated hypothetically. Craig v. Noblesville & S. C. Gravel Road Co. 98 Ind. 109; Stoddard v. Winchester, 157 Mass. 567, 32 N. E. 948; Reed v. State, 62 Miss. 405; Link v. Sheldon, 136 N. Y. 1, 32 N. E. 696; State v. Bowman, 78 N. C. 509; McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682; Dexter v. Hall, 15 Wall. 9, 21 L. ed. 73. Contra, *dictum* in Polk v. State, 36 Ark. 117; Howland v. Oakland Consol. Street R. Co. 110 Cal. 513, 42 Pac. 983; Jones v. Chicago, St. P. M. & O. R. Co. 43 Minn. 279, 45 N. W. 444. But these as well as the following cases, which seem to announce a contrary rule, are generally distinguishable on the ground that there was no conflict of evidence. State v. Windsor, 5 Harr. (Del.) 513; Schneider v. Manning, 121 Ill. 376, 12 N. E. 267; Negroes Jerry v. Townshend, 9 Md. 145; Gretchell v. Hill, 21 Minn. 464; Gilman v. Strafford, 50 Vt. 723; Wright v. Hardy, 22 Wis. 348.

⁶ An expert cannot be asked to give his opinion based upon conflicting testimony. Gunter v. State, 83 Ala. 96, 3 So. 600; Pyle v. Pyle, 158 Ill. 289, 41 N. E. 999; Bishop v. Spining, 38 Ind. 143; Armendaiz v. Stillman, 67 Tex. 458, 3 S. W. 678; Allen v. Union P. R. Co. 7 Utah, 239, 26 Pac. 297; Livingston v. Com. 14 Gratt. 592; Luning v. State, 2 Pinney, 215, 5 Am. Dec. 153. Even though the question assumes the truth of the entire evidence. Smith v. Hickenbottom, 57 Iowa, 733, 11 N. W. 664; Woodbury v. Obear, 7 Gray, 467; Kempsey v. McGinniss, 21 Mich. 123; Coyle v. Com. 104 Pa. 117.

⁷ Atchison, T. & S. F. R. Co. v. Brassfield, 51 Kan. 167, 32 Pac. 814; Hunt v. Lowell Gaslight Co. 8 Allen, 169, 85 Am. Dec. 697; Yardley v. Cuthbertson, 108 Pa. 395, 1 Atl. 765; State v. Hayden, 51 Vt. 296; Abbot v. Dwinell, 74 Wis. 514, 43 N. W. 496.

An expert may be asked for his opinion based upon the testimony of a single witness upon a single subject, which he has heard and to which

his attention has first been directed. *Seymour v. Fellows*, 77 N. Y. 178.

³ *State v. Watson*, 81 Iowa, 380, 46 N. W. 868.

10. Hypothetical questions.

a. In general.—The facts assumed in a hypothetical question as the basis for an expert opinion must have some support in the evidence.¹ The question need not embrace all the facts in evidence,² though it must not exclude from the expert's consideration a material fact essential to an intelligent opinion.³

The question may be based upon the hypothesis of the truth of all the evidence, or upon a hypothesis specially framed on certain facts which the evidence tends to establish,⁴ and, if within the probable or possible range of the evidence, is unobjectionable.⁵ Whether or not the facts assumed are true or are established by the evidence is for the jury to determine,⁶ and constitutes no available objection to the question.⁷

The fact that the question is based in part upon the expert's personal examination and knowledge does not make it objectionable.⁸

¹ *Bostic v. State*, 94 Ala. 45, 10 So. 602; *People v. Dunne*, 80 Cal. 34, 21 Pac. 1130; *Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45; *Haish v. Payson*, 107 Ill. 365; *Hurst v. Chicago, R. I. & P. R. Co.* 49 Iowa, 76; *Davis v. Traveler's Ins. Co.* 59 Kan. 74, 52 Pac. 67; *Fox v. Peninsular White Lead & Color Works*, 92 Mich. 243, 52 N. W. 623; *State v. Scott*, 41 Minn. 365, 43 N. W. 62; *Wittenberg v. Onsgard*, 78 Minn. 342, 47 L.R.A. 141, 81 N. W. 14; *Russ v. Wabash Western R. Co.* 112 Mo. 45, 18 L.R.A. 823, 20 S. W. 472; *Root v. Kansas City Southern R. Co.* 195 Mo. 348, 6 L.R.A.(N.S.) 212, 92 S. W. 621; *People v. Harris*, 136 N. Y. 423, 33 N. E. 65; *Burnett v. Wilmington, N. & N. R. Co.* 120 N. C. 517, 26 S. E. 819; *Williams v. Brown*, 28 Ohio St. 547; *State v. Andersen*, 10 Or. 448; *Reber v. Herring*, 115 Pa. 599, 8 Atl. 830; *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543.

Hypothetical questions are proper where they are directed to the effect of certain conditions, some of which, although not shown to exist in the particular case, are shown to be caused by the same general principles. *Kraatz v. Brush Electric Light Co.* 82 Mich. 457, 46 N. W. 787.

It is not reversible error to permit an expert witness to answer a hypothetical question assuming a fact unsupported by the evidence, where this fact was the only hypothesis of the question. *Hewitt v. Eisenbart*, 36 Neb. 794, 55 N. W. 252.

A hypothetical question cannot be based upon the assumption of the truth of extracts read by counsel from a medical treatise. *Re Mason*, 60 Hun, 46, 14 N. Y. Supp. 434.

² *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *Goodwin v. State*, 96 Ind. 550; *Turnbull v. Richardson*, 69 Mich. 400, 37 N. W. 499; *Coyle v. Com.* 104 Pa. 117; *Re Miller*, 179 Pa. 645, 39 L.R.A. 220, 36 Atl. 139; *Fort Worth & D. City R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *Burt v. State*, 38 Tex. Crim. Rep. 397, 39 L.R.A. 305, 40 S. W. 1000, 43 S. W. 344; *Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217.

The reason is that if, in the opinion of counsel, there is other evidence proper for the witness to consider, his attention may be called to it on cross-examination. *Davidson v. State*, 135 Ind. 254, 34 N. E. 972; *Stearns v. Field*, 90 N. Y. 640; *Gulf, C. & S. F. R. Co. v. Compton*, 75 Tex. 667, 13 S. W. 667.

If there is no dispute as to the facts on which the witness is to base his opinion, it is proper to require that the question shall embrace them all. *Davis v. State*, 35 Ind. 496. The question must fully and fairly reflect the facts (*Briggs v. Minneapolis Street R. Co.* 52 Minn. 36, 53 N. W. 1019; *Prentiss v. Bates*, 88 Mich. 567, 50 N. W. 637; *Burgo v. State*, 26 Neb. 639, 42 N. W. 701; *Fisher v. Monroe*, 2 Misc. 326, 21 N. Y. Supp. 995), and the omission from the question of facts in evidence renders it improper where, by reason of such omission, it manifestly fails to present the facts which it does include in their just and true relation. *Barber's Appeal*, 63 Conn. 393, 22 L.R.A. 90, 27 Atl. 973.

³ *Senn v. Southern R. Co.* 108 Mo. 142, 18 S. W. 1007; *Vosburg v. Putney*, 80 Wis. 523, 14 L.R.A. 226, 50 N. W. 403; *Western Assur. Co. v. J. H. Mohlman Co.* 40 L.R.A. 561, 28 C. C. A. 157, 51 U. S. App. 577, 83 Fed. 811; *Baltimore & O. R. Co. v. Dever*, 112 Md. 296, 26 L.R.A. (N.S.) 712, 75 Atl. 352.

⁴ *Gottlieb v. Hartman*, 3 Colo. 53; *Cole v. Fall Brook Coal Co.* 159 N. Y. 59, 53 N. E. 670.

In propounding hypothetical questions counsel may assume any state of facts which there is evidence tending to prove. *People v. Hill*, 116 Cal. 562, 48 Pac. 711; *Jordan v. People*, 19 Colo. 417, 36 Pac. 218; *Barber's Appeal*, 63 Conn. 393, 22 L.R.A. 90, 27 Atl. 973; *Baker v. State*, 30 Fla. 41, 11 So. 492; *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; *Manatt v. Scott*, 106 Iowa, 203, 76 N. W. 717; *Peterson v. Chicago, M. & St. P. R. Co.* 38 Minn. 511, 39 N. W. 485; *Smith v. Chicago & A. R. Co.* 119 Mo. 246, 23 S. W. 784; *Omaha & R. Valley R. Co. v. Brady*, 39 Neb. 27, 57 N. W. 767; *Filer v. New York C. R. Co.* 49 N. Y. 42, 10 Am. Rep. 327; *Kerr v. Lunsford*, 31 W. Va. 659, 2 L.R.A. 668, 8 S. E. 493; *Tebo v. Augusta*, 90 Wis. 405, 63 N. W. 1045; *Sigafus v. Porter*, 28 C. C. A. 443, 51 U. S. App. 693, 84 Fed. 430.

It is sufficient if the facts hypothecated be proved by some witness, al-

though not proved to a certainty or with any degree of certainty. *Baxter v. Knox*, 19 Ky. L. Rep. 1973, 44 S. W. 972. But a party cannot, however, introduce contradictory evidence upon a given point, and base hypothetical questions upon the theory that some of the witnesses are correct and some mistaken. *Prentis v. Bates*, 88 Mich. 567, 50 N. W. 637.

⁵ *Jackson v. Burnham*, 20 Colo. 532, 39 Pac. 577; *Powers v. Kansas City*, 56 Mo. App. 573; *Harnett v. Garvey*, 66 N. Y. 641.

⁶ *Gottlieb v. Hartman*, 3 Colo. 53; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Grand Lodge, I. O. of M. A. v. Wieting*, 168 Ill. 408, 48 N. E. 59.

⁷ *Deig v. Morehead*, 110 Ind. 451, 11 N. E. 458.

⁸ *Crawford v. Wolf*, 29 Iowa, 567; *Selleck v. Janesville*, 100 Wis. 157, 41 L.R.A. 563, 75 N. W. 975; *State v. Fournier*, 68 Vt. 262, 35 Atl. 178; *Joslin v. Grand Rapids Ice & Coal Co.* 53 Mich. 322, 19 N. W. 17.

But a hypothetical case and personal examination cannot be joined in the same question, where the examination was, from the time it was made, little or no evidence of the point at issue. *State v. Welsor*, 117 Mo. 570, 21 S. W. 443.

For hypothetical question to expert on cross-examination, see *infra*, § 16, d.

b. Based on opinion of other expert.—As a general rule it is not proper, in asking hypothetical questions, to incorporate in them the opinions of other expert witnesses, for the reason that an opinion of a witness must rest upon the facts.¹

¹ *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Williams v. State*, 64 Md. 384, 1 Atl. 887, 5 Am. Crim. Rep. 512; *Kearner v. Charles S. Tanner Co.* 31 R. I. 203, 29 L.R.A.(N.S.) 537, 76 Atl. 833; *Texas Brewing Co. v. Walters*, — Tex. Civ. App. —, 43 S. W. 548.

Thus a hypothetical question propounded to a physician as to the cause of death was not open to the objection that it did not fairly reflect the evidence, because it did not include the statement that the physician who had treated the deceased for the injury had discharged him as cured. *Ward v. Ætna L. Ins. Co.* 82 Neb. 499, 118 N. W. 70. To have done so, said the court, would have required the witness to base his opinion partly upon the opinion of the attending physician, when he should be required to give his judgment independently upon the facts stated to him.

But in *Howland v. Oakland Consol. Street R. Co.* 110 Cal. 513, 42 Pac. 983, an action for personal injuries resulting in a miscarriage, it was held permissible to ask the physician who had been called in consultation too late to know personally the immediate character of the injuries, as to what, in his judgment, was the cause of the miscar-

riage, assuming the statement made by the attending physician to be true, and the character of the injuries described by him to have been inflicted by the collision, since the question did not improperly call for the opinion of one witness based upon that of another, but simply called for the opinion of the witness as to the inducing cause of the condition in which he found the patient, assuming the injuries to have been as described.

And on an issue as to whether an illness suffered by plaintiff had been aggravated by being carried past his destination on defendant's train, whereby he became permanently paralyzed, it was held, in *Nelson v. Chicago & N. W. R. Co.* 130 Wis. 214, 109 N. W. 933, to be proper to take the opinion of the physicians as to plaintiff's condition at the time he was carried past his destination, as the basis for hypothetical questions propounded to other medical experts.

So, in *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253, where the issue was the mental capacity of the testatrix, an expert was asked: "Assuming the testatrix was insane in 1876, what is your opinion of her having recovered at that time in 1885, taking it just as the doctor states it?" It was urged that this was error, for the reason that the opinion and the conclusion of the doctor were made a part of the basis of the opinion of the witness, but the court held that the question only called for the witness's opinion upon the facts, to which the doctor deposed as to the mental condition of the testatrix, as bearing upon the question whether she had recovered.

c. Length of question.—While long hypothetical questions which ask the witness to usurp the functions of the jury and involve many distinct facts and elements are objectionable,¹ their length must necessarily depend upon the nature of the inquiry and the number of particulars which must be considered, and must rest largely in the discretion of the court.²

¹ *Haish v. Munday*, 12 Ill. App. 539; *People v. Brown*, 53 Mich. 531, 19 N. W. 172.

² *Forsyth v. Doolittle*, 120 U. S. 73, 30 L. ed. 586, 7 Sup. Ct. Rep. 408.

11. Leading questions.

a. In general.—A leading question is one which suggests to the witness the answer expected or desired.¹ That the question may be answered by "Yes" or "No" is not necessarily decisive of its leading character.² But it has been held that a question which embodies a material fact and admits of a conclusive affirmative or negative answer is open to that objection.³ And it is sometimes said that a question which assumes the existence of

facts material to the issue is leading.⁴ A question which is suggestive of the answer is none the less leading because propounded in the alternative form.⁵

Introductory questions which are designed to lead the witness with more expedition to the subject upon which he is desired to give his testimony are not objectionable;⁶ nor are those which, though in appearance leading, are necessarily so because of the nature of the inquiry.⁷

Objection to questions as leading are addressed to the discretion of the trial court;⁸ and the exercise of this discretion is not revisable on appeal⁹ except for manifest abuse.¹⁰

The allowance of a leading question is not ground for reversal where the facts embraced in it have been already,¹¹ or are subsequently, elicited by proper questions.¹²

¹ *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262; *Coogler v. Rhodes*, 38 Fla. 240, 21 So. 109; *Harvey v. Osborn*, 55 Ind. 535; *Stoudt v. Shepherd*, 73 Mich. 588, 44 N. W. 696; *Safford v. Horne*, 72 Miss. 470, 18 So. 433; *Daly v. Melendy*, 32 Neb. 852, 49 N. W. 926; *Page v. Parker*, 40 N. H. 47; *Trammell v. McDade*, 29 Tex. 360; *Proper v. State*, 85 Wis. 626, 55 N. W. 1035.

A question which merely suggests the subject, and not the answer, is not leading. *Born v. Rosenow*, 84 Wis. 620, 54 N. W. 1089.

² A question is not objectionable as leading because it can be answered by "Yes" or "No," unless it also suggests the desired answer. *Coogler v. Rhodes*, 38 Fla. 240, 21 So. 109; *Schlesinger v. Rogers*, 80 Ill. App. 420; *Woolheather v. Risley*, 38 Iowa, 486; *McKeown v. Harvey*, 49 Mich. 226; *Lott v. King*, 79 Tex. 292, 15 S. W. 231. But the question is leading when capable of eliciting by such an answer more than one simple proposition. *International & G. N. R. Co. v. Dalwigh*, 92 Tex. 655, 51 S. W. 500. And if the answer "Yes" or "No" will be conclusive the question is objectionable as leading. *Nicholls v. Dowding*, 1 Starkie, 81, 18 Revised Rep. 746; *Daly v. Melendy*, 32 Neb. 852, 49 N. W. 926.

³ *Turney v. State*, 8 Sneddes & M. 104, 47 Am. Dec. 74; *United States v. Angell*, 11 Fed. 34; *Sayre v. Woodyard*, 66 W. Va. 288, 28 L.R.A. (N.S.) 388, 66 S. E. 320.

⁴ *Chattanooga, R. & C. R. Co. v. Huggins*, 89 Ga. 494, 15 S. E. 848; *Klock v. State*, 60 Wis. 574, 19 N. W. 543.

⁵ *State v. Johnson*, 29 La. Ann. 717; *Parsons v. Huff*, 38 Me. 137; *Bartlett v. Hoyt*, 33 N. H. 151; *People v. Mather*, 4 Wend. 229; *Hopkinson v. Steel*, 12 Vt. 582.

⁶ *Williams v. Jarrot*, 6 Ill. 120; *Lowe v. Lowe*, 40 Iowa, 220; *State v.*

Walsh, 44 La. Ann. 1122, 11 So. 811; *People v. Mather*, 4 Wend. 229; *Hausenfleck v. Com.* 85 Va. 702, 8 S. E. 683; *De Haven v. De Haven*, 77 Ind. 236; *Gannon v. Stevens*, 13 Kan. 447.

⁷ *Bullard v. Hascall*, 25 Mich. 132.

⁸ *Harrison v. Yerby*, — Ala. —, 14 So. 321; *Wallace v. Dernheim*, 63 Ark. 108, 37 S. W. 712; *People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323; *Coogler v. Rhodes*, 38 Fla. 240, 21 So. 109; *Cotton States L. Ins. Co. v. Edwards*, 74 Ga. 220; *Crean v. Houmigan*, 158 Ill. 301, 4 N. E. 880; *Kyle v. Miller*, 108 Ind. 90, 8 N. E. 721; *State v. Pugsley*, 75 Iowa, 742, 38 N. W. 498; *State v. Spidel*, 42 Kan. 441, 22 Pac. 620; *Webb v. Feather*, 119 Mich. 473, 78 N. W. 550; *State v. Duestrow*, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; *Whitman v. Morey*, 63 N. H. 448, 2 Atl. 899; *Ellison v. Beannabia*, 4 Okla. 347, 46 Pac. 477; *State v. Chee Gong*, 17 Or. 635, 21 Pac. 882; *McDermott v. Jackson*, 97 Wis. 64, 72 N. W. 375.

⁹ *Krebs Mfg. Co. v. Brown*, 108 Ala. 508, 18 So. 659; *Stratford v. Sanford*, 9 Conn. 279; *Southern Exp. Co. v. Van Meter*, 17 Fla. 783, 35 Am. Rep. 107; *Parsons v. Huff*, 38 Me. 137; *York v. Pease*, 2 Gray, 282; *St. Louis & I. M. R. Co. v. Silver*, 56 Mo. 265; *Trenton Pass. R. Co. v. Cooper*, 60 N. J. L. 219, 38 L.R.A. 637, 37 Atl. 730; *Ducker v. Whitson*, 112 N. C. 44, 16 S. E. 854; *Farmers' Mut. F. Ins. Co. v. Bair*, 87 Pa. 124; *Hopkinson v. Steel*, 12 Vt. 582.

The rule seems the same in New York. *Walker v. Dunspaugh*, 20 N. Y. 170; *Downs v. New York C. R. Co.* 47 N. Y. 83; *Brooker v. Filkins*, 9 Misc. 146, 29 N. Y. 68; *King v. Second Ave. R. Co.* 75 Hun, 17, 26 N. Y. Supp. 973. But the discretion is said to be revisable for abuse in *Budlong v. Van Nostrand*, 24 Barb. 25; *Cope v. Sibley*, 12 Barb. 521; *Van Doren v. Jelliffe*, 1 Misc. 354, 26 N. Y. Supp. 636.

¹⁰ *White v. White*, 82 Cal. 427, 7 L.R.A. 799, 23 Pac. 276; *Parker v. Georgia P. R. Co.* 83 Ga. 539, 10 S. E. 233; *Funk v. Babbitt*, 156 Ill. 408, 41 N. E. 166, affirming 55 Ill. App. 124; *Goudy v. Werbe*, 117 Ind. 154, 3 L.R.A. 114, 19 N. E. 764; *State v. Pugsley*, 75 Iowa, 742, 38 N. W. 498; *Stoner v. Devilbiss*, 70 Md. 144, 16 Atl. 440; *Bellows v. Crane Lumber Co.* 119 Mich. 424, 78 N. W. 536; *Turney v. State*, 8 Smedes & M. 104, 47 Am. Dec. 74; *Harvard v. Stiles*, 54 Neb. 26, 74 N. W. 399; *Bundy v. Hyde*, 50 N. H. 116; *Deveaux v. Clemens*, 17 Ohio C. C. 33, 9 Ohio C. D. 647; *Wilson v. New York, N. H. & H. R. Co.* 18 R. I. 598, 29 Atl. 300; *Spencer Optical Mfg. Co. v. Johnson*, 53 S. C. 533, 31 S. E. 392; *International & G. N. R. Co. v. Dalwigh*, 92 Tex. 655, 51 S. W. 500; *Kohler v. West Side R. Co.* 99 Wis. 33, 74 N. W. 568; *Northern P. R. Co. v. Urlin*, 158 U. S. 271, 39 L. ed. 977, 15 Sup. Ct. Rep. 840.

¹¹ *People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323; *Tift v. Jones*, 77 Ga. 181, 3 S. E. 399; *Hess v. Com.* 9 Ky. L. Rep. 590, 5 S. W. 751; *Brice v. Miller*, 35 S. C. 537, 15 S. E. 272; *Washington, A. & Mt. V. Electric R. Co. v. Quayle*, 95 Va. 741, 30 S. E. 391.

¹² *Mucci v. Houghton*, 89 Iowa, 608, 57 N. W. 305; *State v. Munson*, 7 Wash. 239, 34 Pac. 932.

As where elicited by the complaining party on cross-examination. *Fox v. Steever*, 156 Ill. 622, 40 N. E. 942; *Fire Asso. of Phila. v. Jones*, — Tex. Civ. App. —, 40 S. W. 44.

b. To one's own witness.—While leading questions to one's own witness are generally objectionable, the trial judge may in his discretion permit such questions to be put on direct or re-direct examination to a witness whose answers have taken by surprise the party calling him¹ or where the witness is hostile² or reluctant³ or so youthful,⁴ ignorant,⁵ or infirm⁶ as to require his attention to be led, or where his memory has been exhausted without stating some particular which cannot be significantly pointed to by a general inquiry.⁷

By the weight of authority leading questions may be asked a witness who is called to impeach another witness by contradiction;⁸ but there are decisions declaring that there is no reason for relaxing the general rule in favor of an impeaching witness.⁹

¹ *St. Clair v. United States*, 154 U. S. 134, 38 L. ed. 936, 14 Sup. Ct. Rep. 1002; *Babcock v. People*, 13 Colo. 515, 22 Pac. 817.

² *State v. Stevens*, 65 Conn. 93, 31 Atl. 496; *Rosenthal v. Bilger*, 86 Iowa, 246, 53 N. W. 255; *Meixsell v. Feezor*, 43 Ill. App. 180; *McBride v. Wallace*, 62 Mich. 451, 29 N. W. 75; *Severance v. Carr*, 43 N. H. 65; *Navarro v. State*, 24 Tex. App. 378, 6 S. W. 542.

The witness cannot be deemed hostile merely because he states that he does not remember having made a certain statement, where he has not testified to anything prejudicial to, and has manifested no bias against, the party calling him, and the latter makes no further effort to refresh his memory. *Fisher v. Hart*, 149 Pa. 232, 24 Atl. 225.

³ *Cassem v. Galvin*, 158 Ill. 30, 41 N. E. 1087; *Severance v. Carr*, 43 N. H. 65; *State v. Duestrow*, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; *Robinson v. State*, — Tex. Crim. Rep. —, 49 S. W. 386; *Schuster v. State*, 80 Wis. 107, 49 N. W. 30.

⁴ *Speckman v. Krieg*, 79 Mo. App. 376; *Moody v. Rowell*, 17 Pick. 490, 23 Am. Dec. 317.

⁵ *Doran v. Mullen*, 78 Ill. 342; *Rodriguez v. State*, 23 Tex. App. 503, 5 S. W. 255.

⁶ *Belknap v. Stewart*, 38 Neb. 304, 56 N. W. 881; *Cheeney v. Arnold*, 18 Barb 434.

- ⁷ *Moody v. Rowell*, 17 Pick. 490, 28 Am. Dec. 317; *Huckins v. People's Mut. F. Ins. Co.* 31 N. H. 238; *Hartsfield v. State*, — Tex. Crim. Rep. —, 29 S. W. 777; *Herring v. Skaggs*, 73 Ala. 446, 34 Am. Rep. 4.

A witness may sometimes be asked leading questions which direct his attention to a particular item concerning which he has testified generally. *Graves v. Merchants & B. Ins. Co.* 82 Iowa, 637, 49 N. W. 65. But *People v. Mather*, 4 Wend. 229, holds that after a witness's memory as to a conversation has been exhausted he should not be asked a leading question directed to a particular portion of such conversation.

- ⁸ *Potter v. Bissell*, 3 Lans. 205; *Gunter v. Watson*, 49 N. C. (4 Jones L.) 455; *Norton v. Parsons*, 67 Vt. 526, 82 Atl. 481; *Rounds v. State*, 57 Wis. 45, 14 N. W. 865.
- ⁹ *Wood v. State*, 31 Fla. 221, 12 So. 539; *Allen v. State*, 28 Ga. 396; *Hallett v. Cousens*, 2 Moody & R. 238.

c. On cross-examination.—Leading questions are generally permissible on cross-examination,¹ and the intervention of third parties adversely to both plaintiff and defendant does not change the rule.² The trial judge may in his discretion refuse to allow leading questions to be asked of a witness who shows a strong interest or bias in favor of the cross-examining party.³ And a party who extends his cross-examination of his adversary's witness beyond its strict limits cannot ask leading questions, unless the court in its discretion allows them; since the witness becomes in so far his own.⁴ Where there are two defendants, each making separate defenses or endeavoring to cast the fault upon the other, the court may disallow leading questions propounded upon cross-examination by one defendant to a witness for plaintiff when objected to by the other.⁵

¹ *Phares v. Barber*, 61 Ill. 272; *Ferguson v. Rutherford*, 7 Nev. 390.

² *Townsend's Succession*, 40 La. Ann. 66, 3 So. 488.

³ *Rush v. French*, 1 Ariz. 99, 140, 25 Pac. 816; *Moody v. Rowell*, 17 Pick. 490, 28 Am. Dec. 317.

Even with an impartial witness under cross-examination the words cannot be put into the mouth of the witness to echo back again. *Clingman v. Irvine*, 40 Ill. App. 606.

⁴ *People ex rel. Phelps v. New York County Court of Oyer & Terminer*, 83 N. Y. 436; *Ellmaker v. Buckley*, 16 Serg. & R. 72; *Harrison v. Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141. Contra, *Moody v. Rowell*, 17 Pick. 490, 28 Am. Dec. 317.

In *Rush v. French*, 1 Ariz. 99, 25 Pac. 816, the court says that leading questions may be put on cross-examination as to all matters pertinent

to the party calling the witness except exclusively new matter, and that "nothing shall be deemed new matter except it be such as could not be given under a general denial."

⁵ *Mt. Adams & E. P. Inclined R. Co. v. Lowry*, 20 C. C. A. 596, 43 U. S. App. 408, 74 Fed. 463.

12. Answers.

While it is desirable that a witness be positive in his testimony, it is sufficient if he testifies to the best of his knowledge and belief, where he is unable to state the facts positively,¹ and, when required to narrate a previous conversation, he may give a general answer embodying its substance or purport if he cannot recollect the precise words used.² So, when undertaking to state from memory the testimony given by another witness on a former hearing, he may give its substance instead of the exact language,³ but he cannot give his impression unless it is made to appear that such impression is derived from his recollection,⁴ and he cannot state the impression left on his mind by a conversation of which he cannot recall even the substance.⁵

An answer is not necessarily objectionable as argumentative because the witness gives his reason for doing a particular thing, nor because it contains other than a statement of facts connected with the transaction in controversy.⁶

An answer must be responsive to the question,⁷ and any irresponsible statement will be struck out or the jury instructed to disregard it upon a motion seasonably made.⁸ A witness cannot be compelled to answer "yes" or "no" to a question which is not so worded as to make such an answer appropriate.⁹

¹ *Rhode v. Louthain*, 8 Blackf. 413; *Fitschen v. Thomas*, 9 Mont. 52, 22 Pac. 450; *Swinney v. Booth*, 28 Tex. 113.

² *Seymour v. Harvey*, 11 Conn. 275; *Hope v. Machias Water Power & Mill Co.* 52 Me. 535; *Chambers v. Hill*, 34 Mich. 523; *Buchanan v. Atchison*, 39 Mo. 503; *Chaffee v. Cox*, 1 Hilt. 78.

A witness may state what was an agreement between two parties, as he understood it from their conversation which he overheard, although he may not be able to give the terms used by the parties in making the agreement. *Eaton v. Rice*, 8 N. H. 378; *Moody v. Davis*, 10 Ga. 403, *dictum*.

³ *Kittredge v. Russell*, 114 Mass. 7; *State v. Jones*, 29 S. C. 201, 7 S. E. 296.

⁴ *Rounds v. McCormick*, 11 Ill. App. 220; *Clark v. Bigelow*, 16 Me. 246; *State v. Flanders*, 38 N. H. 324.

⁵ *Crews v. Threadgill*, 35 Ala. 334; *Helm v. Cantrell*, 59 Ill. 525; *Wilder v. Peabody*, 21 Hun, 376.

But a witness who states that he cannot give the language used in a conversation may testify to the impression received and the ideas formed therefrom. *State v. Donovan*, 61 Iowa, 278, 16 N. W. 130.

⁶ *Burlington Gaslight Co. v. Greene*, 28 Iowa, 289.

⁷ *Baldwin v. Walker*, 91 Ala. 428, 8 So. 364; *Pence v. Waugh*, 135 Ind. 143, 34 N. E. 860; *Irlbeck v. Bierle*, 84 Iowa, 47, 50 N. W. 36; *Lazard v. Merchants' & M. Transp. Co.* 78 Md. 1, 26 Atl. 897; *Guild v. Aller*, 17 N. J. L. 310; *Ryan v. People*, 79 N. Y. 593; *Smith v. Northern P. R. Co.* 3 N. D. 555, 58 N. W. 345.

⁸ See post, chapter XIII. § 2.

⁹ *Quinn v. O'Keefe*, 9 App. Div. 68, 41 N. Y. Supp. 116; *Vance v. Upson*, 66 Tex. 476, 1 S. W. 179.

13. Use of scientific books on examination.

Although scientific and medical works are generally not competent evidence,¹ questions properly framed with a view to eliciting expert opinions are not objectionable because they are read from a standard medical treatise² or are drawn from an article in a medical journal by a physician of high standing;³ and quotations from medical works may be incorporated in questions used in catechising an expert as to his technical knowledge.⁴

An expert witness may refresh his recollection by reference to standard authorities prepared by persons of acknowledged ability, though the opinion which he gives must be his own, independent of that of the author,⁵ but he cannot be allowed to read from the work and thereupon testify what is included in it,⁶ nor can he read a paragraph therefrom with which he concurs in opinion.⁷ Nor can such works be resorted to in order to support the testimony of the witness,⁸ although a book which he has cited to sustain his own views may be used to discredit him,⁹ but not a book he has not so cited.¹⁰

Reference to books of approved authority upon the subject under investigation is proper on cross-examination to test the learning of the witness.¹¹ But it is not error to refuse to allow a medical witness under cross-examination to be interrogated as to what is found in a medical treatise, and then require him to find what he says is there.¹²

¹ See post, chapter XVI. § 11; and for an extended discussion of scientific

books and treatises as evidence, see note to *Union P. R. Co. v. Yates*, 40 L.R.A. 553.

² *Tompkins v. West*, 56 Conn. 478, 16 Atl. 237.

³ *State v. Coleman*, 20 S. C. 441.

⁴ *Connecticut Mut. L. Ins. Co. v. Ellis*, 89 Ill. 516; *Williams v. Nally*, 20 Ky. L. Rep. 244, 45 S. W. 874.

⁵ *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318; *Huffman v. Click*, 77 N. C. 55.

⁶ *Marshall v. Brown*, 50 Mich. 148, 15 N. W. 55.

⁷ *Com. v. Sturtivant*, 117 Mass. 123, 19 Am. Rep. 401.

But statistics of mechanical experiments and tabulations of the results thereof contained in a scientific work concededly recognized as a standard authority by engineers may be read in evidence by an expert witness in support of his professional opinion, where such statistics and tabulations are generally relied upon by experts in the particular field of the mechanical arts with which such statistics and tabulations are concerned. *Western Assur. Co. v. J. H. Mohlman Co.* 40 L.R.A. 561, 28 C. C. A. 157, 51 U. S. App. 577, 83 Fed. 811.

⁸ *Lilley v. Parkinson*, 91 Cal. 655, 27 Pac. 1091; *Louisville, N. A. & C. R. Co. v. Howell*, 147 Ind. 266, 45 N. E. 584.

⁹ *Bloomington v. Shrock*, 110 Ill. 219; *Pinney v. Cahill*, 48 Mich. 584, 12 N. W. 862; *Huffman v. Click*, 77 N. C. 55; *Ripon v. Bittel*, 30 Wis. 614; *Gallagher v. Market Street R. Co.* 67 Cal. 13, 6 Pac. 869.

¹⁰ *People v. Goldenson*, 69 Cal. 328, 19 Pac. 161; *Forest City Ins. Co. v. Morgan*, 22 Ill. App. 198; *People v. Vanderhoof*, 71 Mich. 158, 39 N. W. 28; *Knoll v. State*, 55 Wis. 249, 3 Am. Rep. 26, 12 N. W. 369.

¹¹ *Hess v. Lowery*, 122 Ind. 235, 7 L.R.A. 90, 23 N. E. 156; *Hutchinson v. State*, 19 Neb. 262, 27 N. W. 113; *State v. Wood*, 53 N. H. 484; *Connecticut Mut. L. Ins. Co. v. Ellis*, 89 Ill. 516; *Byers v. Nashville, C. & St. L. R. Co.* 94 Tenn. 345, 29 S. W. 128; *Egan v. Dry Dock, E. B. & B. R. Co.* 12 App. Div. 556, 42 N. Y. Supp. 188; *Brownell v. Black*, 31 N. B. 594.

But questions as to extracts from such works should be strictly limited to the one purpose of testing his competency as an expert and the value of his opinion. *Fisher v. Southern P. R. Co.* 89 Cal. 399, 26 Pac. 894; *Bloomington v. Shrock*, 110 Ill. 219, 51 Am. Rep. 679. And counsel cannot on cross-examination call the attention of the witness to medical authorities and read extensively therefrom to the jury. *Hall v. Murdock*, 114 Mich. 233, 72 N. W. 150.

¹² *Davis v. State*, 38 Md. 15.

14. Use of memoranda to refresh recollection.

a. In general.—A witness may refresh and assist his memory by the use of a memorandum made at or near the time to which it relates,¹ and may even be required to do so.² It does not seem

to be necessary that the writing should be made by the witness himself, provided that after inspecting it he can speak to the facts from his own recollection,³ or because of his confidence in the correctness of the memorandum.⁴ But it cannot be so used where the witness neither recollects the facts nor remembers to have recognized the writing as true, since his testimony, so far as founded upon such a writing, is but hearsay.⁵

The writing need not be an original where the witness, after his memory has been refreshed thereby, can testify from his own recollection of the original facts⁶ and can state that the original was a correct statement of the facts and that the writing used is a true copy.⁷ Whether in such case the original must first be accounted for is not free from doubt,⁸ but that the memorandum used is inadmissible in evidence is no objection to its use to refresh the memory.⁹ Nor need the witness have an independent recollection of the facts where he can state that at the time the memorandum was made he knew its contents and knew them to be correct.¹⁰

The manner in which such memoranda may be used must be left to some extent to the discretion of the court, and where they are voluminous he may be permitted to refer to them whenever necessary and will not be required to examine them all before testifying.¹¹ Where the witness can neither read nor write, a memorandum signed with his mark cannot be read to him in the presence of the jury, but he must withdraw for that purpose.¹²

Surprise at unexpectedly adverse testimony has been held by the courts of last resort of several states to justify counsel in calling the attention of the witness to his previous testimony, deposition, or affidavit for the purpose of refreshing his recollection,¹³ but in other states such a course is not permitted,¹⁴ and the doctrine has been vigorously assailed by the Supreme Court of the United States as an unwarranted violation of the general rule which restricts the right to refresh memory to contemporaneous memoranda or writing.¹⁵ But where the witness has been cross-examined as to what he stated in a deposition he may unquestionably be permitted to refresh his recollection from the deposition.¹⁶

¹ Woodruff v. State, 61 Ark. 157, 32 S. W. 102; Rohrig v. Pearson, 15 Colo. 127, 24 Pac. 1083; Adams v. Internal Improvement Fund, 37

Fla. 266, 20 So. 266; *Brown v. Galesburg Pressed Brick & Tile Co.* 132 Ill. 648, 24 N. E. 522; *Sanders v. Wakefield*, 41 Kan. 11, 20 Pac. 518; *Atchison, T. & F. R. Co. v. Lawler*, 40 Neb. 356, 58 N. W. 968; *McCausland v. Ralston*, 12 Nev. 195, 28 Am. Rep. 781; *Wise v. Phoenix F. Ins. Co.* 101 N. Y. 637, 4 N. E. 634, *Friendly v. Lee*, 20 Or. 202, 25 Pac. 396; *Kahn v. Traders Ins. Co.* 4 Wyo. 419, 34 Pac. 1059; *Flint v. Kennedy*, 33 Fed. 820.

In California by a Code provision a witness may refresh his recollection by anything written under his direction at the time when the fact occurred, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. *McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418.

Refusal to permit a witness to refresh his recollection from memoranda is not erroneous where it is not shown by his own testimony that his memory needs the aid of such writings to refresh it. *Hayden v. Hoxie*, 27 Ill. App. 533; *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318; *Young v. Catlett*, 6 Duer, 437. Memorandum cannot be used unless made at or shortly after the time of the transaction and while the facts must have been fresh in his memory. *Howell v. Carden*, 99 Ala. 100, 10 So. 640; *Swartz v. Chickering*, 58 Md. 291; *Schuyler Nat. Bank v. Bullong*, 24 Neb. 825, 40 N. W. 413; *Ballard v. Ballard*, 5 Rich. L. 495; *Bergman v. Shoudy*, 9 Wash. 331, 37 Pac. 453; *Maxwell v. Wilkinson*, 113 U. S. 656, 28 L. ed. 1037, 5 Sup. Ct. Rep. 691.

Where the original memorandum was made in time it is immaterial when the copy was made if it sufficiently appears to be a true copy. *Lawson v. Glass*, 6 Colo. 134.

A memorandum of items of work done on a building, prepared by the witness from an inspection of the premises, may be used to refresh recollection, although not made until long after the work was done. *Ahern v. Boyce*, 26 Mo. App. 558. And see *Johnston v. Farmers' F. Ins. Co.* 106 Mich. 96, 64 N. W. 5, in which a witness in an action on a policy of fire insurance was allowed to use a list of goods made by him from recollection a short time before the trial. It is no objection that the memorandum is written in characters which the witness alone can read. *State v. Cardoza*, 11 S. C. 195, 238.

A written memorandum may not be used to aid or supplement the recollection of a witness, unless its correctness when made is first established. *Territory v. Harwood*, 15 N. M. 424, 29 L.R.A.(N.S.) 504, 110 Pac. 556.

² *Chapin v. Lapham*, 20 Pick. 467; *State v. Staton*, 114 N. C. 813, 19 S. E. 96.

³ *State v. Lull*, 37 Me. 246; *Labaree v. Klosterman*, 33 Neb. 150, 49 N. W. 1102; *Huckins v. Peoples' Mut. F. Ins. Co.* 31 N. H. 238; *Huff v. Bennett*, 6 N. Y. 337; *State v. Finley*, 118 N. C. 1161, 24 S. E. 495; *Springs v. South Bound R. Co.* 46 S. C. 104, 24 S. E. 166; *Aldrich*

v. Griffith, 66 Vt. 390, 29 Atl. 376; Hill v. State, 17 Wis. 675; Geer v. New York City R. Co. 50 Misc. 517, 99 N. Y. Supp. 483.

- ⁴ Bowden v. Spellman, 59 Ark. 251, 27 S. W. 602; Card v. Foot, 56 Conn. 369, 15 Atl. 371; Billingslea v. Smith, 77 Md. 504, 26 Atl. 1077; Coffin v. Vincent, 12 Cush. 98; Third Nat. Bank v. Owen, 101 Mo. 558, 14 S. W. 632; Crystal Ice Mfg. Co. v. San Antonio Brewing Asso. 8 Tex. Civ. App. 1, 27 S. W. 210.

A witness may consult price lists to refresh his memory as to the price of certain articles therein listed, where such lists are recognized as authoritative and the items are too numerous to be carried in the memory. Morris v. Columbian Iron Works & Dry Dock Co. 76 Md. 354, 17 L.R.A. 851, 25 Atl. 417. And a witness testifying to the contents of an excursion railroad ticket may refer to a single trip ticket to refresh his memory, where he testifies that their conditions were identical in all respects save one relating exclusively to the use of the return coupon. Howard v. Chesapeake & O. R. Co. 11 App. D. C. 300.

- ⁵ Orr v. Farmers' Alliance Warehouse & Commission Co. 97 Ga. 241, 22 S. E. 937; Chamberlain v. Sands, 27 Me. 458; Green v. Caulk, 16 Md. 556; Douglas v. Leighton, 57 Minn. 81, 58 N. W. 827; Fritz v. Burris, 41 S. C. 149, 19 S. E. 304; Steele v. Wisner, 141 Pa. 63, 21 Atl. 527; Tingley v. Fairhaven Land Co. 9 Wash. 34, 36 Pac. 1098.

Accounts of sales rendered by a commission merchant cannot be used by the owner to refresh his recollection where he has no personal knowledge of the facts except that afforded by the accounts themselves. Gulf, C. & S. F. R. Co. v. Frost, — Tex. Civ. App. —, 34 S. W. 167. Otherwise where the witness has an independent recollection of the main facts of the transaction and the account of sales is used only to refresh his memory as to the details. Western U. Teleg. Co. v. Collins, 7 Kan. App. 97, 53 Pac. 74.

A witness, under the guise of refreshing his recollection, cannot be permitted to read into the record entries in books. Searle v. Halstead & Co. 139 App. Div. 134, 123 N. Y. Supp. 984.

A witness who has no personal knowledge of a transaction cannot consult a book and then testify as to the facts. Kirschner v. Hirschberg, 90 N. Y. Supp. 351.

See also as to refreshing memory: Blanding v. Cohen, 101 App. Div. 442, 92 N. Y. Supp. 93 (consulting newspapers as to the price of milk); Hart v. Maloney, 101 App. Div. 37, 91 N. Y. Supp. 922 (reading testimony on former trial).

- ⁶ Lawson v. Glass, 6 Colo. 134; Finch v. Barclay, 87 Ga. 393, 13 S. E. 566; Bonnet v. Glattfeldt, 120 Ill. 166, 11 N. E. 250; Bullock v. Hunter, 44 Md. 416; Robinson v. Mulder, 81 Mich. 75, 45 N. W. 505; George v. Joy, 19 N. H. 544; Berry v. Jaurdan, 11 Rich. L. 67; Flato v. Brod, 37 Tex. 735; Harrison v. Middleton, 11 Gratt. 527; Folsom v. Apple River Log-Driving Co. 41 Wis. 602; New York

& C. Mining Syndicate & Co. v. Fraser, 130 U. S. 611, 32 L. ed. 1031, 9 Sup. Ct. Rep. 665.

- ⁷ Calloway v. Varner, 77 Ala. 541; People v. Munroe, — Cal. —, 33 Pac. 776; Chicago & A. R. Co. v. Adler, 56 Ill. 344; Anderson v. Imhoff, 34 Neb. 335, 51 N. W. 854; Mead v. McGraw, 19 Ohio St. 57; Houston & T. C. R. Co. v. Burke, 55 Tex. 323, 40 Am. Rep. 808.

Where the notes of a reporter from which an article was written have been destroyed, he may be allowed to refer to and read the article as published to refresh his memory, where it contains substantially the article as written. Hawes v. State, 88 Ala. 37, 7 So. 302; Com. v. Ford, 130 Mass. 64, 39 Am. Rep. 426.

The correctness of a copy of a memorandum made by someone other than the witness must be proved before he will be allowed to refresh his memory from it. Birmingham v. McPoland, 96 Ala. 363, 11 So. 427. And a witness cannot refresh his memory from a memorandum made up at his dictation by his attorney from old letters, memoranda, and receipts. Watson v. Miller, 82 Tex. 279, 17 S. W. 1053.

- ⁸ The weight of authority is to the effect that where a witness refers to a copy of a memorandum merely to refresh his recollection the original need not be produced or accounted for. Denver & R. G. R. Co. v. Wilson, 4 Colo. App. 355, 36 Pac. 67; Erie Preserving Co. v. Miller, 52 Conn. 446, 52 Am. Rep. 607; Com. v. Ford, 130 Mass. 64, 39 Am. Rep. 426; Harrison v. Middleton, 11 Gratt. 527. Contra, Jones v. Jones, 94 N. C. 114; Byrnes v. Pacific Exp. Co. — Tex. App. —, 15 S. W. 46. But his refusal to produce the original may be considered by the jury in weighing his testimony. Chicago & A. R. Co. v. Adler, 56 Ill. 344; Davie v. Jones, 68 Me. 393.

- ⁹ Morris v. Everly, 19 Colo. 529, 36 Pac. 150; Cameron v. Blackman, 39 Mich. 108; Mead v. White, 6 Sadler (Pa.) 38, 8 Atl. 913; Birchall v. Bullough [1896] 1 Q. B. 325, 65 L. J. Q. B. N. S. 252, 74 L. T. N. S. 27.

- ¹⁰ Acklen v. Hickman, 63 Ala. 494, 35 Am. Rep. 54; Burbank v. Dennis, 101 Cal. 90, 35 Pac. 444; Flynn v. Gardner, 3 Ill. App. 253; O'Brien v. Stambach, 101 Iowa, 40, 69 N. W. 1133; Wright v. Wright, 58 Kan. 525, 50 Pac. 444; Evans v. Murphy, 87 Md. 498, 40 Atl. 109; Costello v. Crowell, 133 Mass. 352; Stahl v. Duluth, 71 Minn. 341, 74 N. W. 143; Lipscomb v. Lyon, 19 Neb. 511, 27 N. W. 731; Abel v. Strimple, 31 Mo. App. 86; Bateman v. New York C. & H. R. R. Co. 47 Hun, 429; State v. Colwell, 3 R. I. 132; State v. Rawls, 2 Nott & M'C. 332; Davis v. Field, 56 Vt. 426; Harrison v. Middleton, 11 Gratt. 527; Schettler v. Jones, 20 Wis. 412; McClaskey v. Barr, 45 Fed. 151. Contra, Clark v. State, 4 Ind. 156; Redden v. Spruance, 4 Harr. (Del.) 217; Owings v. Shannon, 1 A. K. Marsh. 188.

Otherwise where a paper was drawn up several weeks after the fact occurred, unless the witness can speak from his memory after being refreshed by it. O'Neale v. Walton, 1 Rich. L. 234.

¹¹ Johnson v. Coles, 21 Minn. 108; Bullock v. Hunter, 44 Md. 417.

¹² Com. v. Fox, 7 Gray, 585. In this case the witness was directed to withdraw with one counsel on each side and have the paper read to her without comment.

¹³ Billingslea v. State, 85 Ala. 323, 5 So. 137; Stanley v. Stanley, 112 Ind. 143, 13 N. E. 261; State v. Miller, 53 Iowa, 154, 4 N. W. 900; State v. Sorter, 52 Kan. 531, 34 Pac. 1036; People v. Palmer, 105 Mich. 568, 63 N. W. 656; People v. Kelly, 113 N. Y. 647, 21 N. E. 122; George v. Triplett, 5 N. D. 50, 63 N. W. 891; Hurley v. State, 46 Ohio St. 320, 4 L.R.A. 161, 21 N. E. 645.

The witness must, however, speak from his own recollection. Howie v. Rea, 75 N. C. 326.

¹⁴ Com. v. Phelps, 11 Gray, 73; Velott v. Lewis, 102 Pa. 326.

¹⁵ Putman v. United States, 162 U. S. 687, 40 L. ed. 1118, 16 Sup. Ct. Rep. 923.

¹⁶ George v. Joy, 19 N. H. 544.

o. Right, for purpose of cross-examination, to inspect paper used by witness to refresh memory.—The propriety of allowing an adverse party to inspect, for the purpose of cross-examination, any memorandum used by a witness to refresh his memory upon the matter as to which he is testifying, appears to be universally conceded by the courts.¹ But memoranda which were consulted out of court need not be produced for inspection,² unless the witness testifies upon the faith of the papers which he has inspected, and not from his own memory refreshed or confirmed by the examination.³

As to the extent of the inspection which may properly be allowed an opposing party, where a witness has examined a book containing memoranda other than those used to refresh his memory, the weight of authority holds that the inspection should be limited to the parts relating to the subject of the testimony.⁴

¹ National Bank v. First Nat. Bank, 10 C. C. A. 88, 27 U. S. App. 88, 61 Fed. 809; Atchison. T. & S. F. R. Co. v. Hays, 8 Kan. App. 545, 54 Pac. 322 (Provided for by statute); McKivitt v. Cone, 30 Iowa, 455; Tibbetts v. Sternberg, 66 Barb. 201; Peck v. Lake, 3 Lans. 136; Schwickert v. Levin, 76 App. Div. 373, 78 N. Y. Supp. 394; Duncan v. Seeley, 34 Mich. 369; Cortland Mfg. Co. v. Platt, 83 Mich. 419, 47 N. W. 330; Wernwag v. Chicago & A. R. Co. 20 Mo. App. 473; Chute v. State, 19 Minn. 271, Gil. 230; Mt. Terry Min. Co. v. White, 10 S. D. 620, 74 N. W. 1060; Volusia County Bank v. Bigelow, 45 Fla. 638, 33 So. 704; Green v. State, 53 Tex. Crim. Rep. 490, 22 L.R.A. (N.S.) 706, 110 S.

W. 920; *Gregory v. Tavernor*, 6 Car. & P. 281; *Rex v. Ramsden*, 2 Car. & P. 603, 31 Revised Rep. 703; *Sinclair v. Stevenson*, 1 Car. & P. 582, 2 Bing. 514, 10 J. B. Moore, 46; *Palmer v. Maclear*, 1 Swabey & T. 149. But see *Lord v. Colvin*, 2 Drew. 205, 5 De G. M. & G. 47, 23 L. J. Ch. N. S. 469, 18 Jur. 253, 2 Week. Rep. 298.

But he is not bound to introduce it in evidence. *Little v. Lichkoff*, 98 Ala. 321, 12 So. 429. And he may waive the right of inspection. *Adae v. Zangs*, 41 Iowa, 536; *Wernwag v. Chicago & A. R. Co.* 20 Mo. App. 473.

² *State v. Collins*, 15 S. C. 379, 40 Am. Rep. 697; *State v. Cheek*, 35 N. C. (13 Ired. L.) 114; *Wabash & E. Canal v. Bledsoe*, 5 Ind. 133.

So held even under a statute providing that where a witness is allowed to refresh his memory the writing must be produced and may be inspected by the adverse party who may read it to the jury. *State v. Magers*, 36 Or. 38, 58 Pac. 892.

There are a few cases holding that any writing used by a witness before coming into court, to refresh his memory, must be produced in court; but the point actually decided in these cases seems to have been as to the admissibility of the writing or memorandum as evidence in itself, rather than the right of the adverse party to inspect the memorandum for purposes of cross-examination. *Wabash & E. Canal Co. v. Bledsoe*, 5 Ind. 133; *State v. Cheek*, 35 N. C. (13 Ired. L.) 119; *Com. v. Lannan*, 13 Allen, 569; *State v. Collins*, 15 S. C. 379, 40 Am. Rep. 697.

³ *Hall v. Ray*, 18 N. H. 126.

⁴ *Parks v. Biebel*, 18 Colo. App. 12, 69 Pac. 273; *Com. v. Haley*, 13 Allen, 587; *Hardy's Trial*, 24 How. St. Tr. 824; *Burgess v. Bennett*, 20 Week. Rep. 720; *Morrow v. State*, 56 Tex. Crim. Rep. 519, 120 S. W. 491.

Otherwise where the diary referred to seems to have been prepared for the occasion, being kept for only a few days, but purporting to include the date in question. *Kouba v. Horacek*, 53 Hun, 636, 6 N. Y. Supp. 250.

And in *People v. Lyons*, 49 Mich. 78, 13 N. W. 365, it was held that counsel should have been permitted to examine fully a book which a witness had used on the stand for the purpose of fixing dates, and to refresh her recollection from entries therein, although the witness stated that entries on other pages had no reference to the matter in issue.

So, in *State v. Bacon*, 41 Vt. 526, 98 Am. Dec. 616, where a witness, during his examination, referred to his pocket memorandum to refresh his memory, and, on cross-examination, refused to allow opposing counsel to examine the memorandum on the ground that it contained private matters relating to his work as a detective, this was not considered sufficient reason for the refusal to allow an examination of the book.

And see *Loyd v. Freshfield*, 2 Car. & P. 325, holding that where a witness refreshes his memory as to the number of bank notes, by examining his entry thereof in a certain book, the other side may cross-examine as to the other parts of the entry.

As to use of scientific books by expert to refresh his recollection, see *supra*, § 13.

15. Direct examination; adverse party.

The direct examination of a witness cannot properly be limited by the court to the question whether he agrees with or differs from the testimony of a prior witness with respect to a transaction at which he was present, even though the objecting party is allowed full privilege of cross-examination.¹ Nor can a witness be asked whether the facts stated in a particular paper are true. He should be interrogated as to these facts particularly.² But the witness may be asked to state generally the consideration of his note, leaving the details to be supplied by cross-examination,³ and the court may refuse to permit a witness on his direct examination to detail the whole of a conversation to which he has referred.⁴

A party may aid the memory of his own witness by inquiring as to any circumstance tending to enable him to recollect more clearly or more certainly the fact sought to be proved.⁵

More than ordinary freedom is permitted in the direct examination of a witness who is hostile to the party calling him,⁶ and this principle is recognized by those statutes which authorize one party to compel the other to testify in his behalf, such statutes generally providing that the examination may be conducted under the rules applicable to the cross-examination of other witnesses.⁷

¹ *Eames v. Eames*, 41 N. H. 177.

² *Richardson v. Golden*, 3 Wash. C. C. 109, Fed. Cas. No. 11,782.

³ *Ayrault v. Chamberlain*, 33 Barb. 229.

⁴ *Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909.

⁵ *O'Hagen v. Dillon*, 76 N. Y. 170; *State v. Jeandell*, 5 Harr. (Del.) 475.

⁶ See *supra*, § II, b.

If the plaintiff, to prove his case, is obliged to call defendant, he should be allowed a large latitude in conducting the examination. *Levin v. Spero*, 35 Misc. 792, 72 N. Y. Supp. 1115. If a witness proves hostile or unwilling, the party calling him may probe his conscience or test

his recollection for the purpose of eliciting the whole truth, and such examination is subject to the discretion of the trial judge. *People v. Sexton*, 187 N. Y. 495, 116 Am. St. Rep. 621, 80 N. E. 326.

A party may be permitted to ask leading questions of a witness who proves to be adverse, and he may be cross-examined as to previous statements. *Zilver v. Robert Graves Co.* 106 App. Div. 582, 94 N. Y. Supp. 714.

7 *Childs v. Merrill*, 66 Vt. 302, 29 Atl. 532; *Re Brown*, 38 Minn. 112, 35 N. W. 726; *Pfefferkorn v. Seefield*, 66 Minn. 223, 68 N. W. 1072; *Coates Bros. v. Wilkes*, 92 N. C. 376.

Under a statute providing that a party to the record or a person for whose immediate benefit a proceeding is prosecuted or defended may be compelled to testify as if under cross-examination, it is held that leading questions may be put to a party called as a witness by his adversary, and that any facts or admissions may be drawn from him which tend to weaken his case or strengthen that of his adversary. *Brubaker v. Taylor*, 76 Pa. 83. But a husband cannot in an action of ejectment to which his wife is not a party call her as for cross-examination upon the allegation that her interest is adverse to his. *Welis v. Bunnell*, 160 Pa. 460, 28 Atl. 851. Nor can plaintiff's husband be called by defendant as on cross-examination, where he is not a party interested, and there is no evidence that he was his wife's agent. *Callendar v. Kelly*, 190 Pa. 455, 42 Atl. 957. And the motorman of a street-railway company is not a party nor a person having legal interest in a suit for personal injuries against the company, so as to entitle the plaintiff to call him as if on cross-examination. *Callary v. Easton Transit Co.* 185 Pa. 176, 39 Atl. 813.

In Delaware a party cannot, since the passage of a general statute removing all disabilities of parties to testify, call an adverse party as a witness in cross-examination; and if he desires to call him must make him his own witness. *Terry v. Platt*, 1 Penn. (Del.) 1185, 40 Atl. 243.

16. Right to cross-examination and the extent thereof.

a. In general; interruption by sickness or death.—The right of cross examination is deemed so essential that a party is not entitled to the benefit of the direct examination of a witness whom his adversary has had no opportunity to cross examine, as where the witness fails to appear for further cross-examination,¹ or refuses to answer a question pertinent, and not privileged.² So where, because of the illness or death of a witness after his direct examination, the opposing party is unable to complete his cross-examination, the rule is that, if the opposing has not waived his right to cross-examine, or lost it through his own

fault, he is entitled to have the direct testimony stricken out; and the denial of a motion to strike out is deemed reversible error.³ Otherwise, however, where the party has failed to improve an opportunity for cross-examination when afforded,⁴ or has voluntarily deprived himself of the right.⁵

In chancery, however, the rule seems to be to the contrary.⁶

¹ *Matthews v. Matthews*, 53 Hun, 244, 6 N. Y. Supp. 589.

² *Burnett v. Phalon*, 11 Abb. Pr. 157.

³ *People v. Cole*, 43 N. Y. 508; *Morley v. Castor*, 63 App. Div. 38, 71 N. Y. Supp. 363; *Kissam v. Forrest*, 25 Wend. 651; *Sperry v. Moore*, 42 Mich. 353, 4 N. W. 13.

Permitting the state, in a criminal prosecution, to ask a question of a witness who is so ill that the court thinks it would be inhuman to subject him to cross examination, and whose physician states that examination might result fatally, is held in *Wray v. State*, 154 Ala. 36, 15 L.R.A. (N.S.) 493, 129 Am. St. Rep. 18, 45 So. 697, 16 A. & E. Ann. Cas. 362, to deprive the accused of the constitutional right to be confronted by the witnesses against him, although the right of cross-examination was not expressly denied, since the risk of terminating the witness's life cannot be imposed upon the accused as a condition of the exercise of his right.

⁴ As where a witness who failed to appear for further cross-examination at the day fixed by the court was present in court between the time she was excused and the day fixed, and counsel and court were then reminded that she was actively engaged in seeking a position on an ocean vessel and the propriety of then resuming her cross-examination was suggested and declined. *Townsend's Succession*, 40 La. Ann. 66, 3 So. 488. So where the witness died during an adjournment taken before his cross-examination was completed, the circumstances attending the adjournment not being disclosed and it not appearing that the party was deprived of the opportunity of then completing his cross-examination if he had desired to do so. *Curtice v. West*, 50 Hun. 47, 2 N. Y. Supp. 507, affirmed without opinion in 121 N. Y. 696, 24 N. E. 1099.

And in *Bradley v. Mirick*, 91 N. Y. 293, where, on the first trial, the defendant did not appear, and the trial proceeded as on default, but the default was opened and a second trial had, and in the mean time the plaintiff, who had testified on the first trial, had died, it was held, on appeal, that the exclusion by the trial court of the testimony given by the plaintiff, on the ground that there had been no cross-examination, was erroneous, as, by failing to cross-examine on the first trial, the defendant would be deemed to have waived his right.

⁵ A party who voluntarily deprives himself of his right to cross-examine a witness by consenting to the admission in evidence of the written

showing of what the witness would prove, cannot, after the trial has begun, complain that he was deprived of the right to cross-examine the witness. *Nelson v. Shelby Mfg. & Improv. Co.* 96 Ala. 515, 11 So. 695.

⁶ *Gass v. Stinson*, 3 Sumn. 98, Fed. Cas. No. 5,262; *Arundel v. Arundel*, 1 Rep. in Ch. 90; *Nolan v. Shannon*, 1 Molloy, 157; *O'Callaghan v. Murphy*, 2 Sch. & Lef. 158. But in *Reg. v. France*, 2 Moody & R. 207, where a witness signed his direct examination but died before signing his cross-examination, it was held that the entire deposition should be excluded.

A party who has been examined by his adversary may be cross-examined by his own counsel as to any matter relevant to his examination in chief,¹ and one whose interest in the subject-matter accrued before the commencement of an action is entitled upon being added as a party defendant to cross-examine witnesses previously examined, although he had already cross-examined them as attorney for the other defendants.² A witness who, on direct examination, volunteers an uncalled-for statement which is allowed to go to the jury without objection, may be cross-examined with reference thereto,³ though if the statement is irrelevant such cross-examination is not a matter of right.⁴

The right to cross-examine is not affected because the testimony in chief was out of proper order to anticipate a defense⁵ or was unnecessary because of a statute permitting an affidavit to be filed in lieu thereof.⁶ But there can be no cross-examination upon evidence which has been stricken out of the case.⁷

¹ *Reeve v. Dennett*, 141 Mass. 207, 6 N. E. 378.

² *Lange v. Braynard*, 104 Cal. 156, 37 Pac. 868.

³ *Apple v. Marion County*, 127 Ind. 553, 27 N. E. 166.

⁴ *People v. French*, 95 Cal. 371, 30 Pac. 567.

⁵ *Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286.

⁶ A party who takes the stand for the purpose of laying the foundation for the introduction of the record of a conveyance in place of the original, instead of filing an affidavit as permitted by statute, is subject to cross-examination to test the correctness and accuracy of his statement. *Scott v. Bassett*, 174 Ill. 390, 51 N. E. 577.

⁷ *Jones v. State*, 35 Fla. 289, 17 So. 284; *Callison v. Smith*, 20 Kan. 36.

b. Refusal to allow cross-examination as ground for reversal or new trial.—The refusal to allow cross-examination of a witness upon matters brought out on direct examination and relevant to the issue is a denial of an absolute right, and has been generally held to be a sufficient ground for reversal.¹

It is only after the right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary with the trial court.²

When the object of cross-examination is to ascertain the accuracy or credibility of a witness, its method and duration are subject to the discretion of the trial judge, and, unless abused, its exercise is not the subject of review.³

¹ *Eames v. Kaiser*, 142 U. S. 488, 35 L. ed. 1091, 12 Sup. Ct. Rep. 302; *Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286; *Patrick v. Crowe*, 15 Colo. 543, 25 Pac. 985; *United States v. Knowlton*, 3 Dak. 58, 13 N. W. 573; *Reeve v. Dennett*, 141 Mass. 207, 6 N. E. 378; *Lamprey v. Munch*, 21 Minn. 379; *Lynch v. Free*, 64 Minn. 277, 66 N. W. 973; *Prout v. Bernards Land & Sand Co.* 77 N. J. L. 719, 25 L.R.A. (N.S.) 683, 73 Atl. 486; *Sayres v. Allen*, 25 Or. 211, 35 Pac. 254; *Yarborough v. Davis*, — Tex. App. —, 15 S. W. 713.

² *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.* 64 C. C. A. 180, 129 Fed. 668; *Florence v. Calmet*, 43 Colo. 510, 96 Pac. 183. The refusal of the trial court to permit cross-examination on matters relevant to the subject-matter of the direct examination was said in *Campau v. Dewey*, 9 Mich. 381, to be a question of law, and not of discretion; and the ruling was held subject to review on error.

³ *Langley v. Wadsworth*, 99 N. Y. 61, 1 N. E. 106.

c. How far limited to direct.—By the English rule which is followed in several of the states a witness who is sworn and gives some evidence, however formal or unimportant, may be cross-examined in relation to all matters involved in the issues.¹ But a stricter rule, sometimes called by way of distinction the "American rule," obtains in the Federal and very many of the state courts. Under this rule the cross-examination of a witness is limited to an inquiry as to the facts and circumstances connected with the matters stated in his direct examination.² In the application of this rule much is left to the discretion of the trial court.³

A cross-examination always may include whatever tends to qualify or explain the direct testimony of a witness or to rebut

or modify any inference resulting from it.⁴ It is always permissible to inquire into the details of the events testified to in chief by a witness and to develop and unfold the whole transaction about which he has only been partially interrogated.⁵ So, where one party introduces evidence of a part of a conversation, his adversary has a right to draw out all that was said in the conversation material to the case.⁶

A wide latitude will be allowed on the cross-examination of witnesses in an action in which fraud is an issue,—especially of such witnesses as are parties to the alleged fraudulent transaction;⁷ and it has been said that the cross-examination of a party testifying in his own behalf need not be so strictly confined to the matters inquired into upon his direct examination as in the case of other witnesses,⁸ but this is a matter of discretion with the trial court and not a right of the adverse party.⁹

¹ *Huntsville Belt Line & M. S. R. Co. v. Corpening*, 97 Ala. 681, 12 So. 295; *Dawson v. Callaway*, 18 Ga. 573; *News Pub. Co. v. Butler*, 95 Ga. 559, 22 S. E. 282; *King v. Atkins*, 33 La. Ann. 1057; *Beal v. Nichols*, 2 Gray, 262; *Ireland v. Cincinnati, W. & M. R. Co.* 79 Mich. 163, 44 N. W. 426; *Page v. Kankey*, 6 Mo. 433; *State v. Allen*, 107 N. C. 805, 11 S. E. 1016; *Kibler v. McIlwain*, 16 S. C. 551; *Rhine v. Blake*, 59 Tex. 240.

² *Braly v. Henry*, 77 Cal. 324, 19 Pac. 529; *Denver, T. & Ft. W. R. Co. v. Smock*, 23 Colo. 456, 48 Pac. 681; *Ashborn v. Waterbury*, 69 Conn. 217, 37 Atl. 498; *Woodbury v. District of Columbia*, 5 Mackey, 127; *Tischler v. Apple*, 30 Fla. 132, 11 So. 273; *Hartshorn v. Byrne*, 147 Ill. 418, 35 N. E. 62, affirming 45 Ill. App. 250; *Cokely v. State*, 4 Iowa, 477; *Hunsinger v. Hofer*, 110 Ind. 390, 11 N. E. 463; *Atchison v. Rose*, 43 Kan. 605, 23 Pac. 561; *McCormick v. Gliem*, 13 Mont. 469, 34 Pac. 1016; *Atwood v. Marshall*, 52 Neb. 173, 71 N. W. 1064; *Buckley v. Buckley*, 14 Nev. 262; *Pearce v. Strickler*, 9 N. M. 467, 54 Pac. 748; *Neil v. Thorn*, 88 N. Y. 270; *People ex rel. Phelps v. New York County Court of Oyer & Terminer*, 83 N. Y. 436; *Rheinfeldt v. Dahlman*, 19 Misc. 162, 43 N. Y. Supp. 281 (The early New York cases followed the English rule. *Varick v. Jackson ex dem. Eden*, 2 Wend. 166, 19 Am. Dec. 571; *Fulton Bank v. Stafford*, 2 Wend. 483. Except in cases of inquest taken by default. *Hartness v. Boyd*, 5 Wend. 563; *Kerker v. Carter*, 1 Hill, 101); *State v. Kent*, 5 N. D. 516, sub nom. *State v. Pancoast*, 35 L.R.A. 518, 67 N. W. 1052; *Willis v. Lance*, 28 Or. 371, 43 Pac. 384, 487; *Fulton v. Central Bank*, 92 Pa. 112; *Rossum v. Hodges*, 1 S. D. 308, 9 L.R.A. 817, 47 N. W. 140; *People v. Thiede*, 11 Utah, 241, 39 Pac. 837; *Stiles v. Estabrook*, 66 Vt. 535, 29 Atl. 961; *Welcome v. Mitchell*, 81 Wis. 566, 51 N. W. 1080; *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, 10 L. ed. 535.

The rule has in some jurisdictions been somewhat relaxed. Thus, matters tending to disprove plaintiff's cause of action and the case made out by his witnesses may be inquired into on cross-examination of a witness who was not interrogated as to those matters on his direct examination. *Novotny v. Danforth*, 9 S. D. 301, 68 N. W. 749; *Legg v. Drake*, 1 Ohio St. 286. In *Rush v. French*, 1 Ariz. 99, 25 Pac. 816, the court, after an exhaustive review of the authorities, adopts these rules: "1. When an adverse witness has testified to any point material to the party calling him he may then and there be fully cross-examined and led by the adverse party upon all matters pertinent to the case of the party calling him except upon exclusively new matter, and nothing is deemed new matter except such as could not be given under a general denial. 2. The fact that evidence called forth by a legitimate cross-examination happens also to sustain a cross action or counterclaim affords no reason why it should be excluded." And in an action by an employee for personal injuries alleged to have resulted from the incompetency of a fellow servant, it was held that the latter, who has sworn to facts contemporaneous with the injury and closely connected with the main fact might be cross-examined as to the entire case. *Jorgenson v. Butte & M. Commercial Co.* 13 Mont. 288, 34 Pac. 37.

³ *Glenn v. Gleason*, 61 Iowa, 32, 15 N. W. 659; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860; *Neil v. Thorn*, 88 N. Y. 270; *Hardy v. Norton*, 66 Barb. 527; *Helser v. McGrath*, 52 Pa. 531; *Carroll v. Centralia Water Co.* 5 Wash. 613, 32 Pac. 609, 33 Pac. 431; *Stutz v. Chicago & N. W. R. Co.* 73 Wis. 147, 40 N. W. 653; *Davis v. Coblens*, 174 U. S. 719, 43 L. ed. 1147, 19 Sup. Ct. Rep. 832.

⁴ *Wilson v. Wagar*, 26 Mich. 452; *Campan v. Dewey*, 9 Mich. 381, 419; *Haynes v. Ledyard*, 33 Mich. 319; *Ferguson v. Rutherford*, 7 Nev. 385; *Ah Doon v. Smith*, 25 Or. 89, 34 Pac. 1093; *Blake v. Powell*, 26 Kan. 320. And see, for instances, *Baird v. Daly*, 68 N. Y. 547; *Mayer v. People*, 80 N. Y. 364; *Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286; *Olson v. Peterson*, 33 Neb. 358, 50 N. W. 155; *Day v. Donohue*, 62 N. J. L. 380, 41 Atl. 934; *Post Pub. Co. v. Hallam*, 8 C. C. A. 201, 16 U. S. App. 613, 59 Fed. 530; *Blough v. Parry*, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; *Pullen*, 41 N. J. Eq. 417, 5 Atl. 658; *Thomas v. Miller*, 151 Pa. 482, 25 Atl. 127.

⁵ *Vogel v. Harris*, 112 Ind. 494, 14 N. E. 385; *Evans v. Mohr*, 42 Ill. App. 225, *Duttera v. Babylon*, 83 Md. 536, 35 Atl. 64; *State v. Kent*, 5 N. D. 516, sub nom. *State v. Pancoast*, 35 L.R.A. 518, 67 N. W. 1052; *Maxwell v. Bolles*, 28 Or. 1, 41 Pac. 661; *Gilmer v. Higley*, 110 U. S. 47, 28 L. ed. 62, 3 Sup. Ct. Rep. 471; *Fames v. Kaiser*, 142 U. S. 488, 35 L. ed. 1090, 12 Sup. Ct. Rep. 302.

⁶ *Metzer v. State*, 39 Ind. 596; *United States v. Knowlton*, 3 Dak. 58, 13 N. W. 573; *Home Ben. Asso. v. Sargent*, 142 U. S. 691, 35 L. ed. 1160, 12 Sup. Ct. Rep. 332; *Watrous v. Cunningham*, 71 Cal. 30, 11 Pac. 811; *Patrick v. Crowe*, 15 Colo. 543, 25 Pac. 985; *Black v. Wabash*, St. L.

& P. R. Co. 111 Ill. 351; Koogle v. Cline, 110 Md. 587, 24 L.R.A. (N.S.) 413, 73 Atl. 672.

But the admission of a part of the conversation does not warrant the introduction on cross-examination of other portions that do not tend to explain that already admitted and that are objectionable on other grounds. *Hurlbut v. Boaz*, 4 Tex. Civ. App. 371, 23 S. W. 446.

⁷ *Chapman v. James*, 96 Iowa, 233, 64 N. W. 795; *Clark v. Reiniger*, 66 Iowa, 507, 24 N. W. 16; *De Ford v. Orvis*, 42 Kan. 302, 21 Pac. 1105; *Miller v. Hanley*, 94 Mich. 253, 53 N. W. 962; *Ganona v. Green*, 71 Mich. 1, 38 N. W. 661; *Stevenson v. Woltman*, 81 Mich. 200, 45 N. W. 825; *Cohen v. Goldberg*, 65 Minn. 473, 67 N. W. 1149; *Hallock v. Alvord*, 61 Conn. 194, 23 Atl. 131; *Dorrance v. McAlester*, 1 Ind. Terr. 473, 45 S. W. 141; *Barnett v. Farmers' Mut. F. Ins. Co.* 115 Mich. 247, 73 N. W. 372; *Lynch v. Free*, 64 Minn. 277, 66 N. W. 973; *Pinchus v. Reynolds*, 19 Mont. 564, 49 Pac. 145; *Altschuler v. Coburn*, 38 Neb. 881, 57 N. W. 836; *Atwood v. Marshall*, 52 Neb. 173, 71 N. W. 1064; *Bennett v. McDonald*, 52 Neb. 278, 72 N. W. 268; *Armagost v. Rising*, 54 Neb. 763, 75 N. W. 534; *Townsend v. Felthousen*, 156 N. Y. 618, 51 N. E. 279, affirming 90 Hun, 89, 35 N. Y. Supp. 538; *Kalk v. Fielding*, 50 Wis. 339, 7 N. W. 296.

⁸ *Rea v. Missouri*, 17 Wall. 542, 21 L. ed. 709; *Schultz v. Chicago & N. W. R. Co.* 67 Wis. 616, 58 Am. Rep. 881, 31 N. W. 321. *Contra*, *Hansen v. Miller*, 145 Ill. 538, 32 N. E. 548.

⁹ *Norris v. Cargill*, 57 Wis. 251, 15 N. W. 148; *Rea v. Missouri*, 17 Wall. 542, 21 L. ed. 709.

d. Witnesses to opinions or values.—Considerable latitude should be allowed in cross-examining witnesses to values in order to test the accuracy of their knowledge and the reasonableness of their estimates.¹ So it is proper that opinion evidence be subjected to every legitimate test on cross-examination in order that its value may be properly weighed,² and for this purpose the witness may be interrogated as to the grounds on which his opinion is based.³

Hypothetical question may properly be asked of an expert witness on cross-examination,⁴—especially to test his skill or knowledge;⁵ and questions pertinent to the inquiry may be propounded for this purpose although assuming facts for which there is no foundation in the evidence;⁶ but the allowance of such questions rests in the sound discretion of the trial court.⁷

¹ *Buist v. Guice*, 105 Ala. 518, 16 So. 915; *St. Louis & S. F. R. Co. v. Sageley*, 56 Ark. 549, 20 S. W. 413; *Levinson v. Sands*, 74 Ill. App. 273; *Frenzel v. Miller*, 37 Ind. 1, 10 Am. Rep. 62; *Snouffer v. Chicago*

& N. W. R. Co. 105 Iowa, 681, 75 N. W. 501; Chicago, K. & N. R. Co. v. Stewart, 47 Kan. 704, 28 Pac. 1017; Curren v. Ampersee, 96 Mich. 553, 56 N. W. 87; Sigafos v. Minneapolis, L. & M. R. Co. 39 Minn. 8, 38 N. W. 627; Yazoo-Mississippi Delta Levee Comrs. v. Dillard, 76 Miss. 641, 25 So. 292; Chase v. Corson, 67 N. H. 598, 32 Atl. 775; Oregon Pottery Co. v. Kern, 30 Or. 328, 47 Pac. 917; Lentz v. Carnegie Bros. 145 Pa. 612, 23 Atl. 219; Cranmer v. Building & L. Asso. 6 S. D. 341, 61 N. W. 35; Gulf, C. & S. F. R. Co. v. Hepner, 83 Tex. 136, 18 S. W. 441.

But a witness who is first asked on cross-examination to testify to value cannot be further cross-examined on collateral matters to show that his opinion is of no value. *Roberts v. Boston*, 149 Mass. 346, 21 N. E. 668.

Thus, such witnesses may be cross-examined as to the grounds for their opinions (*Re Jack*, 115 Cal. 203, 46 Pac. 1057; *Missouri, K. & T. R. Co. v. Haines*, 10 Kan. 439; *Phillips v. Marblehead*, 148 Mass. 326, 19 N. E. 547), and as to the elements of value on which they are based. *Humes v. Decatur Land Improv. & Furnace Co.* 98 Ala. 461, 13 So. 368; *Eslich v. Mason City & Ft. D. R. Co.* 75 Iowa, 443, 39 N. W. 700; *Morrill v. Palmer*, 68 Vt. 1, 33 L.R.A. 411, 33 Atl. 829.

1 A stipulation that a witness is competent to testify on a question of value does not preclude his cross-examination on that subject. *Chankalian v. Powers*, 89 App. Div. 395, 85 N. Y. Supp. 753.

2 A wide range should be given to the cross-examination of an expert witness for the purpose of testing his knowledge of the subject upon which he assumes to testify. *Hutchinson v. State*, 19 Neb. 262, 27 N. W. 113; *Birmingham Nat. Bank v. Bradley*, 108 Ala. 205, 19 So. 791; *Batten v. State*, 80 Ind. 394; *Clark v. State*, 12 Ohio, 483, 40 Am. Dec. 481; *Andre v. Hardin*, 32 Mich. 324; *Titus v. Gage*, 70 Vt. 14, 39 Atl. 246; *Chicago & A. R. Co. v. Redmond*, 171 Ill. 347, 49 N. E. 541; *Lewis v. Boston Gaslight Co.* 165 Mass. 411, 43 N. E. 178. For cases illustrative of the scope of cross examination of expert witnesses on the question of insanity, see note to *Burt v. State* (— Tex. Crim. App. —) 39 L.R.A. 326. And for cross-examination of nonexperts on the question of insanity, see note to *Ryder v. State*, 38 L.R.A. 743.

It is competent on cross-examination for the purpose of testing his skill to ask a medical witness the probable results of a personal injury. *Louisville, N. A. & C. R. Co. v. Lucas*, 119 Ind. 583, 6 L.R.A. 193, 21 N. E. 968; *State v. Reddick*, 7 Kan. 143. But a physician who has testified that an injury can probably be cured by a dangerous and intensely painful operation cannot be asked if he would submit to the operation himself if similarly afflicted. *Montgomery & E. R. Co. v. Mallette*, 92 Ala. 209, 9 So. 363.

A witness who has testified on direct examination, not only as to the facts in the case, but also as a medical expert, may be cross-examined, not

only concerning the facts testified to in chief, but also to test his skill and knowledge as an expert. *Shields v. State*, 149 Ind. 395, 49 N. E. 351. And a subscribing witness who has testified to the sanity of the testator may be cross-examined as to his qualification as an expert, where he testified upon direct examination that he was an experienced physician and surgeon and attended the testator during his last illness. *Re Mullin*, 110 Cal. 252, 42 Pac. 645. But counsel cannot on cross-examination ask a witness who is not called or examined in chief as an expert, nor asked to give a professional opinion on the facts to which he testifies, questions permissible only in the case of an expert witness, unless he makes the witness his own. *Olmsted v. Gere*, 100 Pa. 127; *Verdelli v. Gray's Harbor Commercial Co.* 115 Cal. 517, 47 Pac. 364. And an expert whose direct testimony was confined to a contradiction of the theory of the experts of the adverse party cannot, on cross-examination, he asked a question which forms a part of the latter's affirmative case, and which cannot be justified as testing the competency of the witness. *Gridley v. Boggs*, 62 Cal. 190.

The value of the opinions of experts who have testified from comparison, as to the genuineness of signatures, may be tested by inquiring as to the genuineness of two signatures of a witness in the case, one admitted to be genuine and the other claimed by him to have been written by another. *Johnston Harvester Co. v. Miller*, 72 Mich. 265, 40 N. W. 429. But spurious signatures cannot be intermingled with the genuine and a nonexpert witness be required on cross-examination to select the genuine. *Andrews v. Hayden*, 88 Ky. 455, 11 S. W. 428. Nor can the accuracy of an expert who has given his opinion upon the question whether a disputed, and an admittedly genuine, writing were written by the same person, be tested by inquiring on cross-examination whether the disputed document and another writing of unknown authorship were in the same handwriting or written by the same person, as a collateral inquiry would thus be raised. *State v. Griswold*, 67 Conn. 290, 33 L.R.A. 227, 34 Atl. 1046. Otherwise where all the writings are claimed to have been written by the same person. *Thomas v. State*, 103 Ind. 419, 2 N. E. 808. And it has been held that the accuracy of the judgment of a handwriting expert cannot be tested on cross-examination by asking his opinion as to the genuineness of the handwriting on papers irrelevant to the issues (*Armstrong v. Shruston*, 11 Md. 148), nor by requiring him to examine a number of slips containing unproved handwriting and to state how many different kinds of handwriting he finds. *State v. Griswold*, 67 Conn. 290, 33 L.R.A. 227, 34 Atl. 1046.

A witness who answers a question on cross-examination as fully and specifically as he can with his present knowledge will not be compelled, for the purpose of further answers, to acquire fresh information or increase his store of knowledge. *Celluloid Mfg. Co. v. Crane Chemical Co.* 14 N. J. L. J. 55.

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- ³ *Howes v. Colburn*, 165 Mass. 385, 43 N. E. 125; *Dresback v. State*, 38 Ohio St. 365; *Plummer v. Ossipee*, 59 N. H. 55; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

Where experts are ordered to examine a party and are called and questioned by the adverse party as to the result of their examination, the former has the right to ask on cross-examination how the examination was conducted and what questions were propounded to him. *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

- ⁴ An expert witness who has been examined upon the theory of the party calling him may be cross-examined by taking his opinion, based on any other set of facts assumed by the opposite party to have been proved, or upon a hypothetical case based upon the latter's theory. *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760; *Grubb v. State*, 117 Ind. 277, 20 N. E. 257, 725; *Conway v. State*, 118 Ind. 482, 21 N. E. 285; *People v. Lake*, 12 N. Y. 358; *Barney v. Fuller*, 61 Hun, 618, 15 N. Y. Supp. 694, affirmed in 122 N. Y. 605, 30 N. E. 1007.

- ⁵ *People v. Sutton*, 73 Cal. 243, 15 Pac. 86; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Kansas City v. Marsh Oil Co.* 140 Mo. 458, 41 S. W. 943.

- ⁶ *Williams v. Great Northern R. Co.* 68 Minn. 55, 37 L.R.A. 199, 70 N. W. 860; *Dilleber v. Home L. Ins. Co.* 87 N. Y. 79; *Missouri, K. & T. R. Co. v. Johnson*, — Tex. Civ. App. —, 49 S. W. 265.

But it is improper on cross-examination to erroneously assume facts to have been proved,—“especially when it is for the purpose of getting the opinion of an expert on a mere hypothesis, not to test his skill or accuracy, but to obtain evidence in support of the defense.” *State v. Stokely*, 16 Minn. 282, Gil. 249. And generally hypothetical questions on cross-examination must be based on facts in evidence. *Smalley v. Appleton*, 75 Wis. 18, 43 N. W. 826; *People v. Dunne*, 80 Cal. 34, 21 Pac. 1130.

- ⁷ *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072; *People v. Augsbury*, 97 N. Y. 501; *West Chicago Street R. Co. v. Fishman*. 169 Ill. 196, 43 N. E. 447.

e. Witnesses to character or reputation.—Witnesses called to testify to the character or reputation of others may be liberally cross examined to test the nature and extent of their knowledge.¹ They may be required to disclose the source of their information,² and may be cross examined as to any facts or rumors which tend to contradict the purpose and effect of their direct testimony.³

- ¹ *State v. Miller*, 71 Mo. 89; *Cox v. Strickland*, 101 Ga. 482, 28 S. E. 655.
A witness who testifies to the reputation of another witness for truth or

veracity may be asked on cross-examination what constitutes reputation. *Hutts v. Hutts*, 62 Ind. 214. So, a witness who has testified to the bad reputation for moral worth of the plaintiff in an action for slander may be asked on cross-examination what particular immorality was imputed to him. *Leonard v. Allen*, 11 Cush. 241. But a witness who has testified in support of the character and the credibility of another witness cannot be asked on cross-examination whether he would believe him upon oath if he were to swear differently from the witness himself. *Ramsey v. State*, 89 Ga. 198, 15 S. E. 6. Where a witness states that he knows the general reputation of another for truth and veracity he should be permitted to go on and testify to the nature of that reputation, without being interrupted by a cross-examination to test the extent and source of his information. *Nelson v. State*, 32 Fla. 244, 13 So. 361.

- 2 A witness who swears to the general bad character of another for truth and veracity may, upon cross-examination, be required to name the individuals from whom he received his information (*Weeks v. Hull*, 19 Conn. 376, 50 Am. Dec. 249; *Bates v. Barber*, 4 Cush. 107; *Annis v. People*, 13 Mich. 511; *Lower v. Winters*, 7 Cow. 263), and to state what they said. *State v. Perkins*, 66 N. C. 126.
- 3 A witness called to testify to the reputation of another witness for truth and veracity may be asked on cross-examination whether he has not heard reports which tend to weaken the effect of his direct testimony. *Hutts v. Hutts*, 62 Ind. 240; *State v. McLaughlin*, 149 Mo. 19, 50 S. W. 315. The same question may be asked of a witness who has testified to the general reputation for skill of a physician and surgeon. *Carpenter v. Blake*, 10 Hun. 358. But a witness who testifies to the bad reputation of plaintiff in an action for libel with respect to the corrupt use of money in political connections cannot be asked on cross-examination if such charges are not common against politicians. *Randall v. Evening News Asso.* 97 Mich. 146, 56 N. W. 361. Nor can a witness who has testified to the bad moral character of another be asked on cross-examination whether he has ever heard certain designated persons, not shown to have been acquainted with or to live in the neighborhood of the person whose character is in question, speak of the latter's character. *State v. Allen*, 100 Iowa, 7, 69 N. W. 274. Testimony in chief that the general reputation of a witness for truth and veracity is good was held in *Wachstetter v. State*, 99 Ind. 290, 50 Am. Rep. 94, to open the door for cross-examination in regard to his reputation for integrity or honesty. The court laid down the rule that, where a person has testified in chief that as to one of the elements of moral character the reputation of the witness sought to be impeached is good, he may be cross-examined with respect to the reputation of the witness as to any other or all of the essential and constituent elements of good moral character.

f. To discredit witness.—A witness may be interrogated on cross examination with a view to test the extent of his knowledge, the accuracy of his recollection, and his habits of observation.¹ So, his interest in the event of the suit, and his bias, prejudice, or hostility towards either of the parties, may be made the subject of inquiry for the purpose of testing the weight to be given to his testimony,² and he may be asked whether he has not made statements inconsistent with his testimony in chief for the purpose of affecting his credit³ or laying the foundation for his impeachment.⁴

The authorities are not harmonious upon the question whether counsel on cross examination may ask questions relating to specific facts which tend to discredit the witness or to impeach his moral character, even though not relevant to the issues.⁵ But even where such inquiries are not forbidden, their allowance or rejection rests in the sound discretion of the trial judge,⁶ and he may exclude them on the objection of the party where no claim of privilege is interposed.⁷ And a witness cannot be cross examined as to any fact which is collateral or irrelevant to the issue, merely for the purpose of contradicting him by other evidence if he denies it.⁸

¹ *Davis v. California Powder-Works*, 84 Cal. 617, 24 Pac. 387; *Sharp v. Hoffman*, 79 Cal. 404, 21 Pac. 846; *Hartford v. Champion*, 58 Conn. 263, 20 Atl. 471; *Schwartz v. Wood*, 67 Hun, 648, 21 N. Y. Supp. 1053; *Derk v. Northern C. R. Co.* 164 Pa. 243, 30 Atl. 231; *Cunningham v. Austin & N. W. R. Co.* 88 Tex. 534, 31 S. W. 629; *Blankenship v. Chesapeake & O. R. Co.* 94 Va. 449, 27 S. E. 20.

Thus a witness may be asked on cross-examination whether he understood a question propounded on his direct examination (*Pence v. Waugh*, 135 Ind. 143, 34 N. E. 860), and whether he has talked with others in reference to the facts of the case before going on the stand. *Bouldin v. State*, 102 Ala. 78, 15 So. 341. And two witnesses who testify to facts observed by them while in company may be cross-examined as to concert of action between them and as to how much the story of either or both has been changed or developed by conversation or otherwise. *State v. Hayward*, 62 Minn. 474, 65 N. W. 63. So, a witness may be asked whether he was not under the influence of intoxicating liquors at the time of the occurrences with regard to which he is testifying (*International & G. N. R. Co. v. Dyer*, 76 Tex. 156, 13 S. W. 377; *State v. Rhodes*, 44 S. C. 325, 21 S. E. 807, 22 S. E. 306), or whether he is not at the time of testifying under such influence. *Pool v. Pool*, 33 Ala. 145. But a witness cannot be asked whether or

not she is addicted to the morphine habit, unless it is proposed to show that she was under its influence when the events happened about which she testifies or at the time of testifying, or it appears that her powers of recollection are impaired thereby. *State v. Gleim*, 17 Mont. 17, 31 L.R.A. 294, 41 Pac. 998. And the range which a cross-examination of this character may take is left to the sound discretion of the trial court. *A. G. Rhodes Furniture Co. v. Weeden*, 108 Ala. 252, 19 So. 318; *State v. Duffy*, 57 Conn. 525, 18 Atl. 791.

- ² *Alabama G. S. R. Co. v. Burgess*, 114 Ala. 587, 22 So. 169; *Long v. Booc*, 106 Ala. 570, 17 So. 716; *Gould v. Stafford*, 91 Cal. 146, 27 Pac. 543; *Hartman v. Rogers*, 69 Cal. 643, 11 Pac. 581; *Driggers v. State*, 38 Fla. 7, 20 So. 758; *Jacksonville, T. & K. W. R. Co. v. Wellman*, 26 Fla. 344, 7 So. 845; *Atlantic Coast Line R. Co. v. Powell*, 127 Ga. 805, 9 L.R.A. (N.S.) 769, 56 S. E. 1006, 9 A. & E. Ann. Cas. 553; *Sage v. State*, 127 Ind. 15, 26 N. E. 667; *Harrington v. Hamburg*, 85 Iowa, 272, 52 N. W. 201; *Schloss v. Estey*, 114 Mich. 429, 72 N. W. 264; *Archer v. Helm*, 70 Miss. 874, 12 So. 702; *Cambeis v. Third Ave. R. Co.* 1 Misc. 158, 20 N. Y. Supp. 633; *Cady v. Bradshaw*, 116 N. Y. 188, 5 L.R.A. 557, 22 N. E. 371; *Wallach v. Kalcheim*, 25 Misc. 171, 54 N. Y. Supp. 148; *Hanson v. Red Rock Twp.* 7 S. D. 38, 63 N. W. 156; *Graham v. McReynolds*, 88 Tenn. 240, 12 S. W. 547; *Cox v. Missouri*, K. & T. R. Co. 20 Tex. Civ. App. 250, 48 S. W. 745; *Atkinson v. Reed*, — Tex. Civ. App. —, 49 S. W. 260; *Vermont Farm Mach. Co. v. Batchelder*, 68 Vt. 430, 35 Atl. 378; *Stossel v. Van De Vanter*, 16 Wash. 9, 47 Pac. 221; *Suit v. Bonnell*, 33 Wis. 180.

The prejudice must exist at the trial or have arisen so recently that it may be assumed to continue down to that time (*Higham v. Gault*, 15 Hun. 383), and the interest must not be too remote (*Bevan v. Atlanta Nat. Bank*, 142 Ill. 302, 31 N. E. 679), although the fact that the witness may have parted with his interest in the suit before the trial will not preclude the inquiry. *Trinity County Lumber Co. v. Denham*, 88 Tex. 203, 30 S. W. 856; *Klatt v. N. C. Foster Lumber Co.* 97 Wis. 641, 73 N. W. 563. The hostility of a witness towards a person not a technical party to the action may be a proper subject of inquiry where the latter's relation to parties or subject-matter is such that the prejudice of the witness may influence the character of his testimony. *Somerset County Comrs. v. Minderlein*, 67 Md. 566, 11 Atl. 57; *Philadelphia use of McGinn v. Reeder*, 173 Pa. 281, 34 Atl. 17.

The extent to which a witness may be so cross-examined is in the discretion of the trial court. *Consaul v. Sheldon*, 35 Neb. 247, 52 N. W. 1104; *Lustig v. New York, L. E. & W. R. Co.* 65 Hun. 547, 20 N. Y. Supp. 477; *Hinchcliffe v. Koontz*, 121 Ind. 422, 23 N. E. 271.

- ³ *Freeman v. Hensley*, — Cal. —, 30 Pac. 792; *Lothrop v. Roberts*, 16 Colo. 250, 27 Pac. 698; *Chielinsky v. Hoopes & T. Co.* 1 Marv. (Del.) 273, 40 Atl. 1127; *Stanley v. Dunn*, 143 Ind. 495, 42 N. E. 908; *Rob-*

ertson v. Craver, 88 Iowa, 381, 55 N. W. 492; Southern Kansas R. Co. v. Michaels, 49 Kan. 388, 30 Pac. 408; Watts v. Stevenson, 165 Mass. 518, 43 N. E. 497; Langworthy v. Green Twp. 88 Mich. 207, 50 N. W. 130; Lawlor v. Kemper, 20 Mont. 13, 49 Pac. 398; Beuerlien v. O'Leary, 149 N. Y. 33, 43 N. E. 417; Walley v. Desenet Nat. Bank, 14 Utah, 305, 47 Pac. 147; Stacy v. Milwaukee, L. S. & W. R. Co. 72 Wis. 331, 39 N. W. 532.

A party may on cross-examination be asked if he did not make statements in his pleadings contrary to his testimony (Hall v. Chicago, R. I. & P. R. Co. 84 Iowa, 311, 51 N. W. 150; Hare v. Mahoney, 60 Hun, 576, 14 N. Y. Supp. 81), and in an action on an open account may be cross-examined as to inconsistencies between his testimony and the original statement on which the original petition was based, although both the original petition and account have been abandoned. Ryan v. Dutton, — Tex. Civ. App. —, 38 S. W. 546. But a party is entitled to have his pleadings in a former suit exhibited to him before being required to testify with reference thereto. Teller v. Ferguson, 24 Colo. 432, 51 Pac. 429. A witness may be cross-examined as to his testimony on a former trial inconsistent with his present testimony. Brooks v. Rochester R. Co. 156 N. Y. 244, 50 N. E. 945; Waterman v. Chicago & A. R. Co. 82 Wis. 613, 52 N. W. 247, 1136. And the record of his former testimony need not be produced. Oderkirk v. Fargo, 61 Hun, 418, 16 N. Y. Supp. 220. Contra, People v. Ching Hang Chang, 74 Cal. 389, 16 Pac. 201. If the inconsistent statements are in writing they must be first produced and shown or read to the witness, or the nonproduction accounted for. East Tennessee, V. & G. R. Co. v. Thompson, 94 Ala. 636, 10 So. 280.

The extent of the interest or prejudice is as material as the main fact of its existence. Blenkiron v. State, 40 Neb. 11, 58 N. W. 587; Stewart v. Kindel, 15 Colo. 539, 25 Pac. 990; State v. Collins, 33 Kan. 77, 5 Pac. 368; State v. Dee, 14 Minn. 35, Gil. 27. But a witness admitted to be interested in the result of a suit because of contract relations with one of the parties cannot be compelled to produce the contract for the purpose of showing the extent of his interest. Goss Printing-Press Co. v. Scott, 89 Fed. Rep. 818. Nor can a witness who has admitted an attempt to procure a settlement be questioned as to the amount demanded. Pomaski v. Grant, 119 Mich. 675, 78 N. W. 891. And a witness cannot be examined as to the character of a difficulty claimed to have generated an ill feeling against the cross-examining party until the state of feeling between them has been inquired into. Miller v. Dill, 149 Ind. 326, 49 N. E. 272. So, a witness who has admitted that he had trouble with one of the parties, growing out of a law suit tried and settled to the satisfaction of the parties years before, cannot be asked to state the amount of the judgment recovered against him in that action. Boldon v. Thompson, 60 Kan. 856, 56 Pac. 131. And it has been held that a witness who has been inter-

rogated as to the state of his feelings towards one of the parties cannot be asked for its cause. *Conyers v. Field*, 61 Ga. 258.

- 4 *Hoye v. Chicago, M. & St. P. R. Co.* 46 Minn. 269, 48 N. W. 1117; *Hamilton v. Rich Hill Coal Min. Co.* 108 Mo. 364, 18 S. W. 977; *Vogt v. Baldwin*, 20 Mont. 322, 51 Pac. 157; *Krewson v. Purdom*, 13 Or. 563, 11 Pac. 281; *Missouri, K. & T. R. Co. v. Calnon*, 20 Tex. Civ. App. 697, 50 S. W. 422; *Walley v. Deseret Nat. Bank*, 14 Utah, 305, 47 Pac. 147; *Smith v. Watson*, 82 Va. 712, 1 S. E. 96; *Waterman v. Chicago & A. R. Co.* 82 Wis. 613, 52 N. W. 247.

And it is immaterial that counsel fails or has no intention to follow up the impeachment by the introduction of evidence to sustain the matters inquired into. *Texas Standard Oil Co. v. Hanlon*, 79 Tex. 678, 15 S. W. 703.

But in *Walters v. Seattle, R. & S. R. Co.* 48 Wash. 233, 24 L.R.A. (N.S.) 788, 93 Pac. 419, it is held that a witness as to the proper method of stopping an electric car, in an action to hold the company liable for injuries to a passenger through a collision, may decline to answer a question, asked for purposes of impeachment, as to the causes for which he was dismissed from the police force.

- 5 The allowance of such questions seems to be favored in some jurisdictions as a proper mode of testing the credibility of the witness. *Wilbur v. Flood*, 16 Mich. 40, 93 Am. Dec. 203; *State v. Greensburg*, 59 Kan. 404, 53 Pac. 61; *Roberts v. Com.* 14 Ky. L. Rep. 219, 20 S. W. 267; *People v. Irving*, 95 N. Y. 541; *People ex rel. Phelps v. New York County Court of Oyer & Terminer*, 83 N. Y. 436; *Zanone v. State*, 97 Tenn. 101, 35 L.R.A. 556, 36 S. W. 711; *Muller v. St. Louis Hospital Asso.* 5 Mo. App. 390, affirmed in 73 Mo. 243; *Carroll v. State*, 32 Tex. Crim. Rep. 431, 24 S. W. 100. So held even under a statute providing that a witness cannot be impeached by evidence of wrongful acts. *Oxier v. United States*, 1 Ind. Terr. 85, 38 S. W. 331. But see *State v. Houx*, 109 Mo. 654, 19 S. W. 35 (holding that a witness cannot be cross-examined as to the immorality of his previous life unless his answers tend directly to prove some issue); *Gulf, C. & S. F. R. Co. v. Johnson*, 82 Tex. 628, 19 S. W. 151 (holding that a witness cannot be asked whether he is a deserter from the United States Army). Under the guise of discrediting the witness he cannot be questioned as to fraudulent transactions of the party calling him collateral to the issue in which the witness participated. *Madden v. Koester*, 52 Iowa, 692, 3 N. W. 790.

The contrary rule is upheld in *Elliott v. Boyles*, 31 Pa. 67; *Holbrook v. Dow*, 12 Gray, 357; *Com. v. Schaffner*, 146 Mass. 512, 16 N. E. 280; *Crawford v. Christian*, 102 Wis. 51, 78 N. W. 406. But see *Prescott v. Ward*, 10 Allen, 203 (in which it was held that, so far as inquiries on cross-examination relating to matters entirely collateral and immaterial to the issue have a tendency to contradict the witness or disparage his character, it is discretionary in the court to allow or

reject them). Such a course of examination is prohibited by statute in some states. *State v. Anthony*, 6 Idaho, 383, 55 Pac. 884; *Jones v. Duchow*, 87 Cal. 109, 23 Pac. 371, 25 Pac. 256.

It is generally permissible, and authorized by statute in some states, to interrogate a witness with respect to a prior conviction of crime without producing the record of conviction. *State v. Martin*, 124 Mo. 514, 28 S. W. 12; *Handlin v. Law*, 34 Ill. App. 84; *State v. Merriam*, 34 S. C. 16, 12 S. E. 619; *McLaughlin v. Mencke*, 80 Md. 83, 30 Atl. 603; *State v. Adamson*, 43 Minn. 196, 45 N. W. 152; *Spiegel v. Hays*, 118 N. Y. 660, 22 N. E. 1105; *Perham v. Noel*, 20 App. Div. 516, 47 N. Y. Supp. 100; *Lights v. State*, 21 Tex. App. 308, 17 S. W. 428. Contra, *Clement v. Brooks*, 13 N. H. 92; *Com. v. Quin*, 5 Gray, 478; *Com. v. Sullivan*, 150 Mass. 315, 23 N. E. 47; *Buck v. Com.* 107 Pa. 486. In some states evidence of this character is limited by statute to a conviction for a felony. *People v. Carolan*, 71 Cal. 195, 12 Pac. 52. Under such a statute a witness cannot be asked whether he was ever convicted of crime. *Hanners v. McClelland*, 74 Iowa, 318, 37 N. W. 389.

That an attorney may be asked on cross-examination whether he has been disbarred was held in *People v. Reavey*, 38 Hun, 418, and denied in *People v. Dorthy*, 20 App. Div. 308, 46 N. Y. Supp. 970. In affirming the latter case the court of appeals without deciding the question held that the witness cannot be required to answer or explain the charges on which the disbarment proceedings rested. *People v. Dorthy*, 156 N. Y. 237, 50 N. E. 800. A discharge or compulsory resignation from the police force was held in *Wroe v. State*, 20 Ohio St. 460, to be a proper subject of inquiry on cross-examination, but the opposite view was maintained in *Nolan v. Brooklyn City & N. R. Co.* 87 N. Y. 63, 41 Am. Rep. 345, in which it was held improper to ask a witness if he had been expelled from the fire department. And it is improper to ask a witness whether he has been expelled from the church to which he belonged. *People v. Dorthy*, 156 N. Y. 237, 50 N. E. 800.

It has been held that a witness may be asked whether he has even been arrested or indicted. *Oxier v. United States*, 1 Ind. Terr. 85, 38 S. W. 331; *State v. Greenburg*, 59 Kan. 404, 53 Pac. 61; *Roberts v. Com.* 14 Ky. L. Rep. 219, 20 S. W. 267; *People v. Hite*, 8 Utah, 461, 33 Pac. 254; *Wroe v. State*, 20 Ohio St. 460; *Linz v. Skinner*, 11 Tex. Civ. App. 512, 32 S. W. 915. But it would seem that such inquiries should be excluded, since the fact of indictment or arrest is not inconsistent with innocence. *State v. Brown*, 100 Iowa, 50, 69 N. W. 277; *McKesson v. Sherman*, 51 Wis. 303, 8 N. W. 200; *Van Bokkelen v. Berdell*, 130 N. Y. 141, 29 N. E. 254; *Smith v. Mulford*, 42 Hun, 347; *V. Loewer's Gambrinus Brewery Co. v. Bachman*, 45 N. Y. S. R. 48, 18 N. Y. Supp. 138. A witness cannot be asked if he has been sued for assault and battery for the purpose of discrediting him (*Yager v. Person*, 42 Hun, 400), nor whether a suit for damages is pending against him because of false swearing in another case (*Pennsylvania*

Co. v. Bray, 125 Ind. 229, 25 N. E. 439), nor whether he has not pleaded the statute of limitations to certain specified claims. **Cecil v. Henderson**, 119 N. C. 422, 25 S. E. 1018. Nor can he be questioned with a view to showing that he is an habitual litigant. **Palmeri v. Manhattan R. Co.** 133 N. Y. 261, 16 L.R.A. 136, 30 N. E. 1001.

⁶ **Bank of Cadiz v. Slemmons**, 34 Ohio St. 142, 32 Am. Rep. 364; **Bissell v. Starr**, 32 Mich. 297; **State v. May**, 33 S. C. 39, 11 S. E. 440; **Byrd v. Hudson**, 113 N. C. 203, 18 S. E. 209.

⁷ **South Bend v. Hardy**, 98 Ind. 577; **Third Great Western Turnp. Road Co. v. Loomis**, 32 N. Y. 127, 88 Am. Dec. 311; **People v. Braun**, 158 N. Y. 558, 53 N. E. 529; **State v. Bacon**, 13 Or. 143, 9 Pac. 393.

⁸ **Eldridge v. State**, 27 Fla. 162, 9 So. 448; **Clinton v. State**, 33 Ohio St. 27; **Curran v. Percival**, 21 Neb. 434, 32 N. W. 213; **Com. v. Hourigan**, 89 Ky. 305, 12 S. W. 550; **Territory v. Campbell**, 9 Mont. 16, 22 Pac. 121; **State v. Grant**, 144 Mo. 56, 45 S. W. 1102; **People v. Van Tassel**, 156 N. Y. 561, 51 N. E. 274; **Moore v. Moore**, 73 Tex. 382, 11 S. W. 396.

But this rule does not limit the cross-examination for the purpose of laying the foundation for impeachment to the particular matters testified to by the witness on his direct examination, nor to such matters as bear directly and immediately upon the issue where they are directly connected with the subject-matter of the action and with the subject-matter of the examination in chief. **Seller v. Jenkins**, 97 Ind. 430.

The test as to whether a fact inquired of on cross-examination is collateral is whether the cross-examining party would be entitled to prove it as part of his own case tending to establish his plea. **Johnson v. State**, 22 Tex. App. 208, 2 S. W. 609; **Hildeburn v. Curran**, 65 Pa. 59.

17. Redirect examination.

A witness may be re-examined to rebut or neutralize any adverse inferences which can be drawn from the evidence elicited on his cross-examination.¹ But the right to such re-examination extends only to such inquiries as tend to explain, modify, or rebut the facts or statements brought out in the cross-examination.² The court may, however, in its discretion permit a witness to be re-examined with reference to subjects not brought out on either his cross-examination or his examination in chief.³

Where a subject is first introduced on cross-examination the party calling the witness may, on his redirect examination, question him with reference thereto⁴ although the evidence would not have been competent on the examination in chief.⁵ And where a portion of a conversation has been drawn out on

cross-examination the witness may on redirect examination, be required to state the whole of the conversation so far as it relates to the subject of inquiry on cross-examination.⁶

¹ *Kendall v. Albia*, 73 Iowa, 241, 34 N. W. 833; *Rumrill v. Ash*, 169 Mass. 341, 47 N. E. 1017; *Norfolk Nat. Bank v. Job*, 48 Neb. 774, 67 N. W. 781; *Carlson v. Winterson*, 147 N. Y. 652, 42 N. E. 347; *State v. Glenn*, 95 N. C. 677; *Westbrook v. Aultman, M. & Co.* 3 Ind. App. 83, 28 N. E. 1011; *Loy v. Petty*, 3 Ind. App. 241, 29 N. E. 788.

² *Blake v. Stump*, 73 Md. 160, 10 L.R.A. 103, 20 Atl. 788; *Dutton v. Woodman*, 9 Cush. 255, 57 Am. Dec. 46; *Backus v. Barber*, 75 Minn. 262, 77 N. W. 959; *State v. Ussery*, 118 N. C. 1177, 24 S. E. 414; *Robinson v. Peru Plow & Wheel Co.* 1 Okla. 140, 31 Pac. 988; *Farmers' Bank v. Saling*, 33 Or. 394, 54 Pac. 190; *Ranney v. St. Johnsbury & L. C. R. Co.* 67 Vt. 594, 32 Atl. 810; *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671; *Schaser v. State*, 36 Wis. 429; *Queen's Case*, 2 Brod. & B. 297, 22 Revised. Rep. 662, 11 Eng. Rul. Cas. 183.

³ *Springfield v. Dalby*, 139 Ill. 34, 29 N. E. 860; *Brown v. Burrus*, 8 Mo. 26; *Schlencker v. State*, 9 Neb. 241, 1 N. W. 857; *Donnelly v. State*, 26 N. J. L. 601; *Hemmens v. Bentley*, 32 Mich. 89; *Baird v. Gleckler*, 7 S. D. 284, 64 N. W. 118; *Graham v. McReynolds*, 90 Tenn. 673, 18 S. W. 272.

⁴ *Wadsworth v. Dunn*, 117 Ala. 661, 23 So. 699; *Hamilton v. Miller*, 46 Kan. 486, 26 Pac. 1030; *Chicago, R. I. & P. R. Co. v. Griffith*, 44 Neb. 690, 62 N. W. 868; *Gray v. Cooper*, 65 N. C. 183; *Farmers' Bank v. Saling*, 33 Or. 394, 54 Pac. 190; *Chamberlin v. Fuller*, 59 Vt. 247, 9 Atl. 832; *Pullman's Palace Car Co. v. Harkins*, 5 C. C. A. 326, 17 U. S. App. 22, 55 Fed. 932.

An expert may be asked on redirect examination for the reasons of an opinion brought out on cross-examination. *Leslie v. Granite R. Co.* 172 Mass. 468, 52 N. E. 542. So, a witness may testify on redirect examination as to his reasons for his interest disclosed on cross-examination (*Postal Teleg. Cable Co. v. Hulsey*, 115 Ala. 193, 22 So. 854), and as to the reasons for his belief as expressed on cross-examination. *Pullen v. Pullen*, — N. J. —, 12 Atl. 138. The circumstances attending the conviction of a witness which has been proved on his cross-examination cannot be explained on a redirect examination (*Lamoureux v. New York, N. H. & H. R. Co.* 169 Mass. 338, 47 N. E. 1009), though the witness has a right on redirect examination to show his innocence. *Sims v. Sims*, 75 N. Y. 466; *Wolkoff v. Tefft*, 35 N. Y. S. R. 93, 12 N. Y. Supp. 464.

⁵ *McElheny v. Pittsburgh, V. & C. R. Co.* 147 Pa. 1, 23 Atl. 392; *United States v. 18 Barrels of High Wines*, 8 Blatchf. 475, Fed. Cas. No. 15,033.

Cross-examination as to irrelevant or incompetent matter does not bring it in issue so as to permit a redirect examination upon it. *Smith v.*

Dreer, 3 Whart. 154; *Miller v. Illinois C. R. Co.* 89 Iowa, 567, 57 N. W. 418; *Roberts v. Boston*, 149 Mass. 346, 21 N. E. 668. Contra, *Dutcher v. Howard*, 15 Wash. 693, 47 Pac. 28. In *Sturgis v. Robins*, 62 Me. 289, the allowance or rejection of irrelevant testimony on redirect examination under such circumstances was held discretionary with the trial court, and in *Goodman v. Kennedy*, 10 Neb. 270, 4 N. W. 987, the admission of incompetent testimony on redirect examination was held immaterial where substantially the same testimony was brought out on cross-examination.

⁶ *Louisville & N. R. Co. v. Malone*, 109 Ala. 509, 20 So. 33; *Robinson v. Dugan*, — Cal. —, 35 Pac. 902; *Savannah, F. & W. R. Co. v. Holland*, 82 Ga. 257, 10 S. E. 200; *Dole v. Wooldredge*, 142 Mass. 161, 7 N. E. 832; *Quigley v. Baker*, 169 Mass. 303, 47 N. E. 1007; *Alderton v. Wright*, 81 Mich. 294, 45 N. W. 968; *Clift v. Moses*, 112 N. Y. 426, 20 N. E. 392; *Roberts v. Roberts*, 82 N. C. 29; *Wendt v. Chicago, St. P. M. & O. R. Co.* 4 S. D. 476, 57 N. W. 226; *Dupree v. Estelle*, 72 Tex. 575, 10 S. W. 666.

Testimony on cross-examination as to part of a conversation does not render admissible on redirect examination the other parts of the conversation on a different subject. *Ballow v. United States*, 160 U. S. 187, 40 L. ed. 388, 16 Sup. Ct. Rep. 263; *Mott v. Detroit, G. H. & M. R. Co.* 120 Mich. 127, 79 N. W. 3. Nor does it change the rule with respect to hearsay. *Wagner v. People*, 30 Mich. 384. And the fact that plaintiff in an action for criminal conversation on his cross-examination testified to a conversation regarding his wife and defendant, held with the latter's mother, does not justify his redirect examination as to the details of the conversation. *Smith v. Merrill*, 75 Wis. 461, 44 N. W. 759.

18. Re-cross examination.

An opportunity for further cross-examination should be extended where new matter has been elicited upon the redirect examination,¹ but it is proper for the court to restrict such recross-examination to the matters inquired into on the redirect.² And where nothing new has been brought out on redirect examination a further cross-examination is not a right of counsel, and its allowance rests in the discretion of the court.³

¹ *Wood v. McGuire*, 17 Ga. 303.

² *State v. Southern*, 48 La. Ann. 628, 19 So. 668; *Thornton v. Thornton*, 39 Vt. 122.

³ *State v. Hoppiss*, 27 N. C. (5 Ired. L.) 406; *Atlantic & D. R. Co. v. Rieger*, 95 Va. 418, 28 S. E. 590.

But the rejection of an offer to show on recross-examination an important fact omitted upon the cross-examination, the witness being still upon

the stand, is an erroneous exercise of this discretion which will not be sustained unless it is apparent that no injury resulted. *Knight v. Cunningham*, 6 Hun, 100.

19. Interpreters; deaf and dumb witnesses.

Where a witness cannot speak the English language, or speaks it very imperfectly, his testimony may properly be given through a sworn interpreter.¹ The accuracy of the interpreter's interpretation may be impeached,² and a witness who has testified through an interpreter may make corrections in his testimony as recorded, if he has been misinterpreted.³

Deaf mutes may give evidence either through an interpreter who can communicate with them by signs,⁴ or by means of written questions and answers;⁵ but the fact that they can read or write does not preclude the use of the former method.⁶

¹ *State v. Hamilton*, 42 La. Ann. 1204, 8 So. 304; *Chicago & A. R. Co. v. Shenk*, 131 Ill. 283, 23 N. E. 436; *State v. Severson*, 78 Iowa, 653, 43 N. W. 533; *Haupt v. Haupt*, *Wright* (Ohio) 156; *Norberg's Case*, 4 Mass. 81. Under the California statute the granting or refusing of an application for an interpreter is vested in the discretion of the court. *People v. Young*, 108 Cal. 8, 41 Pac. 281.

The calling of an interpreter to aid a witness in giving his testimony is within the discretion of the trial court, and is not subject to review on appeal. *Brzozowski v. National Box Co.* 104 Ill. App. 338.

It is the duty of the court to appoint an interpreter in a proper case, and it is error to dismiss the complaint where the plaintiff is unable to examine the witness because of his inability to understand the language. *Menella v. Metropolitan Street R.* 43 Misc. 5, 86 N. Y. Supp. 930. A chinese account may be interpreted to the court by a witness. *Yick Wo v. Underhill*, 5 Cal. App. 519, 90 Pac. 967.

A witness who wrote an agreement offered in evidence which is in a foreign language may translate it without swearing him as an interpreter. *Krewson v. Purdom*, 13 Or. 563, 11 Pac. 281. So, a witness may narrate in English the admissions of a party made in a foreign language (*Com. v. Kepper*, 114 Mass. 278), and a party is not bound to resort to an interpreter sworn as such to translate foreign words testified to by a witness which he claims to have been incorrectly translated by the witness. *Thon v. Rochester R. Co.* 29 N. Y. Supp. 675.

Where the oath is administered to witnesses through an interpreter it is not necessary that the clerk should repeat the oath to him as often as he is called upon to administer it to a witness. *Com. v. Jonegras*, 181 Pa. 172, 37 Atl. 207.

As to the admissibility of evidence when given through an interpreter, see note to *Com. v. Vose*, 17 L.R.A. 813.

² *Schnier v. People*, 23 Ill. 17.

But the fact that an interpreter took counsel as to the correctness of the interpretation with other persons not sworn does not render the evidence incompetent where the interpretation is given under oath. *United States v. Gibert*, 2 Sumn. 90, Fed. Cas. No. 15,204.

³ *Erickson v. Milwaukee, L. S. & W. R. Co.* 93 Mich. 414, 53 N. W. 393.

⁴ *Ruston's Case*, 1 Leach, C. L. 408; *Snyder v. Nations*, 5 Blackf. 295.

The interpreter need not be an expert if it is satisfactorily sworn that he can correctly interpret the meaning of the communication required. *Skaggs v. State*, 108 Ind. 53, 8 N. E. 695; *State v. Weldon*, 39 S. C. 318, 24 L.R.A. 126, 17 S. E. 688.

A deaf and dumb person may be appointed as an additional interpreter to interpret between the deaf and dumb witness and the original interpreter who can declare the testimony orally. *Skaggs v. State*, 108 Ind. 53, 8 N. E. 695.

⁵ *Ritchey v. People*, 23 Colo. 314, 47 Pac. 272, 384.

⁶ *State v. Howard*, 118 Mo. 127, 24 S. W. 41; *State v. DeWolf*, 8 Conn. 93, 2 Am. Dec. 90.

For extended discussion of deaf and dumb persons as witnesses, see note to *State v. Weldon*, 24 L.R.A. 126.

IX.—IMPEACHMENT AND CORROBORATION OF WITNESSES.

A. IMPEACHMENT BY PROOF OF INCONSISTENT STATEMENTS OR ACTS.

1. Laying foundation.
 - a. In general.
 - b. Party to suit.
 - c. Recalling for purpose of.
 - d. As to statements in writing.
 - e. Sufficiency of foundation.
2. Inconsistent statements or conduct generally.
3. Written statements.
 - a. In general.
 - b. Depositions or affidavits.
 - c. Pleadings.
 - d. Former testimony.
4. Form of question to impeaching witness.

B. IMPEACHMENT BY PROOF OF HOSTILITY, BIAS, OR INTEREST IN THE ACTION.

C. IMPEACHMENT BY PROOF AS TO CHARACTER OR REPUTATION AND FACTS AFFECTING THEM.

1. General reputation for truth and veracity or moral character.
2. Foundation, questioning impeaching witness.
3. Place and time of reputation.
4. Conviction.
5. Indictment, etc.
6. Specific acts or offenses or line of conduct.

D. IMPEACHMENT AS TO COLLATERAL AND IMMATERIAL OR IRRELEVANT MATTERS BROUGHT OUT ON CROSS-EXAMINATION.

E. IMPEACHMENT OF ONE'S OWN WITNESS.

1. In general.
2. Compulsory witness.
3. Hostile or unwilling witness.
4. Opponent as witness.

F. CORROBORATION OF IMPEACHED WITNESS.

A. IMPEACHMENT BY PROOF OF INCONSISTENT STATEMENTS OR ACTS.

1. Laying foundation.

a. *In general*.—A foundation must be laid for impeaching a witness by proof of his inconsistent statements or acts by interro-

gating him with reference thereto,¹ and calling his attention to the time, place, person to whom, or other essential circumstances of the making thereof,² so as to give him an opportunity to explain them;³ and in the absence of such foundation evidence thereof is inadmissible.⁴ But a predicate cannot be based upon irrelevant or immaterial evidence.⁵

¹ *Ayers v. Watson*, 132 U. S. 394, 33 L. ed. 378, 10 Sup. Ct. Rep. 116; *Chicago, M. & St. P. R. Co. v. Artery*, 137 U. S. 507, 34 L. ed. 747, 11 Sup. Ct. Rep. 129; *Times Pub. Co. v. Carlisle*, 36 C. C. A. 475. 94 Fed. 762; *Barkly v. Copeland*, 74 Cal. 1, 15 Pac. 307; *Skaggs v. Martinsville*, 140 Ind. 476, 33 L.R.A. 781, 49 Am. St. Rep. 209, 39 N. E. 241; *Illinois C. R. Co. v. Houchins*, 121 Ky. 526, 1 L.R.A.(N.S.) 375, 123 Am. St. Rep. 205, 89 S. W. 530; *Louisville & N. R. Co. v. Alumbaugh*, 21 Ky. L. Rep. 134, 51 S. W. 18; *Neff v. Cameron*, 213 Mo. 350, 18 L.R.A.(N.S.) 320, 127 Am. St. Rep. 606, 111 S. W. 1139; *Thompson v. Wertz*, 41 Neb. 31, 59 N. W. 518; *Cabell v. Holloway*, 10 Tex. Civ. App. 1307, 31 S. W. 201; *Gregory Consol. Min. Co. v. Starr*, 141 U. S. 222, 35 L. ed. 715, 11 Sup. Ct. Rep. 914. And see further statutes in Arkansas, California, Florida, Idaho, Iowa, New Mexico, and Oregon; and also special provisions in Florida, Vermont, and Massachusetts as to party's own witness.

² *Ayers v. Watson*, 132 U. S. 394, 33 L. ed. 378, 10 Sup. Ct. Rep. 116; *Wood River Bank v. Kelley*, 29 Neb. 590, 46 N. W. 86; *Montgomery v. Knox*, 23 Fla. 595, 3 So. 211; *Skaggs v. Martinsville*, 140 Ind. 476, 33 L.R.A. 781, 39 N. E. 241; *Diffenderfer v. Scott*, 5 Ind. App. 243. 32 N. E. 87; *Watson v. St. Paul City R. Co.* 42 Minn. 46, 43 N. W. 904; *Hammond v. Dike*, 42 Minn. 273, 44 N. W. 61; *Dunlap v. Richardson*, 63 Miss. 447; *Bartlett v. Cheesebrough*, 32 Neb. 339, 49 N. W. 360; *Hunter v. Gibbs*, 79 Wis. 70, 48 N. W. 257; *Daly v. Melendy*, 32 Neb. 852, 49 N. W. 926; *Davison v. Cruse*, 47 Neb. 829, 66 N. W. 823; *Bogart v. Delaware, L. & W. R. Co.* 72 Hun, 412, 25 N. Y. Supp. 175; *Sieber v. Amunson*, 78 Wis. 679, 47 N. W. 1126. See also *Smith v. Jones*, 11 Tex. Civ. App. 18, 31 S. W. 306; *Remy v. Lilly*, 22 Ind. App. 109, 53 N. E. 387. And where the statement or declaration has been alleged to have been made within a year of the date of trial it is held in *Wood River Bank v. Kelley*, 29 Neb. 590, 46 N. W. 86, that the time ought to be stated within a few days or weeks, or at most, a month, of the time proved.

The matter of discrediting witness by such proof without first calling attention thereto is held to rest in the sound discretion of the court in *Cronkrite v. Trexler*, 187 Pa. 100, 41 Atl. 22 (evidence not admitted).

In Massachusetts it is not necessary to call attention to the occasion of such statement and give the witness a chance to explain. *Allen v. Whittemore*, 171 Mass. 259, 50 N. E. 618; *Carville v. Westford*, 163 Mass. 544, 40 N. E. 893. But where it is sought to show that one's

own witness has made contradictory statements, the rule is different. Mass. Pub. Stat. chap. 169, § 22.

- ³ *Ayers v. Watson*, 132 U. S. 394, 33 L. ed. 378, 10 Sup. Ct. Rep. 116; *Hammond v. Dike*, 42 Minn. 273, 44 N. W. 61; *Dunlap v. Richardson*, 63 Miss. 447; *Hunter v. Gibbs*, 79 Wis. 70, 48 N. W. 257. See statutes of California, Idaho, Indian Territory, Iowa, and Wyoming.

A witness admitting inconsistent statements or acts is entitled to state in explanation thereof how, why, and under what circumstances made. *Graham v. McReynolds*, 90 Tenn. 673, 18 S. W. 272. And letters having been put in evidence to impeach a witness the addressee's answers are admissible in explanation. *Ibid.* And likewise where a deposition has been admitted to impeach, without giving a witness an opportunity to explain, the testimony of others is admissible for that purpose. *Ibid.* So, a bill of sale absolute on its face having been introduced to impeach a witness' testimony as to the ownership of property, he may in explanation testify that although absolute on its face it was in fact intended as security. *Peck v. Manning*, 99 N. C. 157, 5 S. E. 743. And a witness interrogated as to a conversation to lay a foundation for impeachment is entitled to give the whole thereof, so far as pertinent. *Savannah, F. & W. R. Co. v. Holland*, — Ga. —, 9 S. E. 1040. So, a witness impeached by the introduction of evidence as to a conversation should, on being recalled, be allowed to state what that conversation was so as to show that there was a misunderstanding and that his statements at that time were not inconsistent with his testimony on the trial. *Louisville & N. R. Co. v. Alumbaugh*, 21 Ky. L. Rep. 134, 51 S. W. 18. A witness who on cross-examination has been asked as to an answer in garnishment proceedings to lay a foundation for impeaching his credibility, must be permitted on redirect examination to explain such answer. *Smith v. Traders Nat. Bank*, 82 Tex. 368, 17 S. W. 779.

- ⁴ *The Charles Morgan*, 115 U. S. 69, 29 L. ed. 316, 5 Sup. Ct. Rep. 1172; *Mutter v. I. X. L. Lime Co.* — Cal. —, 42 Pac. 1068; *Birch v. Hale*, 99 Cal. 299, 33 Pac. 1038; *Trabing v. California Nav. & Improv. Co.* 121 Cal. 137, 53 Pac. 644; *Sharp v. Hicks*, 94 Ga. 624, 21 S. E. 203; *Robinson v. Savage*, 124 Ill. 266, 15 N. E. 850; *Perishable Freight Transp. Co. v. O'Neill*, 41 Ill. App. 423; *North Chicago Street R. Co. v. Cottingham*, 44 Ill. App. 46; *Seckel v. York Nat. Bank*, 57 Ill. App. 579; *Richmond Bros. v. Sundburg*, 77 Iowa, 255, 42 N. W. 184; *Swanson v. French*, 92 Iowa, 695, 61 N. W. 407; *Kreuger v. Sylvester*, 100 Iowa, 647, 69 N. W. 1059; *Koehler v. Buhl*, 94 Mich. 496, 54 N. W. 157; *Connell v. McNett*, 109 Mich. 329, 67 N. W. 344; *Standard Life & Acci. Ins. Co. v. Tinney*, 73 Miss. 726, 19 So. 662; *Fulton v. Hughes*, 63 Miss. 61; *Bates v. Holladay*, 31 Mo. App. 162; *Wheeler v. Van Sickle*, 37 Neb. 651, 56 N. W. 196; *Wylar v. Rothschild*, 53 Neb. 566, 74 N. W. 41; *Morris v. New York, O. & W. R. Co.* 143 N. Y. 88, 42 N. E. 410; *McCulloch v. Dobson*, 133 N. Y. 114, 30 N. E. 641; *Vaughn Mach. Co. v. Quintard*, 37 App. Div. 368, 55 N. Y. Supp.

1114; *Weymouth v. Broadway & S. Ave. R. Co.* 2 Misc. 506, 22 N. Y. Supp. 1047; *Parroski v. Goldberg*, 80 Wis. 339, 50 N. W. 191. See also *infra*, § 2, as to laying foundation for written statements. Such a foundation must be laid either before or supplied by examination of a witness subsequently. *Stone v. Northwestern Sleigh Co.* 70 Wis. 585, 36 N. W. 248. So, a witness whose testimony has been taken by deposition or commission cannot be impeached by proof of his inconsistent statements or declarations to which his attention was not called on such examination. *Monroeville v. Wehl*, 2 Ohio Dec. 343, *Texas & P. Coal Co. v. Lawson*, 10 Tex. Civ. App. 491, 31 S. W. 843; *Fitch v. Kennard*, 46 N. Y. S. R. 271, 19 N. Y. Supp. 468. But in *Billings v. Metropolitan L. Ins. Co.* 70 Vt. 477, 41 Atl. 516, it is held that a witness whose testimony is given on a trial by deposition may be impeached by the introduction in evidence of a letter written and signed by him which tended to contradict his testimony as to material facts, without calling his attention to the declaration therein. A witness may be impeached by evidence of declarations out of court contrary to what he has testified to on the witness stand, although no foundation was laid therefor in his cross-examination, where no objection is made on that ground. *Haas v. Brown*, 21 Misc. 434, 47 N. Y. Supp. 606.

- ⁵ *Beall v. Folmar & Sons Co.* 122 Ala. 414, 26 So. 1; *Griel v. Solomon*, 82 Ala. 85, 60 Am. Rep. 733, 2 So. 322. See *infra*, subdivision D, as to contradiction as to immaterial matters brought out on cross-examination.

b. Party to suit.—The rule is generally stated to be that where a party to a suit becomes a witness therein he may be impeached by proof of statements made by him without a foundation being laid therefor, and it would seem to be on the ground that the admissions of a party are always admissible in evidence against him.¹

- ¹ *Coffin v. Bradbury*, 3 Idaho, 770, 95 Am. St. Rep. 37, 35 Pac. 715; *Sanders v. Clifford*, 72 Mo. App. 548; *Owens v. Kansas City, St. L. & C. B. R. Co.* 95 Mo. 169, 6 Am. St. Rep. 39, 8 S. W. 350; *Kreiter v. Bomberger*, 82 Pa. 59, 22 Am. Rep. 750; *Collins v. Mack*, 31 Ark. 684; *Lucas v. Flinn*, 35 Iowa, 9; *Robbins v. Downey*, 45 N. Y. S. R. 279, 18 N. Y. Supp. 100; *Rose v. Otis*, 18 Colo. 59, 31 Pac. 493.

But in *Conway v. Nicol*, 34 Iowa, 533, it is said that while the declaration out of court of a party may be introduced as an admission of fact, yet in order that such declaration may operate as an impeachment of his character as a witness his attention must be directed to the time, place, and person involved in the supposed contradiction. And in *Browning v. Gosnell*, 91 Iowa, 448, 59 N. W. 340, deciding that a witness cannot be impeached by proof of statements out of court in

conflict with his testimony in chief without laying a foundation therefor by calling his attention to the time and place when and where the statements were made, although he is a party to the action, the court says that the rule seems to be different when the proposed evidence is in the nature of an admission of a party to the record and it is not intended for impeaching purposes. So, in *Davis v. Franke*, 33 Gratt. 413, it is held that a witness, although a party to the suit, cannot be discredited by proof that he requested the impeaching witness to testify for him, without calling his attention thereto. And in *Martineau v. May*, 18 Wis. 54, deciding that failure to first interrogate a party to a suit who testified in his own behalf, as to an attempt by him to procure a witness to give false testimony, before the admission of such testimony for the purpose of impeachment, is not error justifying a reversal where the witness sought to be discredited did not depart the court but was afterwards recalled and testified further on the subject, it is said that where such evidence is admitted merely for the purpose of impeachment it is perhaps the established rule that the witness sought to be impeached must first be interrogated as to the fact.

c. Recalling for purpose of.—The court may, in its discretion, permit the recalling of a witness of an adverse party for the purpose of laying a foundation for impeaching him, where such foundation was not laid upon cross-examination.¹

¹ *Ashton v. Ashton*, 11 S. D. 610, 79 N. W. 1001. And see also *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510. But that it is not necessary to call his attention thereto, see *Wilkins v. Babbershall*, 32 Me. 184; *Hedge v. Clapp*, 22 Conn. 262, 58 Am. Dec. 424; *Cook v. Brown*, 34 N. H. 460; *Tucker v. Welsh*, 17 Mass. 160, 9 Am. Dec. 137; *Gould v. Norfolk Lead Co.* 9 Cush. 338, 57 Am. Dec. 50. See also *Allin v. Whittemore*, 171 Mass. 259, 50 N. E. 518; *Carville v. Westford*, 163 Mass. 544, 40 N. E. 893.

d. As to statements in writing.—To permit the introduction in evidence of written inconsistent statements of a witness to impeach him a foundation must have been laid therefor.¹

¹ *Mullen v. McKim*, 22 Colo. 468, 45 Pac. 416 (answer in previous suit); *Robinson v. Savage*, 124 Ill. 266, 15 N. E. 850 (affidavit); *Travelers Preferred Acci. Asso. v. McKinney*, 57 Ill. App. 141 (affidavit); *Michigan F. & M. Ins. Co. v. Wich*, 8 Colo. App. 409, 46 Pac. 687 (affidavit); *Hanscom v. Burmood*, 35 Neb. 504, 53 N. W. 371 (former testimony); *Carder v. Primm*, 52 Mo. App. 102 (former testimony); *Georgia R. & Bkg. Co. v. Smith*, 85 Ga. 530, 11 S. E. 859 (brief of former testimony); but see below as to statement under oath in

Georgia. Nor can failure to testify on former trial as to facts testified to on a second trial be shown at the latter trial for the purpose of impeaching the witness without showing that he was interrogated on the first trial as to such facts, or had his attention directed thereto. *Wheeler v. Van Sickle*, 37 Neb. 651, 56 N. W. 196; *Bradford v. Barclay*, 39 Ala. 33 (deposition in same case); *Howe Mach. Co. v. Clark*, 15 Kan. 492 (deposition); *Samuels v. Griffith*, 13 Iowa, 103 (prior deposition to impeach subsequent deposition). So, a deposition in another action was held not admissible without foundation laid, in *Draper v. Taylor*, 58 Neb. 787, 79 N. W. 709. And letters written by a witness are not admissible where the witness's attention is not called to them on his examination. *Root v. Borst*, 142 N. Y. 62, 36 N. E. 814, reversing 47 N. Y. S. R. 799, 20 N. Y. Supp. 189; *Burleson v. Collins*, — Tex. Civ. App. —, 28 S. W. 898; *Perishable Freight Transp. Co. v. O'Neill*, 41 Ill. App. 423; *Richmond v. Sundburg*, 77 Iowa, 255, 42 N. W. 184; but written statements are held, in *Doud v. Donnelly*, 59 Ill. 615, 12 N. Y. Supp. 396, to be admissible for impeachment without first calling the witness's attention to the time and place where they were made, if identified as genuine by the witness after examination. And in *McDanel v. McDanel*, 136 Ind. 603, 36 N. E. 286, it is held not error to permit a letter to be introduced for the purpose of impeachment, where no objection was made to it on the ground that no proper foundation had been laid for impeaching the witness.

After admitting that a witness, if present, would testify as stated in the affidavit, in order to avoid a continuance, he cannot be impeached by a letter written by him, because no foundation can be laid for the impeaching evidence. *North Chicago Street R. Co. v. Cottingham*, 44 Ill. App. 46.

In *Billings v. Metropolitan L. Ins. Co.* 70 Vt. 477, 41 Atl. 516, it is held that a witness whose testimony is given on the trial by deposition may be impeached by the introduction in evidence of a letter written and signed by him which tends to contradict him as to material matters, without calling his attention to the declarations therein. But see *Monroeville v. Weihl*, 2 Ohio Dec. 343; *Texas & P. Coal Co. v. Lawson*, 10 Tex. Civ. App. 491, 31 S. W. 843; *Fitch v. Kennard*, 46 N. Y. S. R. 271, 19 N. Y. Supp. 468; *Seckel v. York Nat. Bank*, 57 Ill. App. 579.

Other written statements held inadmissible without foundation: *Maxted v. Fowler*, 94 Mich. 106, 53 N. W. 921; *Kirchner v. Laughlin*, 6 N. M. 300, 28 Pac. 505; *Weymouth v. Broadway & S. Ave. R. Co.* 2 Misc. 506, 22 N. Y. Supp. 1047; *Galveston, H. & S. A. R. Co. v. Briggs*, 4 Tex. Civ. App. 515, 23 S. W. 503.

But a contract for the construction of a sewer by which the contractor agreed to save the city from all damage because of injuries received by the work is held admissible to show interest of the contractor as a witness for the city in an action for personal injuries caused by defective condition of the street, without any cross-examination of

such witness and denial of interest, as affecting his credibility. *Aurora v. Scott*, 82 Ill. App. 616. And that it is not necessary, in order to introduce a former deposition of a witness or answers to interrogatories taken by commission as impeaching evidence, to lay a foundation therefor by interrogating him, as to whether he made it, stating the time and place, etc., see *Williams v. Chapman*, 7 Ga. 467; *Bryan v. Walton*, 14 Ga. 185; *Molyneaux v. Collier*, 30 Ga. 731; and the Georgia Code dispenses with such preliminary where the statements of a witness are written and have been made under oath in some judicial proceeding.

That where the statements are in writing it is necessary to show the same to the witness before cross-examining him in reference thereto, see *Ecker v. McAllister*, 45 Md. 291; *Peck v. Parchen*, 52 Iowa, 46, 2 N. W. 597; *Stamper v. Griffin*, 12 Ga. 450, 65 Am. Dec. 628 (letter, but as to statements under oath in Georgia see cases cited supra); *Newcomb v. Griswold*, 24 N. Y. 298. And in deciding that in laying a foundation to impeach a witness he cannot be asked to state what he thought he made oath to concerning a certain matter in his petition, the court in *Callanan v. Shaw*, 24 Iowa, 441, says that it might have been proper to have stated the particular matter and then ask him if he made oath thereto, or the better, and probably the correct, practice would have been to have shown the witness the petition and then ask him if he had sworn to it. So, in *Romertze v. East River Nat. Bank*, 49 N. Y. 577, deciding that a sufficient foundation is laid for the introduction of the deposition of a witness to impeach him by showing it to him and by his statement that he signed it and that it was read over to him before he signed it, it is said that it would not have been competent to have repeated particular sentences and ask if he testified to them, because the paper was the best evidence of what it contained. See further statutory provisions requiring written statement to be shown, in Arkansas, California, Georgia, Idaho, Indian Territory, Kentucky, Montana, Oregon, and in New Mexico (may cross-examine without showing, but if it is intended to contradict the witness thereby his attention must be called to the parts of the writing to be used therefor).

e. Sufficiency of foundation.—In laying the predicate for impeachment it is not necessary that the exact time, place, or words be given, but it is sufficient if these be named with reasonable certainty and sufficient distinctness to fully call to the attention of the witness the statements it is claimed he had made.¹

¹ *Donahoo v. Scott*, — Tex. Civ. App. —, 30 S. W. 385; *Mayer v. Appel*, 13 Ill. App. 87; *Nelson v. Iverson*, 24 Ala. 9, 60 Am. Dec. 442; *Union Parish School Board v. Trimble*, 33 La. Ann. 1073; *Fennett v. O'Byrne*, 23 Ind. 604. But a proper foundation is not laid for impeaching a

witness by proof of certain statements, where such witness's attention was not called to the statements made nor the time of making the same, but was asked if she had a conversation with a certain person in reference to the matter in question. *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666.

- A sufficient foundation for impeachment by proof of contradictory statements is laid where the whole of the cross-examination makes known to the witness the time and place where and to whom the statements were made, although any one question asked may not have sufficiently shown such facts. *International & G. N. R. Co. v. Dyer*, 76 Tex. 156, 13 S. W. 377. And the impeaching question need not negative the presence of other persons than the witness and the person to whom the witness, as disclosed by the question, addressed himself, or state affirmatively that such person was present. *Plass v. Plass*, 122 Cal. 3, 54 Pac. 372. Questions propounded which call attention to the time and place and the specific statements claimed to have been made are sufficiently specific. *Ashton v. Ashton*, 11 S. D. 610, 79 N. W. 1001.
- A question which elicits an answer that the witness did not see the impeaching witness for over a year before a certain occurrence, during which period the alleged conversation took place, and that she never made a certain statement to such witness, lays a sufficient foundation for the introduction of the testimony of the impeaching witness affirming the making of such statement. *Hertz v. Minzesheimer*, 12 Misc. 58, 33 N. Y. Supp. 48.
- A sufficient foundation for a question as to whether a witness did not on a certain occasion state to the impeaching witness that the insured's books were wrong, and that he had no such stock as he claimed, and that his charges were erroneous, is laid by testimony of the former witness that he did not remember having any conversation specially with the impeaching witness and his denial of stating that he had told insured his books were wrong, and that he had no such stock as he claimed, and that he never said anything to the impeaching witness about the stock being overestimated by the insured. *Caledonial Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13. And a question whether a witness did not make certain statements to a person named at or before the time of the last trial of the cause, in a certain city and during a certain month and year, is sufficient to advise him of the declarations on which he is to be impeached and when, to whom, and the occasion on which they were made. *Spohn v. Missouri P. R. Co.* 122 Mo. 1, 26 S. W. 663. But a sufficient foundation is not laid if the witness's attention is not called to the place at all, and to the time only as some time in a designated month or thereabouts, and the impeaching question differs materially in subject-matter from that asked the witnesses sought to be impeached. *Spohn v. Missouri P. R. Co.* 116 Mo. 617, 22 S. W. 690. So, a former inconsistent declaration was held inadmissible in *Wood River Bank v. Kelley*, 29 Neb. 590, 46 N. W. 86, where the witness's attention was called thereto

as having been made in July of a certain year, and the offer is to prove such a declaration some time during the summer of that year. And where the witness's examination was limited to a conversation with the impeaching witness during a certain year, testimony which related to a conversation in some other year was excluded in *Jackson v. Swope*, 134 Ind. 111, 33 N. E. 909. But in *Kirshbaum v. Hanover F. Ins. Co.* 16 Ind. App. 606, 45 N. E. 1113, the fixing of the time at "about one year ago" was held sufficient where the exact time could not be fixed. Calling the attention of a witness to contradictory statements as made shortly after a previous trial is not sufficient to lay a foundation for impeachment by proof of such statements as made shortly before such previous trial. *Quincy Horse R. & Carrying Co. v. Gnuse*, 137 Ill. 264, 27 N. E. 190. And a sufficient foundation is not laid for the admission of impeaching evidence by testimony as to a conversation with the witness sought to be impeached, where the latter's attention was called not to the conversation so testified to, but to a subsequent conversation between the same parties. *Green v. Southern P. Co.* 122 Cal. 563, 55 Pac. 577. Asking a witness if he was ever arrested for fast driving in a certain city does not lay a sufficient foundation for his impeachment by proof that he pleaded guilty to a violation of an ordinance against fast driving in that city, before a justice of the peace on a certain day and year. *Sieber v. Amunson*, 78 Wis. 679, 47 N. W. 1126.

2. Inconsistent statements or conduct, generally.

A witness may be impeached by proof as to a material matter,¹ of subsequent² or prior contradictory statements³ which he denies making, or of which he testifies he has no recollection or does not remember;⁴ but where he admits having made such statements further evidence is inadmissible, as such admission is sufficient proof thereof.⁵ Facts or conditions contradictory of the witness's testimony are not always so admissible.⁶ And usually a mere former opinion expressed by a witness which is inconsistent with the facts or the opinion which the facts he testifies to tend to establish, is inadmissible for the purpose of impeachment;⁷ but his inconsistent acts or conduct are admissible for that purpose.⁸ The impeaching testimony must be limited to the purpose for which it was admitted.⁹

¹ *Jordan v. McKinney*, 144 Mass. 438, 11 N. E. 702; *St. Louis Gaslight Co. v. American F. Ins. Co.*, 33 Mo. App. 348; *A. C. Conn Co. v. Little Suamico Lumber Mfg. Co.*, 74 Wis. 652, 43 N. W. 660. But not as to an immaterial or irrelevant matter. *Mann v. State*, 124 Ga. 760, 4 L.R.A. (N.S.) 934, 53 S. E. 324; *Louisville & N. R. Co. v. Webb*, 99 Ky. 332, 35 S. W. 1117; *Towle v. Sherer*, 70 Minn. 312, 73 N. W. 180;

Corder v. Primm, 60 Mo. App. 423; *Ern v. Rubinstein*, 72 Mo. App. 337; *Curran v. Percival*, 21 Neb. 434, 32 N. W. 213. See also *infra* as to collateral matter brought out on cross-examination.

- ² Where a witness admits that he testified to matters of which he knew nothing the opposite party may, after recalling him and asking him as to such admissions, impeach him by proof thereof, although it was after he was discharged. *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510. But not until a proper foundation is laid therefor by interrogating him in regard to the statement. *McCulloch v. Dobson*, 133 N. Y. 114, 30 N. E. 641. See also *Haas v. Brown*, 21 Misc. 434, 47 N. Y. Supp. 606 (hostility). But that a party cannot directly discredit his own witness by proof of a subsequent contradictory statement out of court, see *Wheeler v. Thomas*, 67 Conn. 577, 35 Atl. 499. As to impeachment of one's own witness by proof of contradictory statements, see *infra*, subdivision E, note 6.

- ³ See the statutory provisions in various states. *Leahey v. Cass Ave. & F. G. R. Co.* 97 Mo. 165, 10 S. W. 58; *First Nat. Bank v. Atlanta Rubber Co.* 77 Ga. 781; *Milligan v. Butcher*, 23 Neb. 683, 37 N. W. 596; *Spohn v. Missouri P. R. Co.* 101 Mo. 417, 14 S. W. 880; *McAfee v. Montgomery*, 21 Ind. App. 196, 51 N. E. 957; *Louisville & N. R. Co. v. Lawson*, 88 Ky. 496, 11 S. W. 511; *Western U. Teleg. Co. v. Bennett*, 1 Tex. Civ. App. 558, 21 S. W. 699; *Milford v. Veazie*, — Me. —, 6 New Eng. Rep. 646, 14 Atl. 730; *Jones v. New York L. Ins. Co.* 163 Mass. 245, 47 N. E. 92; *Re Hardy*, 59 Mich. 352, 26 N. W. 539; *Stratton v. Dolc*, 45 Neb. 472, 63 N. W. 875; *Spague v. Bristol*, 63 N. H. 430; *Palmeri v. Manhattan Elev. R. Co.* 60 Hun, 579, 14 N. Y. Supp. 468; *Effray v. Masson*, 28 Abb. N. C. 207, 18 N. Y. Supp. 353; *Barrett v. Smith*, 47 N. Y. S. R. 936, 19 N. Y. Supp. 1020; *Post Pub. Co. v. Hallam*, 8 C. C. A. 201, 16 U. S. App. 613, 59 Fed. 530; *Woodward v. Blue*, 103 N. C. 109, 9 S. E. 492; *Josephi v. Furnish*, 27 Or. 260, 41 Pac. 424; *Phillips v. Kesterson*, 154 Ill. 572, 39 N. E. 599; *Farmers' Bank v. Saling*, 33 Or. 394, 54 Pac. 190; *Edwards v. Osman*, 84 Tex. 656, 19 S. W. 868; *McQuiggan v. Ladd*, 79 Vt. 90, 14 L.R.A. (N.S.) 689, 64 Atl. 503; *Bonner v. Mayfield*, 82 Tex. 234, 18 S. W. 305; *Tunell v. Larson*, 37 Minn. 258, 34 N. W. 29; *Hertz v. Minzesheimer*, 12 Misc. 58, 33 N. Y. Supp. 48, affirming 10 Misc. 779, 30 N. Y. Supp. 805; *Bruner v. Nisbett*, 31 Ill. App. 517; *Handy v. Canning*, 166 Mass. 107, 44 N. E. 118 (against title); *Towle v. Sherer*, 70 Minn. 312, 73 N. W. 180 (admission); *Swift v. Withers*, 63 Minn. 17, 65 N. W. 85 (ownership); *Immaculate Conception Church v. Shaffer*, 88 Hun, 335, 34 N. Y. Supp. 724 (declaration as to easement); *Wilson v. Wilson*, 137 Pa. 269, 20 Atl. 644 (declaration); *Heintz v. Caldwell*, 16 Ohio C. C. 630, 9 Ohio C. D. 412 (declarations, affirmance of facts); *Dudley v. Satterlee*, 8 Misc. 538, 28 N. Y. Supp. 741 (whether of fact or opinions); *Donahoo v. Scott*, — Tex. Civ. App. —, 30 S. W. 385 (duress); *Re Snelling*, 136 N. Y. 515, 32 N. E. 1006 (pay offered for testimony); *Doherty v. Lord*, 8 Misc. 227, 28 N. Y. Supp. 720 (cause

of accident); *Hess v. Redding*, 2 Ind. App. 199, 28 N. E. 234 (pay offered for testimony); *Bray v. Latham*, 81 Ga. 640, 8 S. E. 64; *Baltimore City Pass. R. Co. v. Knee*, 83 Md. 77, 34 Atl. 252 (witness denying statement of no knowledge of "particulars" of the accident, impeachable by proof of statements of knowledge of "details"); *Ludtke v. Hertzog*, 18 C. C. A. 487, 30 U. S. App. 637, 72 Fed. 142; *Tolman v. Smith*, 43 Ill. App. 562. But evidence of contradictory statements for the purpose of impeachment is properly excluded where the impeaching witness is unable to remember which of two witnesses made such statement. *Southern R. Co. v. Williams*, 113 Ala. 620, 21 So. 328. And a witness whose credibility has been attacked by the introduction in evidence of the record of her conviction of a crime and who has given no testimony in explanation thereof, cannot be cross-examined in regard to that crime and then impeached by showing that she had made statements contradictory to those made on such cross-examination. *Cole v. Lake Shore & M. S. R. Co.* 95 Mich. 77, 54 N. W. 638. Evidence of contradictory statements is admissible for impeachment, although not admissible as evidence of the truth of such statements. *Rechow v. American Cent. Ins. Co.* 65 Mo. App. 52; *Smith v. Thomas*, 121 Cal. 533, 54 Pac. 71; *Union Coal Co. v. Edman*, 16 Colo. 438, 27 Pac. 1060. That declarations of an agent are admissible for the purpose of impeaching him as a witness, although inadmissible to affect his principal, see *Morris v. Guffey*, 188 Pa. 534, 41 Atl. 731; *Sowles v. Carr*, 70 Vt. 630, 41 Atl. 581. And see also *Allin v. Whittemore*, 171 Mass. 259, 50 N. E. 618; *Thornton v. Savage*, 120 Ala. 449, 25 So. 27. And a witness testifying as to testator's sanity may be impeached by proof of inconsistent statements. *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *Re O'Connor*, 118 Cal. 69, 50 Pac. 4. And a physician whose testimony tends to show that in his opinion deceased was competent to make a will and denies having stated otherwise may be contradicted by showing that he has stated that deceased was, in his opinion, not competent to make a will. *Re McCarthy*, 48 N. Y. S. R. 315, 20 N. Y. Supp. 581. But the declaration of a witness that he had never seen testatrix since her husband died, when she was fit to make a will, is not admissible to contradict his testimony that during that time she had been at his house for several months, and that he saw no change in her intelligence, also relating the conversations indicating that she was of sound mind. as such testimony does not show that he ever thought she was fit to make a will. *Williams v. Spencer*, 150 Mass. 346, 5 L.R.A. 790, 23 N. E. 105.

- A witness for defendant in an action for personal injuries may be impeached by proof of contradictory statements relative to the accident. *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; *Jamison v. Illinois C. R. Co.* 63 Miss. 33; *Dampman v. Pennsylvania R. Co.* 166 Pa. 520, 31 Atl. 244; *Central R. Co. v. Allmon*, 147 Ill. 471, 35 N. E. 725; *McClellan v. Ft. Wayne & B. I.*

R. Co. 105 Mich. 101, 62 N. W. 1025; Missouri, K. & T. R. Co. v. Sanders, 12 Tex. Civ. App. 5, 33 S. W. 245; Missouri, K. & T. R. Co. v. Milan, 20 Tex. Civ. App. 688, 50 S. W. 417; Heddles v. Chicago & N. W. R. Co. 77 Wis. 228, 46 N. W. 115.

Testimony by persons on a steamer of contradictory statements and admissions made by some of the crew of a schooner, who had been taken on board the steamer after a collision, will not be sufficient to impeach the latter, unless the proof is of a clear and unmistakable character. *The Nessmore*, 41 Fed. 437.

A physician testifying for plaintiff in an action for personal injuries may be impeached by evidence of inconsistent statements as to the injury. *McMahon v. Salem*, 25 App. Div. 1, 49 N. Y. Supp. 310; *Liddle v. Old Lovell Nat. Bank*, 158 Mass. 15, 32 N. E. 954. And a witness in a suit for personal injuries, who first found plaintiff after the accident and described the time and place of finding her, may be contradicted by showing that a few days later he made inconsistent statements to another witness when they were at the place of the accident. *Judd v. Claremont*, 66 N. H. 418, 23 Atl. 427.

Plaintiff is entitled to show by an account of the injury for which suit is brought, prepared by an employee of defendant and in defendant's possession at and before the trial, that one of defendant's witnesses had made a statement upon another occasion inconsistent with his testimony upon the trial. *Freel v. Market Street Cable R. Co.* 97 Cal. 40, 31 Pac. 730.

⁴ *Pringle v. Miller*, 111 Mich. 663, 70 N. W. 345; *Kelly v. Cohoes Knitting Co.* 8 App. Div. 156, 40 N. Y. Supp. 477; *Heddles v. Chicago & N. W. R. Co.* 77 Wis. 228, 46 N. W. 115; *Allen v. Conn.* — Tex. Civ. App. —, 37 S. W. 192; *Gregg Twp. v. Jamison*, 55 Pa. 468. And a witness who testifies that he did not make a given statement may be impeached by showing that he has made such statement, although he first testifies that he has no recollection of making such statement. *Moeller v. Karhoff*, 98 Iowa, 726, 68 N. W. 446. And also that where the statement is not distinctly admitted, proof may be given, see Florida and New Mexico statutes. And that where a witness on cross-examination as to inconsistent statements says he does not recollect having made the statements, he may be impeached by proof thereof the same as if he denied the statements, see Indiana statutes.

⁵ *Swift & Co. v. Madden*, 165 Ill. 41, 45 N. E. 979 (signed statement); *Atchison, T. & S. F. R. Co. v. Feehan*, 149 Ill. 202, 36 N. E. 1036, affirming 47 Ill. App. 66 (former testimony); *Winter v. Judkins*, 106 Ala. 259, 17 So. 627 (mortgage).

⁶ *Vierling v. Iroquois Furnace Co.* 68 Ill. App. 643, affirmed in 170 Ill. 189, 48 N. E. 1069 (witness cannot be impeached as to testimony that he told an agent that iron sold by plaintiff was giving universal satis-

faction elsewhere, by showing that the iron did not give such satisfaction); *Chicago City R. Co. v. Allen*, 169 Ill. 287, 48 N. E. 414 (witness accounting for his presence at a particular point by statement that he had gone there to vote at primary cannot be contradicted by showing that his residence was not in the same polling precinct as the point in question, where he does not testify that he lived in the precinct in which primary held); *Patterson v. Wilson*, 101 N. C. 594, 8 S. E. 341 (witness testifying to declaration as to boundary by testator when they were together at the point in question when a fence was burned cannot be impeached by proof that on the night of that day testator asked how much fence was burned). See also *Moore v. Powers Bros.* 16 Tex. Civ. App. 436, 41 S. W. 707. But see *Hancock v. Kelly*, 81 Ala. 368, 2 So. 281 (fact of execution of conveyance, where witness denies signing a conveyance); *East Tennessee, V. & G. R. Co. v. Daniel*, 91 Ga. 768, 18 S. E. 22 (proof that witness made no purchase at a designated store, which he gives as the reason for his presence at the place of the accident); *Gulf, C. & S. F. R. Co. v. Kiziah*, 4 Tex. Civ. App. 356, 22 S. W. 110, 26 S. W. 242 (witness for railroad company sued for injuries due to failure to furnish copy of rules and regulations, who testifies that injured employee never demanded copy thereof, may be impeached by testimony of another witness showing that he had demanded a copy); and in *Townsend v. Felthousen*, 156 N. Y. 618, 51 N. E. 279, it is held that defendant in an action for damages for fraudulent representations inducing a purchase of corporate stock, who went into the subject of the organization of the corporation, and testifies on cross-examination that he informed the subscribers at what figure the patent account was taken over as a part of the assets of the corporation, may be impeached by testimony of the stockholder on that subject.

Similar facts: Defendant in an action for eggs sold cannot be impeached by evidence that his claims for deductions for unsalable eggs bought of other people were very heavy. *Davey v. Lohrmann*, 1 Misc. 317, 20 N. Y. Supp. 675. And in an action against a railroad company for personal injuries, evidence merely that the plaintiff has made claims against other railroad companies is inadmissible to affect his credibility, without proof that such claims were dishonest. *Hanse v. Brooklyn Elev. R. Co.* 66 Hun, 384, 21 N. Y. Supp. 230. And so also proof that plaintiff is an habitual litigant is not competent to impeach her as a witness. *Palmeri v. Manhattan R. Co.* 60 Hun, 579, 14 N. Y. Supp. 468. But evidence of similar representations to others at about the same time is admissible in an action to recover property purchased by defendant's assignor by means of false and fraudulent representations as to solvency, for the purpose of impeaching such assignor who on cross-examination denies that he made such similar representations. *Ankersmit v. Tuch*, 114 N. Y. 51, 20 N. E. 819.

⁷*Sweeney v. Kansas City Cable R. Co.* 150 Mo. 385, 51 S. W. 682; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 536; *Royal v. Chandler*, 81

Me. 118, 16 Atl. 410; *Rucker v. Beaty*, 3 Ind. 70; *Holmes v. Anderson*, 18 Barb. 420; *Lane v. Bryant*, 9 Gray, 245, 59 Am. Dec. 282; *City Bank v. Young*, 43 N. H. 457; *Sloan v. Edwards*, 61 Md. 89. A witness who does not express an opinion as to the sanity of a person, but merely testifies to facts which are offered in evidence to show insanity, cannot be impeached by proof that during the time of the alleged incapacity he offered to submit a dispute with another to the person claimed to have been of unsound mind. *Hubbell v. Bissell*, 2 Allen, 196 (tending to show his opinion of his sanity).

But see *Cochran v. Amsden*, 104 Ind. 282, 3 N. E. 934 (opinion out of court different from that expressed on the witness stand); *Re McCarthy*, 65 Hun, 624, 20 N. Y. Supp. 581 (opinion of physician as to competency of testator may be contradicted by showing that he has previously stated that deceased was, in his opinion, not competent to make a will); *Sanderson v. Nashua*, 44 N. H. 492 (physician's opinion as to health of plaintiff may be contradicted by proof of prior inconsistent opinion).

And in *Dudley v. Satterlee*, 8 Misc. 538, 28 N. Y. Supp. 741, it is said that a party has the right, for the purpose of discrediting a witness, to prove statements made by him contradicting his testimony, after the requisite examination of a witness in regard to such statements, whether they are statements of fact or expressions of opinion. *Waterman v. Chicago, A. & W. R. Co.* 82 Wis. 613, 52 N. W. 247, 1136 (present opinion of physician and opinion on former trial). So, a witness who has testified as to the conduct, business habits, and conversation of testator and has stated that in his opinion the testator was a person of sound mind, may be impeached by proof of the prior opinion expressed by him that such testator was crazy. *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990. And it is proper to show on the cross-examination of a witness who testifies as to the value of property, that he had at some prior time entertained a different opinion as to the value thereof. *San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 11 L.R.A. 604, 25 Pac. 977.

³ *Daniels v. Weeks*, 90 Mich. 190, 51 N. Y. 273; *Williams v. Eikenberry*, 25 Neb. 721, 41 N. W. 770; *Young v. Johnson*, 123 N. Y. 226, 25 N. E. 363; *Allin v. Whittemore*, 171 Mass. 259, 50 N. E. 618; *Fitzgerald v. Williams*, 148 Mass. 462, 20 N. E. 100; *Miller v. Baker*, 160 Pa. 172, 28 Atl. 648; *Whitney v. Butts*, 91 Ga. 124, 16 S. E. 649. And a witness who has testified for plaintiff in an action for personal injuries caused by a gully in a street, that he saw it before and after the accident, may be discredited by evidence that he had been employed by defendant town to repair any defects he might see in the street. *Spalding v. Merrimack*, 67 N. H. 382, 36 Atl. 253. So, the husband of one suing for personal injuries caused by her horse stumbling on a loose stone in a highway, who testifies he found a good many loose stones in the highway where the accident occurred, may be contradicted by the testimony of another witness that she was at the

place of the accident with him soon after it occurred, and that he made no reply to her remark that there were no stones in the road. *Judd v. Claremon*, 66 N. H. 418, 24 Atl. 427. But a father who brings an action as the next friend of his son for assault and battery upon the latter cannot, upon his examination as a witness for plaintiff, be impeached by evidence that before the trial he offered to settle if the defendant would pay the doctor's bill without further ceremony. *Neal v. Thornton*, 67 Vt. 221, 31 Atl. 296.

⁹ *Texas Loan & T. Co. v. Angel*, 39 Tex. Civ. App. 166, 86 S. W. 1056.

3. Written statements.

a. In general.—A statement signed by a witness is admissible to contradict his testimony,¹ and, if admitted by the witness to have been made by him, a written statement is admissible even though not signed or sworn to.² So letters contradictory of the testimony of the writer are admissible.³ And tax returns may be admitted to contradict the officer making them.⁴

¹ *Baumer v. French*, 8 N. D. 319, 79 N. W. 340; *Cooke v. Kansas City, Ft. S. & M. R. Co.* 57 Mo. App. 471; *Hughes v. Delaware & H. Canal Co.* 176 Pa. 254, 35 Atl. 190 (although the body thereof was written by another person); *Sullivan v. Jefferson Ave. R. Co.* 133 Mo. 1, 32 L.R.A. 167, 34 S. W. 566 (not inadmissible when accuracy denied, because procured by agent of party offering it without notice to the other party); *Kaufman v. Schoeffel*, 46 Hun, 574.

² *Cross v. McKinley*, 81 Tex. 332, 16 S. W. 1023. See also *Schnitzer v. Gordon*, 28 App. Div. 341, 51 N. Y. Supp. 152 (note); *Whitney v. Butts*, 91 Ga. 124, 16 S. E. 649 (judgment).

In *Dawson v. Pittsburgh*, 159 Pa. 317, 28 Atl. 171, a report of viewers as to damages to abutting property by the change of grade of the street was held admissible to contradict one of such viewers whose testimony as a witness differed from the estimate given in such report. And in *Munkwitz v. Chicago, M. & St. P. R. Co.* 64 Wis. 403, 25 N. W. 438, it is held that a witness may on cross-examination be asked as to the amount of an award made by commissioners, of whom he was one, for the purpose of affecting the weight of his testimony, where he has given an opinion adverse to such award.

But the record of a board of selectmen showing their deliberations in agreeing on the question of the amount of damages to land by the laying out of a street is held inadmissible in *Phillips v. Marblehead*, 148 Mass. 326, 19 N. E. 547, for the purpose of contradicting a witness who testifies as to such damage and who was a member of such board, as in such bodies there must ordinarily be compromises of individual opinion in coming to an agreement.

- 3 *Western Mfrs.' Mut. Ins. Co. v. Boughton*, 136 Ill. 317, 26 N. E. 591, affirming 37 Ill. App. 183; *Dick v. Marble*, 155 Ill. 137, 39 N. E. 602; *Anthony v. Jones*, 39 Kan. 529, 18 Pac. 519; *Sharp v. Hall*, 86 Ala. 110, 5 So. 497; *Barrett v. Dodge*, 16 R. I. 740, 19 Atl. 530; *Foster v. Worthing*, 146 Mass. 607, 16 N. E. 572 (where the tendency thereof as a whole is to contradict his testimony, although there may be no contradiction in express terms). But a letter containing nothing in conflict with his testimony or deposition is inadmissible. *Phoenix Ins. Co. v. Gray*, 107 Ga. 110, 32 S. E. 948; *Cronkrite v. Trexler*, 187 Pa. 100, 41 Atl. 22.
- 4 *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533. But it is held in *German Mut. Ins. Co. v. Niewedde*, 11 Ind. App. 624, 39 N. E. 534, that a tax list duly signed and sworn to is inadmissible to contradict the testimony of the owner of the property as to its value in an action upon an insurance policy.

b. Depositions or affidavits.—Depositions or affidavits of witnesses are admissible to impeach them by inconsistent statements therein.¹

- ¹ *New York, P. & N. R. Co. v. Kellam*, 83 Va. 851, 3 S. E. 703 (deposition); *Southern Kansas R. Co. v. Painter*, 53 Kan. 414, 36 Pac. 731 (deposition, although not filed with the claim and not admissible as a deposition, may be read in evidence to contradict); *Zebley v. Storey*, 117 Pa. 478, 12 Atl. 569 (deposition); *Fein v. Covenant Mut. Ben. Asso.* 60 Ill. App. 274 (affidavit); and that the admission of the entire affidavit for the purpose of showing inconsistent statements of the witness is not objectionable if expressly limited to that purpose, see *Hine v. Cushing*, 53 Hun, 519, 6 N. Y. Supp. 850. But where three trials of the same case have been had, in each of which the same deposition of the same witness has been given in evidence, in the taking of which he was cross-examined, and on those trials no reference was made to a former deposition of his in another suit, and no attempt made to call his attention to it, and by his death subsequently he is placed beyond the power of explanation, then on the fourth trial of the case contradictory declarations of his in such former deposition cannot be used to impeach his testimony. *Ayers v. Watson*, 132 U. S. 394, 33 L. ed. 378, 10 Sup. Ct. Rep. 116. And where one introducing interrogatories omits certain answers which are inadmissible in his behalf because they purport to state the contents of a written instrument which is in evidence, the other party cannot introduce such answers merely to discredit the witness by showing that these answers are contrary to the facts proved by the writing itself. *Maynard v. Cleveland*, 76 Ga. 52. And an affidavit made by an agent of defendant railroad company, alleging that he did not know the origin of the fire by which plaintiff's cotton sued for was destroyed, but that he

supposed it was set on fire by a passing engine of defendant, is inadmissible to impeach him as a witness, where he testifies on the trial that he did not know the origin of the fire. *Houston & T. C. R. Co. v. Bath*, 17 Tex. Civ. App. 697, 44 S. W. 595.

And a pauper affidavit to appeal a case, and a bond of security given thirty days later to dissolve a garnishment in the same case, are not admissible as affecting the credibility of appellant as a witness in his own behalf, as such evidence is not proof of contradictory statements previously made by him as to matters relevant to his testimony and to the case. *Harrison v. Langston*, 100 Ga. 394, 28 S. E. 162.

c. Pleadings.—And a witness may be contradicted by his pleadings, whether in the same or another proceeding.¹

¹ *Barrett v. Featherstone*, 89 Tex. 567, 36 S. W. 245 (original answer, although superseded by amended answer); *Re O'Connor*, 118 Cal. 69, 50 Pac. 4 (original answer, although superseded by amended answer); *Smith v. Traders Nat. Bank*, 74 Tex. 457, 12 S. W. 113 (answer in another proceeding); *Floyd v. Thomas*, 108 N. C. 93, 12 S. E. 740 (answer in another action).

d. Former testimony.—Former testimony of a witness is admissible to impeach him as to contradictory statements.¹

¹ *Kerr v. Hodge*, 39 Ill. App. 546; *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481, 10 L.R.A. 696, 25 N. E. 799; *Tobin v. Jones*, 143 Mass. 448, 9 N. E. 804; *Georgia R. & Bkg. Co. v. Lybrend*, 99 Ga. 421, 27 S. E. 794 (admission in testimony of falsity of affidavit made). And proof of the claim and evidence introduced by plaintiff on a former trial, contradictory of her present testimony, is admissible to discredit her. *Bridgman v. Corey*, 62 Vt. 1, 20 Atl. 273. But it is not admissible for that purpose unless it relates to some matter material to the issue on trial. *Steinhardt v. Bell*, 80 Ala. 208. And evidence is inadmissible to discredit a witness, that on a former trial, after he had testified to being present on a specified occasion, other witnesses testified that he was not present. *Curren v. Ampersee*, 96 Mich. 553, 56 N. W. 87. How proved: By member of coroner's jury as to testimony thereat. *Maxwell v. Wilmington City R. Co.* 1 Marv. (Del.) 199, 40 Atl. 945. By stenographer who took the testimony: *Pennsylvania Co. v. Trainer*, 12 Ohio C. C. 66, 5 Ohio C. D. 519 (although at the time he testifies he has no independent recollection thereof, but remembers and testifies that at the time his notes were correctly taken and contained all the witness's evidence); *Klepsch v. Donald*, 8 Wash. 162, 35 Pac. 621 (although he has no recollection thereof independent of his notes which he testifies he took at the time). *Anglo-American Pkg. & Provision Co. v. Baier*, 31 Ill. App. 653. But not by the min-

utes of the testimony. *Cohn v. Heimbauch*, 86 Wis. 176, 56 N. W. 638. Nor by the transcript of the reporter's notes. *Stayner v. Joyce*, 120 Ind. 99, 22 N. E. 89; *Redford v. Spokane Street R. Co.* 15 Wash. 419, 46 Pac. 650 (certified copy of transcript); but, contra, see *Hibbard v. Zenor*, 82 Iowa, 505, 49 N. W. 63, under statute providing that a duly certified transcript of shorthand notes of evidence in a case shall be admissible in any case in which material and competent to the issue, with the same force and effect as depositions. But a witness cannot be impeached by his testimony as shown by the statements of facts on the former appeal and the charge of the court on a former trial. *McCamant v. Roberts*, 80 Tex. 316, 15 S. W. 580, 1054. Nor by a bill of exceptions containing his testimony at a former trial. *Pennsylvania Co. v. Marion*, 123 Ind. 415, 7 L.R.A. 687, 23 N. E. 973; *Boyd v. First Nat. Bank*, 25 Iowa, 255; but, contra, see *Baylor v. Smithers*, 1 T. B. Mon. 6. Nor is a case made on a former trial admissible for the purpose of impeaching a witness on another trial by showing what he swore to upon the previous trial. *Neilson v. Columbian Ins. Co.* 1 Johns. 301. But an abstract in a suit admitted by a witness to have been prepared by him is admissible as bearing upon his testimony and the weight to be given it, where the recitals therein are in conflict with his testimony, or his memory as to the matters recited appears to be defective. *Rosenthal v. Bilger*, 86 Iowa, 246, 53 N. W. 255.

4. Form of question to impeaching witness.

The impeaching witness should be asked the same questions propounded to the principal witness in respect to the alleged statements;¹ but while such question should be identical it need not be in the exact words of the question asked the other witness.²

¹ *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833. And in *Farmers Mut. F. Ins. Co. v. Bair*, 87 Pa. 124, in passing on the propriety of leading questions to an impeaching witness, the court says the proper and only way in which he could have been examined was by putting the question to him in the same language in which it had been put to the principal witness.

² *Pence v. Waugh*, 135 Ind. 143, 34 N. E. 860; *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948 (and so framed as to permit of a negative and affirmative answer); *Spohn v. Missouri P. R. Co.* 122 Mo. 1, 26 S. W. 663. So, in *Sloan v. New York C. R. Co.* 45 N. Y. 125, deciding that a question asked an impeaching witness, although not the one precisely put to the principal witness, is sufficient as to form where it directs the attention of the impeaching witness to the time and place and subject, and the answer brought out is substantially a contradiction of the statement of the principal witness, it is said that the usual and most accurate mode of examining the contradicting witness is to

ask the precise question put to the principal witness, but that the practice upon this subject must be, to some extent, under the control and discretion of the court. And in *Gallinger v. Lake Shore Traffic Co.* 67 Wis. 529, 30 N. W. 790, it is said that a ruling that, in examining an impeaching witness, the same questions must be put that are put to the witness sought to be impeached, if erroneous, is immaterial, where the impeaching witness did in fact testify fully as to all the conflicting statements claimed to have been made.

B. IMPEACHMENT BY PROOF OF HOSTILITY, BIAS, OR INTEREST IN THE ACTION.

The hostility,¹ bias,² or interest in the action³ of a witness may be shown for the purpose of affecting his credibility.

¹ *John Morris Co. v. Burgess*, 44 Ill. App. 27; *Consaul v. Sheldon*, 35 Neb. 247, 52 N. W. 1104; *Lamb v. Lamb*, 146 N. Y. 317, 41 N. E. 26; *Morgan v. Wood*, 24 Misc. 739, 53 N. Y. Supp. 791; *Gulf, C. & S. F. R. Co. v. Coon*, 69 Tex. 730, 7 S. W. 492; *Battishill v. Humphreys*, 64 Mich. 514, 38 N. W. 581; *McQuiggan v. Ladd*, 79 Vt. 90, 14 L.R.A. (N.S.) 689, 64 Atl. 503; Evidence of declarations made by a witness for plaintiff out of court after he has testified in the case is admissible to show his hostility to defendant. *Haas v. Brown*, 21 Misc. 434, 47 N. Y. Supp. 606. And evidence that a witness has had an altercation with a brother of the opposite party is held admissible to show the *animus* of such witness in *Gallagher v. Kingston Water Co.* 25 App. Div. 82, 49 N. Y. Supp. 250. But that it is not error to exclude evidence as to the cause of the trouble, see *Bertoli v. Smith*, 69 Vt. 425, 38 Atl. 76. That a witness may be shown to have been discharged from the service of the opposite party, for the purpose of affecting his credibility, see *Louisville & N. R. Co. v. Berry*, 96 Ky. 604, 29 S. W. 449. But such evidence is inadmissible in the absence of any testimony showing how recent or remote in point of time the discharge was, as it is too remote and uncertain. *Missouri, K. & T. R. Co. v. St. Clair*, 21 Tex. Civ. App. 345, 51 S. W. 666. And in *Chielinsky v. Hoopes & T. Co.* 1 Marv. (Del.) 273, 40 Atl. 1127, it is held that evidence tending to show the feeling of a discharged employee toward defendant, as a witness for plaintiff in an action for personal injuries, is immaterial to the issue, and not admissible for the purpose of affecting the credibility of such witness. Evidence of hostility between a witness and the father of two other witnesses whose characters he has impeached is inadmissible. *Atlanta Consol. Street R. Co. v. Bagwell*, 107 Ga. 157, 33 S. E. 191. And a witness cannot be discredited on the ground of ill-feeling against a party to an action, by proof merely that such party had brought an action for slander against him. *Wischstadt v. Wischstadt*, 47 Minn. 358, 50 N. W. 225. So, statements by the wife of defendant in a suit for alien-

ating the affections of their son from his wife, that the son's wife may have got him cornered somewhere, but it will never do her any good, are incompetent to show any prejudice or feeling to affect the mother's testimony. *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833. And testimony that impeaching witness belonged to a village faction opposed to that to which the witness impeached belongs is too vague and remote. *Holston v. Boyle*, 46 Minn. 432, 49 N. W. 203.

- ² Preferred Acci. Ins. Co. v. Gray, 123 Ala. 482, 26 So. 517; *Pyne v. Broadway & S. Ave. R. Co.* 46 N. Y. S. R. 662, 19 N. Y. Supp. 217; *Tolbert v. Burke*, 89 Mich. 132, 50 N. W. 803; *Belmont v. Vinalhaven*, 82 Me. 524, 20 Atl. 89; *Wise v. Ackerman*, 76 Md. 375, 25 Atl. 424 (medical witness for plaintiff in action for personal injuries, who denies having urged as a reason for settling another case the fact that he was instrumental in securing a large verdict in former trial of present case, may be contradicted by proof of such statement for the purpose of showing his attitude in the matter as affecting the weight of his evidence); *Tolbert v. Burke*, 89 Mich. 132, 50 N. W. 803 (threat to make a house a dear one for the opposite party); *Longworthy v. Green Twp.* 95 Mich. 93, 54 N. W. 697. Defendant in an action for personal injuries is not concluded by the answers of plaintiff's witness on cross-examination denying a conversation with a third party tending to show his willingness to sell his testimony, but may call another witness to show his *animus*. *Hope v. West Chicago Street R. Co.* 82 Ill. App. 311. And a witness for plaintiff who states on cross-examination that he has no recollection of having admitted to a specified person that the defendant received a consideration for giving an agent of plaintiff a sworn statement as to his evidence in suit, or as to facts connected with the conspiracy, may be shown by such person to have made such statement, for the purpose of impeachment, as tending to show that his testimony is the result of corruption. *Texas & P. Coal Co. v. Lawson*, 10 Tex. Civ. App. 491, 31 S. W. 843.

- ³ *Elliott v. Luengene*, 20 Misc. 18, 44 N. Y. Supp. 775; *Jernigan v. Flowers*, 94 Ala. 508, 10 So. 437; *Goodman v. Myers*, 11 Misc. 360, 32 N. Y. Supp. 239 (that witness has indemnified the party for whom he testifies is admissible to show his interest); *Waddingham v. Hulett*, 92 Mo. 528, 5 S. W. 27 (deed of land involved admissible to show interest of apparently disinterested witness); *McKindley v. Drew*, 69 Vt. 210, 37 Atl. 285 (pecuniary interest of life insurance solicitor, where agent is witness in his own behalf); *Michigan Condensed Milk Co. v. Wilcox*, 78 Mich. 431, 44 N. W. 281 (on cross-examination); *Totten v. Burhans*, 103 Mich. 6, 61 N. W. 58 (on cross-examination). See also statutory provisions in Connecticut, Illinois, Kansas, Maine, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Jersey, Oklahoma, Utah, Vermont, Washington, Wisconsin; and also general provisions in Indiana, Iowa, Nebraska, Nevada, and New Mexico that facts which formerly disqualified or ex-

cluded testimony may still be shown to effect credibility. Under Alabama statutes the interest of a witness in a criminal case, goes to his credibility. But the pecuniary interest of the witness in the result of the litigation as affecting his credibility cannot be shown on the trial before a jury by evidence that he is a surety on an appeal bond given in the case by the party calling him, as such evidence would necessarily disclose the fact that such party was unsuccessful in the lower court. *Israel v. Baker*, 170 Mass. 12, 48 N. E. 621. And a witness whose credibility is attacked on the ground of interest as a partner in a suit may testify that he sold out to his partner who has indemnified him as to past liabilities of the firm, as showing that he has no interest in the result. *Tomson v. Heidenheimer*, 16 Tex. Civ. App. 114, 40 S. W. 425.

Many of the above statutes likewise cover relationship, either in express terms, or by stating that facts which at common law would cause the exclusion of a witness may still be shown to affect his credibility.

As to cross-examination for the purpose of showing hostility, bias, or interest, see ante, chapter VIII. § 16, f.

C. IMPEACHMENT BY PROOF AS TO CHARACTER OR REPUTATION AND FACTS AFFECTING THEM.

1. General reputation for truth and veracity or moral character.

Whether the impeachment of a witness by proof as to general reputation or character should be confined to reputation for truth and veracity¹ or extended to include general character² has been much discussed, and the decisions widely differ. In some states at least the inquiry has been extended by statute to truth, honesty, and integrity,³ and in others to general bad reputation or moral character.⁴

¹ That it should be so limited, see *United States v. Vansickle*, 2 McLean, 219, Fed. Cas. No. 16,609; *Dore v. Babcock*, 74 Conn. 425, 50 Atl. 1016; *Frye v. Bank of Illinois*, 11 Ill. 367; *Hansell v. Erickson*, 28 Ill. 257; *Dimick v. Downs*, 82 Ill. 570; *Fletcher v. State*, 49 Ind. 124, 19 Am. Rep. 673; *Farley v. State*, 57 Ind. 331; *Taylor v. Clendenning*, 4 Kan. 524; *Phillips v. Kingfield*, 19 Me. 375, 36 Am. Dec. 760; *Holbrook v. Dow*, 12 Gray, 357; *People v. Abbott*, 97 Mich. 484, 37 Am. St. Rep. 360, 56 N. W. 862; *Rudsill v. Slingerland*, 18 Minn. 380, Gil. 342; *Moreland v. Lawrence*, 23 Minn. 84; *Warner v. Lockerby*, 31 Minn. 421, 18 N. W. 145, 821; *Atwood v. Impson*, 20 N. J. Eq. 151; *Perkins v. Mobley*, 4 Ohio St. 668; *Sargent v. Wilson*, 59 N. H. 396; *Boon v. Weathered*, 23 Tex. 675; *Newman v. Mackin*, 13 Smedes & M. 383.

And in *Jackson ex dem. Boyd v. Lewis*, 13 Johns. 504, and *Bakeman v. Rose*, 14 Wend. 110, in deciding that evidence of character of witness as public prostitute or of particular immoral acts was inadmissible for the purpose of impeachment, the courts say that the evidence should be confined to reputation or character for truth and veracity.

² That a witness may be impeached by independent testimony as to his general moral character, see *Motes v. Bates*, 80 Ala. 382; *McInerney v. Irvin*, 90 Ala. 275, 7 So. 841; *Birmingham Union R. Co. v. Hale*, 90 Ala. 8, 24 Am. St. Rep. 748, 8 So. 142; *Heath v. Scott*, 65 Cal. 548, 4 Pac. 557; *Hume v. Scott*, 3 A. K. Marsh, 261, overruling in this respect *Mobley v. Hamit*, 1 A. K. Marsh. 591; *Thurman v. Virgin*, 18 B. Mon. 785; *Tacket v. May*, 3 Dana, 80; *State v. Parker*, 7 La. Ann. 83; *Blasland-Parcels-Jordan Shoe Co. v. Hicks*, 70 Mo. App. 301; *Leverich v. Frank*, 6 Or. 212.

And a witness may be impeached by evidence that his reputation for fair dealing is not good. *Kingman & Co. v. Shawley*, 61 Mo. App. 54. But while a witness may be asked as to the general reputation or character of a witness sought to be impeached, the specific constituents of character other than truth and veracity, or the cause producing character cannot be inquired into. *McCutchen v. Loggins*, 109 Ala. 457, 19 So. 810; *Birmingham Union R. Co. v. Hale*, 90 Ala. 8, 8 So. 142. See *infra*, § 6, as to specific acts or reputation as to particular conduct.

³ California, Idaho, Montana, and Utah.

⁴ Georgia, Oregon, Indiana, Indian Territory, Iowa, Kentucky, and New Mexico.

2. Foundation, questioning impeaching witness.

Before the impeaching witness can be asked as to what is the reputation of the witness sought to be impeached, a foundation must be laid by asking him as to his knowledge of the general reputation of such witness.¹ After his knowledge is shown and he has stated what such reputation is, he may be asked whether, from his knowledge of such reputation, he would believe the witness under oath.²

¹ *Foulk v. Eckert*, 61 Ill. 318; *French v. Sale*, 63 Miss. 386; *Carlson v. Winterson*, 10 Misc. 368, 31 N. Y. Supp. 430. Evidence that an impeaching witness has had business dealings with the other witness for many years is not a sufficient foundation for questions touching the other's reputation for truth and veracity and as to whether he is entitled to belief under oath. *Healey v. Terry*, 16 Daly, 117, 9 N. Y. Supp. 519. Nor is a witness qualified where his information on the subject is derived from two persons, only one of whom resides

in the place where the witness sought to be impeached lives, and the other living in another place and having, so far as it appears, no knowledge or information upon the subject. *Meyer v. Suburban Home Co.* 25 Misc. 686, 55 N. Y. Supp. 566. And impeaching witnesses must speak from general reputation and not from their private opinions as to such reputation. *Benesch v. Waggner*, 12 Colo. 534, 21 Pac. 706. In *Wetherbee v. Norris*, 103 Mass. 566, it is said to be within the discretion of the trial judge to require the impeaching witness to be first asked whether he knows the reputation of the other witness for truth and veracity.

Where persons called to impeach a witness have been familiar with his reputation in the past, recent lack of opportunity for knowledge of his reputation goes rather to the effect of their testimony than to its admissibility. *Wagoner v. Wagoner*, — Md. —, 10 Atl. 221. So, a witness may testify to the bad reputation for truth in the vicinity where he lived, of another witness, although he does not know such reputation for the last two years preceding the trial. *Hope v. West Chicago Street R. Co.* 82 Ill. App. 311. Evidence of impeaching witnesses whose answers show that they understand the question in a general sense, and that they relate to the general reputation of the witness to be impeached, is not rendered incompetent by the omission of the word "general" from the question. *Coates v. Sulan*, 46 Kan. 341, 26 Pac. 720. But an impeaching witness who testifies that he is not acquainted with the general reputation of the witness sought to be impeached should not be allowed to testify further upon the subject. *Overstreet v. Dunlay*, 56 Ill. App. 486. And a witness cannot testify as to the bad reputation of another witness to impeach his credibility, until the competency of the former has been established, where the issue is raised. *Carlson v. Winterson*, 10 Misc. 388, 31 N. Y. Supp. 430. A witness not professing to know the general reputation of a witness sought to be impeached, except in connection with "some alleged frauds," is not acquainted with the general character of such witness so as to make him competent as an impeaching witness. *Sorrelle v. Craig*, 9 Ala. 534. But an impeaching witness who has known the witness sought to be impeached for twenty years, at one time lived within 4 miles of him and has dealt with him, is competent to testify to his general reputation as a man of truth, although he has no knowledge of his general character for truth except by report. *Kimmel v. Kimmel*, 3 Serg. & R. 337, 8 Am. Dec. 655.

In Georgia the statutes provide that the opinion of one witness is inadmissible as to character.

An impeaching witness to be competent is generally required to come from the place of residence, or former residence, of the witness sought to be impeached, on the theory that to know the general reputation of a person one must live in the same community; and so it is held that a stranger who goes to the community in which such witness

lives for the purpose of ascertaining his character or reputation, and giving evidence in the cause, is not competent to testify as to what he ascertains as to his character or reputation, for the purpose of impeachment. *Douglass v. Tousey*, 2 Wend. 354, 20 Am. Dec. 616; *Reid v. Reid*, 17 N. J. Eq. 101. So, the evidence of a person at a place where the witness sought to be impeached visited for only a few months, as to his general reputation, is inadmissible for the purpose of impeachment. *Waddingham v. Hulett*, 92 Mo. 528, 5 S. W. 27. But one who resides in the same place as that in which the witness sought to be impeached formerly resided, and for five years in the neighborhood in the place in which the latter subsequently lived twelve years before the taking of his deposition in the case, is competent as an impeaching witness.

² *Wise v. Wakefield*, 118 Cal. 107, 50 Pac. 310; *Hillis v. Wylie*, 26 Ohio St. 574; *Eason v. Chapman*, 21 Ill. 33; *Mobley v. Hamit*, 1 A. K. Marsh. 590; *Stevens v. Irwin*, 12 Cal. 306; *Snow v. Grace*, 29 Ark. 136. And see also criminal cases of *State v. Johnson*, 40 Kan. 266, 19 Pac. 749; *State v. Christian*, 44 La. Ann. 950, 11 So. 589; *Hudspeth v. State*, 50 Ark. 534, 9 S. W. 1. And that the impeaching witness may be asked whether he would believe the other witness under oath in a matter in which he was interested, see *Knight v. House*, 29 Md. 194, 96 Am. Dec. 515; but in *Massey v. Farmers' Nat. Bank*, 104 Ill. 327, it was held that the impeaching witness could not be asked if he would believe the other witness under oath in a case where he was personally interested. And sustaining witness may be likewise asked if they would believe the witness they sustain under oath. *National Bank v. Scriven*, 63 Hun, 375, 18 N. Y. Supp. 277; *Adams v. Greenwich Ins. Co.* 70 N. Y. 166. See also the provision of the Georgia statutes permitting the asking of this question. In *Laclede Bank v. Keeler*, 109 Ill. 385, it is said that to successfully impeach a witness it is not necessary to ask the impeaching witness who testifies to his knowledge of the general reputation of the other witness and that it is bad, whether he would believe him under oath, although this question is permitted by the rule adopted in Illinois.

But see, contra, *Benesch v. Waggner*, 12 Colo. 534, 21 Pac. 706, and criminal case of *State v. Miles*, 15 Wash. 534, 46 Pac. 1047. And in *Phillips v. Kingfield*, 19 Me. 375, 36 Am. Dec. 760, it is said, in discussing proper examination of the impeaching witness, that he cannot be asked whether he would believe the other witness under oath. So, the court in *Willard v. Goodenough*, 30 Vt. 393, in deciding that on the cross-examination of an impeaching witness he cannot be asked if he would believe the other witness under oath, says that the same rule is applicable as in direct examination, which in that state does not permit such question.

A witness who has not been asked the preliminary questions as to his knowledge of the general reputation of the witness sought to be impeached, and what such reputation is, cannot be asked whether he

would believe such witness under oath. *Bogle v. Kreitzer*, 46 Pa. 465. See also *Carlson v. Winterscn*, 10 Misc. 388, 31 N. Y. Supp. 430. And so, in *Healey v. Terry*, 16 Daly, 117, 9 N. Y. Supp. 519, it is held that excluding questions touching reputation for truth and veracity and as to whether one is entitled to belief under oath, is discretionary where the preliminary question whether the impeaching witness knows the general reputation of the other, has not been asked.

As to cross-examination of impeaching witness, see ante, chapter, VIII. § 16, c.

3. Place and time of reputation.

As a general rule, the testimony should be confined to the reputation of the witness sought to be impeached in the community where he lives,¹ but is permitted as to his former residence if not too remote in point of time and under special circumstances.² As it is the credibility of the witness at the time of the trial that is to be impeached the evidence should not be too remote.³

¹ *Sun Fire Office v. Ayerst*, 37 Neb. 184, 55 N. W. 635. To impeach a witness on the ground that his general reputation is bad, it must be shown that such bad reputation is general in the community. *Winter v. Central Iowa R. Co.* 80 Iowa, 443, 45 N. W. 737. And it is not limited to the immediate neighborhood, but will embrace his reputation in the community. *Hope v. West Chicago Street R. Co.* 82 Ill. App. 311. So, the testimony of an impeaching witness who lives in the same city, but not in the same ward as the other witness, who testifies that he has lived in such city twenty years and has known such other witness about four years, is improperly excluded on the ground that he does not reside in the immediate neighborhood of such other witness. *Wallis v. White*, 58 Wis. 26, 15 S. W. 767. And his general character for integrity and fair dealing in commercial transactions cannot be impeached by evidence of particular statements and criticisms made by persons living remote from his home and place of business, as to his failure and inability to meet his pecuniary obligations. *Bird v. Halsy*, 87 Fed. 671. And evidence of a person at a place where the witness sought to be impeached visited for only a few months, as to his general reputation, is inadmissible for the purpose of impeachment. *Waddingham v. Hulett*, 92 Mo. 528, 5 S. W. 27. A question to an impeaching witness as to what the reputation of the other witness was at the time of the execution of the deposition in a place different from that where it appears he resided at the time of the taking thereof, and in which the deposition was so taken, is prima facie irrelevant. *Aurora v. Cobb*, 21 Ind. 492.

² *Holliday Bros. v. Cohen*, 34 Ark. 707 (a few months before); *Louisville, N. A. & C. R. Co. v. Richardson*, 66 Ind. 43 (few months before);

Coates v. Sulau, 46 Kan. 341, 26 Pac. 720 (few months before); Pape v. Wright, 116 Ind. 502, 19 N. E. 459 (two months before); Norwood & B. Co. v. Andrews, 71 Miss. 641, 16 So. 262 (two years before); Brown v. Luehrs, 1 Ill. App. 74 (three or four years before); Mynatt v. Hudson, 66 Tex. 66, 17 S. W. 396 (four years before); Rathbun v. Ross, 46 Barb. 127 (five years before, where witness of mature age). And in Stevens v. Rodger, 25 Hun, 54, the judgment was reversed because the trial court had restricted the inquiry to a period five years previous to the trial. A witness who has lived in one locality long enough to make a reputation may be impeached by proof thereof at that place, where since he left that vicinity he has not resided in any one locality long enough to establish a reputation that could be generally known. Blackburn v. Mann, 85 Ill. 222. So, evidence of the general bad character of a witness for truth and veracity during eleven years at his former place of residence is admissible for the purpose of impeachment, where for seven years since that time he has been roving about the country. Holmes v. Stateler, 17 Ill. 453. But in Louisville & N. R. Co. v. Alumbaugh, 21 Ky. L. Rep. 134, 51 S. W. 18, where no such special circumstances existed, it was held that a witness cannot be impeached by evidence of his bad character at a place from which he removed seven years before the trial, in the absence of any evidence that his reputation is bad at the place where he is living at the time of the trial. And in Sun Fire Office v. Ayerst, 37 Neb. 184, 55 N. W. 635, evidence of the general reputation of the witness for truth and veracity at his former residence, which had ceased two and one-half years before his testimony was given, is said not to be available.

- ³ Not too remote, see Beatty v. Larzelere, 15 Montg. Co. L. Rep. 67 (seven months). And where a witness might be considered as impeached by his testimony, the evident contradictions by himself and the circumstances surrounding the transactions with which he is connected, he may be impeached by evidence as to his character for truth and veracity thirty years before, where during the intervening time he has been absent in a foreign country at different times and is not shown to have any settled place of abode. Brown v. Perez, 89 Tex. 282, 34 S. W. 725. See also cases cited supra, note 2.

But testimony touching the credibility of a witness is held too remote in Miller v. Miller, 187 Pa. 574, 41 Atl. 277, when it relates to a period about four years before the trial. And the court in Rucker v. Beaty, 3 Ind. 70, in passing on the propriety of and holding harmless the exclusion of evidence of the general bad character of the witness five years before, where his bad character at the time of the trial had been proved by other evidence, says that if the defendant had not been able to establish that it was bad at the time of the trial he had no right to go back five years for the sake of attacking it. But see cases supra, note 2.

In *Buse v. Page*, 32 Minn. 111, 19 N. W. 736, 20 N. W. 95, it is said that it is in the discretion of the court to admit, as to a witness's reputation for truth and veracity four years before the trial, the impeaching testimony of a witness who had several years' acquaintance with him, as no inflexible rule can be laid down.

4. Conviction.

A witness may be impeached by proof of his conviction of a crime;¹ and this may usually be shown, otherwise than by cross-examination of the witness himself, only by the record thereof.²

¹ Just what may be shown under this rule has been much discussed, some cases and statutes requiring the conviction to have been of a felony, or of a crime involving moral turpitude, while other decisions and statutes permit the proving of a conviction of any crime or of a misdemeanor, for the purpose of impeachment.

In *Quigley v. Turner*, 150 Mass. 108, 22 N. E. 586, conviction of any crime is held admissible, although not of such nature as in itself to affect the witness's credibility, under the Massachusetts statutes providing that a conviction of a crime may be shown to affect the credibility of a witness. So, in *Koch v. State*, 126 Wis. 470, 3 L.R.A. (N.S.) 1086, 106 N. W. 531, 5 A. & E. Ann. Cas. 389, it is held that misdemeanors may be proved to affect credibility. Several indictments and convictions of violating excise law may be shown even on plea of guilty. *Morenus v. Crawford*, 51 Hun, 89, 5 N. Y. Supp. 453. Arrest and conviction for violation of pension laws. *Cole v. Lake Shore & M. S. R. Co.* 95 Mich. 77, 54 N. W. 638. Conviction of forgery notwithstanding lapse of time since the conviction. *Wolff v. Van Housen*, 55 Ill. App. 295. In Ohio, in civil cases, previous conviction of an infamous crime is relevant to impeach the credibility of a witness, although there is no express statutory provision concerning it. *Baltimore & O. R. Co. v. Rambo*, 8 C. C. A. 6, 16 U. S. App. 277, 59 Fed. 75. A conviction of larceny is a conviction of a *crimen falsi* and admissible as tending to discredit the testimony of the person convicted. *Georgia R. Co. v. Homer*, 73 Ga. 251. But in *Card v. Foot*, 57 Conn. 427, 18 Atl. 713, it is held that the provision of the general statutes that no person shall be disqualified by reason of his conviction of "a crime," but such conviction may be shown for the purpose of affecting his credit, does not permit a conviction of any offense to be proved for the purpose of discrediting him, except for such offenses as at common law would disqualify him as a witness.

A judgment of conviction from which an appeal has been taken, followed by a *nolle pros.* in the appellate court, cannot be proved to affect the credit of the witness. *Card v. Foot*, 57 Conn. 427, 18 Atl. 713.

Conviction under a municipal ordinance is not within the meaning of a statute providing that conviction of a criminal offense may be proved

to affect the credibility of a witness. *Koch v. State*, 126 Wis. 470, 3 L.R.A.(N.S.) 1086, 106 N. W. 531, 5 A. & E. Ann. Cas. 389; *Arhart v. Stark*, 6 Misc. 579, 27 N. Y. Supp. 301.

Statutes or code provisions in some states at least cover this question. Conviction of a crime or criminal offense: Massachusetts, Michigan, Connecticut, Kansas, New Jersey, Oklahoma, Oregon, Washington, Wisconsin, Mississippi. Any crime: Colorado, Illinois, Minnesota, New York (Penal Code). Crime or misdemeanor: Rhode Island, New York (Code Civ. Proc). Felony or misdemeanor: New Mexico. Felony: California, Delaware, Idaho, Indian Territory, Iowa, Arkansas, Kentucky, Montana, Nebraska, Nevada. Crime involving moral turpitude: Vermont. Infamous crime: Alabama, Maryland, New Hampshire. Any offense: Montana (Penal Code).

In the late Nebraska case of *Young Men's Christian Assn. v. Rawlings*, 60 Neb. 377, 83 N. W. 175, it is held that the provisions of the statute that a witness may be interrogated as to his previous conviction of a felony, but that no other proof is competent except the record thereof, must control the general provision that facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility, so that evidence of a judgment of conviction of contempt of court is inadmissible for the purpose of impeachment.

² *Baltimore & O. R. Co. v. Rambo*, 8 C. C. A. 6, 16 U. S. App. 277, 59 Fed. 75; *Pulliam v. Cantrell*, 77 Ga. 563, 3 S. E. 280; *Killian v. Georgia R. & Bkg. Co.* 97 Ga. 727, 25 S. E. 384. But see *Gage v. Eddy*, 167 Ill. 102, 47 N. E. 200, that oral testimony of conviction of a witness for crime is admissible for the purpose of affecting his credibility, under the Illinois statutes.

Statutes. By record, or examination of the witness: Arkansas, Indian Territory, Idaho, Minnesota, Nebraska, New Hampshire (record), New Jersey (otherwise), New York, Oregon, Wisconsin. Or certificate as to record: Maryland, New Mexico. Like any fact not of record, by witness cognizant thereof, or other competent evidence: Colorado, Illinois. By the examination of "a witness:" Kentucky. By other evidence: Mississippi.

Combining in one question the elements of arrest and conviction of a witness for the purpose of affecting his credibility is not error. *Koch v. State*, 126 Wis. 470, 3 L.R.A.(N.S.) 1086, 106 N. W. 531, 5 A. & E. Ann. Cas. 389.

As to cross-examination of the witness as to conviction, see ante, chapter VIII. § 16, f.

5. Indictment, etc.

Evidence merely that a person has been charged with and

tried for a crime, or indicted, without proof of conviction, is usually inadmissible for the purpose of impeachment.¹

¹ *Willson v. Eveline*, 35 App. Div. 92, 54 N. Y. Supp. 514; *Killiam v. Georgia R. & Bkg. Co.* 97 Ga. 727, 25 S. E. 384; *Pullen v. Pullen*, 43 N. J. Eq. 136, 6 Atl. 887. That a witness has been fined for disturbing the peace and for some other misdemeanor is inadmissible for the purpose of impeachment. *Gardner v. St. Louis & S. F. R. Co.* 135 Mo. 90, 36 S. W. 214. See ante, chapter VIII. § 16, f, as to cross-examination of the witness with reference thereto.

A certified copy of the record adjudging one guilty of having found stolen property is inadmissible to impeach the person so charged, as no crime is charged thereby. *Norton v. Perkins*, 67 Vt. 203, 31 Atl. 148. And to contradict a witness who denies that he pleaded guilty of a certain offense before a magistrate, proof that he did plead guilty of some offense not specified is erroneous. *Heeney v. Kilbane*, 59 Ohio St. 499, 53 N. E. 262.

In Texas there seems to have been much confusion in the decisions. That witness cannot be impeached by proof that he is charged by indictment with misdemeanors, see *Lewis v. Bell*, — Tex. Civ. App. —, 40 S. W. 747. But in *Texas & P. Coal Co. v. Lawson*, 10 Tex. Civ. App. 491, 31 S. W. 843, it is held that the answer of the witness to a cross-interrogatory, that he has been indicted for embezzlement and is confined in jail awaiting trial, is admissible in evidence as affecting his credibility. But in *Texas Brewing Co. v. Dickey*, — Tex. Civ. App. —, 43 S. W. 577, it is said that evidence that a criminal charge was pending against a witness, or that he was indicted for theft, the indictment having been dismissed for want of evidence to sustain the charge, if admissible at all for the purposes of impeachment, can only be drawn out on cross-examination.

On the question of cross-examination there seems also to have been much difference of opinion. *Freedman v. Bonner*, — Tex. Civ. App. —, 40 S. W. 47, holds that a witness cannot be asked for the purpose of impeachment, with reference to his prosecution for forgery, his defense, etc. And in *Hill v. Dons*, — Tex. Civ. App. —, 37 S. W. 638, it is held that a witness cannot be impeached by compelling him to answer on cross-examination a question as to his having been indicted for forgery. Likewise the credibility of a witness cannot be attacked on cross-examination by showing that he had been acquitted of the charge of carrying a pistol, because he did not know it was wrong to do so. *Houston, E. & W. T. R. Co. v. Norris*, — Tex. Civ. App. —, 41 S. W. 708. And in *Gulf, C. & S. F. R. Co. v. Johnson*, 83 Tex. 628, 19 S. W. 151, a similar rule was laid down with reference to compelling a witness to answer on cross-examination that he was a deserter from the United States Army. But in *Linz v. Skinner*, 11 Tex. Civ. App. 512, 32 S. W. 915, it was held that a witness may

for the purpose of affecting his credibility be asked on cross-examination if he had not been indicted for embezzlement or perjury, if such indictments are not too remote.

In the criminal case of *Lights v. State*, 21 Tex. App. 309, 17 S. W. 428, it was permitted on cross-examination to ask a witness for defendant whether he had not been in a penitentiary and if he was not sent up from a certain place and county. And in *Woodson v. State*, 24 Tex. App. 162, 6 S. W. 184, holding that it was not error to refuse a question to the state's witness as to whether he had not been confined in a penitentiary for a crime, because the purpose of the question was not disclosed, the court says that if it had been shown that the defendant expected an affirmative answer and that the object in eliciting such answer was to affect the credibility of the witness, we would hold that the court erred materially in refusing to permit the question to be answered. But here there was conviction and sentence and not merely indictment or charge.

In the criminal case of *Carroll v. State*, 32 Tex. Crim. Rep. 431, 24 S. W. 100, it is held that a witness may on cross-examination be interrogated as to whether he is not then under indictment for theft, for the purpose of impeachment. And in the case of *Jackson v. State*, 33 Tex. Crim. Rep. 281, 26 S. W. 194, 622, it is held that a defendant on trial for robbery, who testifies as a witness in his own behalf, may be impeached by compelling him to answer on cross-examination whether he has been previously arrested for burglary, robbery, and theft.

For the discussion of the question of cross-examination for the purpose of testing credibility, see ante, chapter VIII. § 16, f.

6. Specific acts or offenses or line of conduct.

While the authorities are not agreed as to whether, in impeaching a witness, his general reputation for truth and veracity only, or his general moral character, may be assailed, it is in any case a well-established rule that no particular acts of immorality or crime or wrongdoing can be shown.¹

¹ *Birmingham Union R. Co. v. Hale*, 90 Ala. 8, 24 Am. St. Rep. 748, 8 So. 142; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *Crabtree v. Kile*, 21 Ill. 180; *Spencer v. Robbins*, 106 Ind. 580, 5 N. E. 726; *Thurman v. Virgin*, 18 B. Mon. 785; *Phillips v. Kingfield*, 19 Me. 375, 36 Am. Dec. 760; *Shaefer v. Missouri P. R. Co.* 98 Mo. App. 445, 72 S. W. 154; *Troup v. Sherwood*, 3 Johns. Ch. 558; *Jackson ex dem. Gibbs v. Osborn*, 2 Wend. 555, 20 Am. Dec. 649; *Conley v. Meeker*, 85 N. Y. 618, 9 N. Y. Week. Dig. 288; *Doolittle v. Gambee*, 88 Hun, 364, 34 N. Y. Supp. 861; *Wike v. Lightner*, 11 Serg. & R. 198; *Sweet v. Gilmore*, 52 S. C. 530, 30 S. E. 395; *Hill v. Dons*, —

Tex. Civ. App. —, 37 S. W. 633; Houston & T. C. R. Co. v. Bulger, 35 Tex. Civ. App. 478, 80 S. W. 557; Boon v. Weathered, 23 Tex. 675; Rixey v. Bayse, 4 Leigh, 330; Bringgold v. Bringgold, 40 Wash. 121, 82 Pac. 179.

Evidence as to general character for drunkenness of a witness is not admissible for the purpose of impeachment. Hoitt v. Moulton, 21 N. H. 586; Brindle v. M'Ilvaine, 10 Serg. & R. 282; Thayer v. Boyle, 30 Me. 475 (intemperate habits). But it may be shown that the witness was drunk at the time of the occurrence, as bearing on his ability to testify correctly to what occurred. Stillwell v. Farewell, 64 Vt. 286, 24 Atl. 243; Mace v. Reed, 89 Wis. 440, 62 N. W. 186; Joyce v. Parkhurst, 150 Mass. 243, 22 N. E. 899.

So a witness's character as to any particular acts of ignominy or turpitude cannot be inquired about on the examination of an impeaching witness. Thurman v. Virgin, 18 B. Mon. 785. Evidence that one witness wrote and the other has read a highly immoral book is inadmissible to impeach their credibility. Re James, 124 Cal. 653, 57 Pac. 578, 1008. Acts tending to show that a woman who has testified as a witness is destitute of moral qualities cannot be proved. Barkly v. Copeland, 86 Cal. 483, 25 Pac. 1, 405. Evidence of immoral connection is inadmissible when it consists of proof of particular facts not directly touching the question of their veracity. Sweet v. Gilmore, 52 S. C. 530, 30 S. E. 395. Evidence of improper relations of one claiming a distributive share of a decedent's estate under an allegation of marriage with him, is inadmissible to impeach her credibility as a witness. Re James, 124 Cal. 653, 57 Pac. 578, 1008. Evidence that a witness was guilty of illicit intercourse with her husband before their marriage, thirteen years before, is too remote for the purpose of impeaching her credibility. De Arman v. Taggart, 65 Mo. App. 82 (brought out on cross-examination). A letter written by plaintiff in an action for slander, tending to show improper intimacy with a certain man, is inadmissible to impeach her under the Oregon statutes. Leverich v. Frank, 6 Or. 212. Proof of adultery at various times and places not admissible to impeach witness. Dimick v. Downs, 82 Ill. 570. Single act of bastardy on the part of a female witness cannot be given in evidence to destroy her credit. Weathers v. Barksdale, 30 Ga. 888. That a witness kept a house of assignation and was a disreputable character is inadmissible for impeachment. Pennsylvania F. Ins. Co. v. Faires, 13 Tex. Civ. App. 111, 35 S. W. 55. Particular instances of moral turpitude, that a woman is unchaste, cannot be proved to impeach her, although general character may be inquired into. Holland v. Barnes, 53 Ala. 83, 25 Am. Rep. 595; Evans v. Smith, 5 T. B. Mon. 363, 17 Am. Dec. 74. Or that she was so regarded sixteen years before. Turner v. King, 98 Ky. 253, 32 S. W. 941, 33 S. W. 405. And evidence that a woman was arrested in a house of ill fame is not admissible to impeach her testimony. Tucker v. Tucker, 74 Miss. 93, 32 L.R.A. 623, 19 So. 955.

Evidence tending to show bigamy is likewise inadmissible to impeach the credibility of a witness. *Evans v. DeLay*, 81 Cal. 103, 22 Pac. 408. And that a woman is a prostitute is inadmissible to impeach her testimony, see *McInerny v. Irvin*, 90 Ala. 275, 7 So. 841; *Bakeman v. Rose*, 14 Wend. 105; *Spears v. Forrest*, 15 Vt. 435. Especially where it relates to a period some years before. *Jackson ex dem. Boyd v. Lewis*, 13 Johns. 504.

See also *Gilpin v. Daly*, 58 Hun, 610, 12 N. Y. Supp. 448; *Meyer v. Suburban Home Co.* 25 Misc. 686, 55 N. Y. Supp. 566; *Dillingham v. Ellis*, 86 Tex. 447, 25 S. W. 618 (that witness expelled from Masonic lodge for false swearing); *Carlson v. Winterson*, 10 Misc. 388, 31 N. Y. Supp. 430 (that the witness has forged the impeaching witness's name to a note); *Crane v. Thayer*, 18 Vt. 162, 46 Am. Dec. 142 (notorious counterfeiter); *McCutchen v. Loggins*, 109 Ala. 457, 19 So. 810 (impeaching witness cannot be asked if witness sought to be impeached is not a common thief); *Palmeri v. Manhattan R. Co.* 39 N. Y. S. R. 23, 14 N. Y. Supp. 468 (habitual litigant); *Silliman v. Sampson*, 42 App. Div. 623, 59 N. Y. Supp. 923 (proof that witness many years before had confessed to committing a larceny).

Statutes in some states exclude such proof: Arkansas, California, Georgia (except on cross-examination), Idaho, Indian Territory, Kentucky, Montana, Oregon.

For fuller treatment of the question of the right to impeach witnesses by evidence of specific instances to prove character, see note in 14 L.R.A. (N.S.) 697.

D. IMPEACHMENT AS TO COLLATERAL AND IMMATERIAL OR IRRELEVANT MATTER BROUGHT OUT ON CROSS-EXAMINATION.

The general rule is that a witness cannot be impeached as to collateral or immaterial matter brought out on cross-examination;¹ but hostility or bias denied on cross-examination may nevertheless be proved to impeach the witness,² and a corrupt motive may sometimes be shown.³

¹ *Louisville Jeans Clothing Co. v. Lischoff*, 109 Ala. 136, 19 So. 436; *Bunzel v. Maas*, 116 Ala. 68, 22 So. 568; *Barkly v. Copeland*, 86 Cal. 483, 25 Pac. 1, 405; *Trabing v. California Nav. & Improv. Co.* 121 Cal. 137, 53 Pac. 644; *Swanson v. French*, 92 Iowa, 695, 61 N. W. 407; *Atchison, T. & S. F. R. Co. v. Townsend*, 39 Kan. 115, 17 Pac. 804; *Butler v. Cooper*, 3 Kan. App. 145, 42 Pac. 839; *Hill v. Froehlick*, 38 N. Y. S. R. 24, 14 N. Y. Supp. 610; *Paddock v. Kappahan*, 41 Minn. 528, 43 N. W. 393; *Manget v. O'Neill*, 51 Mo. App. 35; *Pullen v. Pullen*, 43 N. J. Eq. 136, 6 Atl. 887; *Tallman v. Kimball*, 74 Hun, 279, 26 N. Y. Supp. 811; *Leinkauff v. Lombard*, 12 App. Div. 302, 42 N. Y. Supp. 391; *McNeill v. Metropolitan Street R. Co.* 20 Misc.

426, 45 N. Y. Supp. 1030; North Chicago Street R. Co. v. Southwick, 165 Ill. 494, 46 N. E. 377; Johnson v. Brown, 130 Ind. 534, 28 N. E. 698; Carpenter v. Lingenfelter, 42 Neb. 728, 32 L.R.A. 422, 60 N. W. 1022; Woodroffe v. Jones, 83 Me. 21, 21 Atl. 177; Franklin v. Franklin, 90 Tenn. 44, 16 S. W. 557; Gulf, C. & S. F. R. Co. v. Coon, 69 Tex. 730, 7 S. W. 492.

Thus a witness on the trial of a particular issue or issues before a referee cannot be impeached by evidence of statements contradictory to his evidence, made upon the trial of an issue by the court before the order of reference, which is collateral to the issue tried by the referee. Mullen v. McKim, 22 Colo. 468, 45 Pac. 416. And a witness for plaintiff in an action for personal injuries caused by a defective sidewalk, who has testified that the walk was constructed of inferior lumber, cannot be contradicted as to a collateral matter testified to by him in connection therewith,—that there was no lumber yard in the city at the time the walk was constructed. East Dubuque v. Burhyte, 173 Ill. 553, 50 N. E. 1077. And witness for employer in an action for wrongful discharge cannot be impeached by evidence contradicting his denials of statements claimed to have been made by him while acting as foreman of the employer and in the latter's absence, to the effect that it was fixed so that plaintiff would not stay in the employment, as such inquiry relates to a collateral matter. Pape v. Lathrop, 18 Ind. App. 633, 46 N. E. 154. One who testifies on direct examination that only parts of law books would be consumed in a fire like the one in question, and gives his opinion on cross-examination that in another fire designated a specified quantity of such books could not have been burned without leaving some portion of them, cannot be impeached by showing that in the designated fire no portion of such books was left unburned. Names v. Dwelling Ins. Co. 95 Iowa, 642, 64 N. W. 628. A witness for defendant who has denied on cross-examination that he stated at a specified time and place that he had borrowed money of defendant at a usurious rate of interest cannot, where the question at issue is whether or not the loan to the plaintiff was usurious, be contradicted by proof that he had made such statement, as the question relates to a collateral matter and the party asking it was bound by the answer. Murphy v. Backer, 67 Minn. 510, 70 N. W. 799. That a witness who has testified to the value of land told another, two years before, that he was not acquainted with real estate values in the vicinity, is inadmissible, as it is a collateral and immaterial matter. Pierce v. Boston, 164 Mass. 92, 41 N. E. 227. So, testimony of previous habits of sobriety of a person suing for negligence, being brought out on cross-examination, and being a clearly collateral matter, is not open to contradiction for the purpose of discrediting him by previous deposition tending to prove drunkenness during the same period. Union P. R. Co. v. Reese, 5 C. C. A. 510, 15 U. S. App. 92, 56 Fed. 288. A witness who fixes the time of a conversation as that when he went to sell a

party to the action a machine cannot be impeached by proof that the order for such machine was not written by him. *Hoover v. Cary*, 86 Iowa, 494, 53 N. W. 415. And a witness who on cross-examination has testified that she is not addicted to the use of morphine cannot be impeached by evidence of the mere fact that she had taken morphine, there being nothing to show the amount or frequency or any ill effects on her mind or memory, as that is an immaterial matter. *Botkin v. Cassady*, 106 Iowa, 334, 76 N. W. 722. In an action for personal injuries in a wreck claimed to have been caused by a loose wheel, a witness who denies that he was informed that the wreck was caused by a loose wheel cannot be contradicted and impeached by proof that he was so informed, as that is an immaterial matter. *Gulf, C. & S. F. R. Co. v. Coon*, 69 Tex. 730, 7 S. W. 492. And an engineer who has testified that he did not see plaintiff before he was struck by his train, or know that he was injured until the following day, cannot be impeached by contradicting his testimony that he did not see any person on one side of the track near the crossing where the accident occurred, who it is claimed attracted his attention and pointed back where the accident happened, as such testimony is immaterial. *Texas & P. R. Co. v. Phillips*, 91 Tex. 278, 42 S. W. 852. So, a statement by the daughter of plaintiff in an action for personal injuries received by collision with an electric car, made soon after its occurrence, that it was her father's "fault," being inadmissible as original evidence, cannot be made the basis for impeaching the daughter as a witness on her denial that she made such statement. *Saunders v. City & Suburban R. Co.* 99 Tenn. 130, 41 S. W. 1031.

The test of whether a matter is collateral or not is said to be whether or not the cross-examining party would be entitled to prove it as a part of his case tending to establish his plea.

See further illustrations of the rule: *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848; *Blough v. Parry*, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; *Robbins v. Spencer*, 121 Ind. 594, 22 N. E. 660; *Brower v. Ream*, 15 Ind. App. 51, 42 N. E. 824; *Kennett v. Engle*. 105 Mich. 693, 63 N. W. 1009; *Scharff v. Grossman*, 59 Mo. App. 199; *Hinton v. Pritchard*, 98 N. C. 355, 4 S. E. 462; *Feibelman v. Manchester F. Assur. Co.* 108 Ala. 180, 19 So. 540; *Jordan v. McKinney*, 144 Mass. 438, 11 N. E. 702; *Gates v. Rifle Boom Co.* 70 Mich. 309, 38 N. W. 245; *Farmers' Loan & T. Co. v. Montgomery*, 30 Neb. 33, 46 N. W. 214; *Hamilton v. Forsyth*, 77 Hun, 578, 28 N. Y. Supp. 1016; *Rogers v. Cook*, 8 Utah, 123, 30 Pac. 234; *Payne v. Crawford*, 102 Ala. 387, 14 So. 854. So the declarations of the foreman of defendant some time after the happening of an accident, with reference to the cause thereof, are not admissible to impeach him as a witness for defendant, although he denied on cross-examination that he made such declarations, where there is no substantive evidence tending to establish the matter to which the alleged declarations related. *Pfeffer v. Stein*, 26 App. Div. 535, 50 N. Y. Supp. 516. A

witness cannot be impeached by evidence that he has made statements contradictory of testimony elicited by the party offering to impeach him, given when recalled for the purpose, and which did not tend to better or explain that given on his direct examination. *Surdam v. Ingraham*, 36 N. Y. S. R. 769, 12 N. Y. Supp. 798. And previous declarations of a witness in regard to an immaterial matter as to which his testimony is incompetent and improperly elicited on cross-examination by the party seeking to impeach him are inadmissible in evidence for the purpose of impeaching his veracity. *Goltz v. Griswold*, 113 Mo. 144, 20 S. W. 1044.

But evidence by a witness for defendant as to a conversation with plaintiff's intestate, who on cross-examination also testifies to a similar conversation at a later date, may be contradicted as to the latter conversation in rebuttal, for the purpose of discrediting the witness. *Cloutier v. Grafton & U. R. Co.* 162 Mass. 471, 39 N. E. 110. And in *Central R. Co. v. Allmon*, 147 Ill. 471, 35 N. E. 725, it is held that where a motorman of an electric street-railway company, by whose alleged negligence plaintiff was injured, has testified in chief that he instantly applied the brake and did everything possible to stop the car, questions to him on cross-examination as to whether he had not told others on the day after the accident that he neglected his business and forgot to put on the brake, are not collateral or irrelevant to the issue, and his negative answers thereto may be contradicted by other testimony for the purpose of impeachment. A conversation of the general manager of a corporation defendant in a libel suit, tending to show his motive, is not a mere collateral matter. *Post Pub. Co. v. Hallam*, 8 C. C. A. 210, 16 U. S. App. 613, 59 Fed. 530.

Any error there may be in permitting witnesses to be contradicted on collateral matters for the purpose of impeachment, without having cautioned that they would be contradicted, is obviated when the witnesses impeached are recalled and allowed to make explanations. *Patterson v. Wilson*, 101 N. C. 594, 8 S. E. 341.

² Thus, evidence of statements made by a witness out of court is admissible for the purpose of showing his hostility to one of the parties to the suit, although brought out and denied on cross-examination, as the general rule that a witness cannot be impeached or contradicted as to collateral matters so brought out does not apply where interest or hostility are sought to be shown. *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990. Where a witness on cross-examination has denied that he had previously stated that he would have to testify as favorably as possible for the party calling him in order to hold his job, it is not error to permit the other party to prove that he had made such declaration, as the rule precluding contradiction of an answer on cross-examination to an immaterial question does not apply where the purpose of it is to show motive or bias in favor of or against a party. *Illinois C. R. Co. v. Haynes*, 64 Miss. 604, 1

So. 765. And a witness who on cross-examination denies making a declaration may be contradicted by proof of such declaration, although it relates to a collateral matter, where it tends to show his temper, bias, or disposition. *Cathey v. Shoemaker*, 119 N. C. 424, 26 S. E. 44. See also, *supra*, subdivision B, as to impeachment by proof of hostility, bias, or interest. While interest is usually provable for the purpose of impeachment, either under the decisions of the courts or under statutory provisions, yet in the case of *Kramer v. Thomson-Houston Electric Light Co.* 95 N. C. 277, it is held that the answer of a witness who is also a party to an action, to a question as to a collateral matter put solely with a view to disparage and discredit him by showing his interest in or relation to the controversy, cannot be contradicted.

³ Thus, letters written by a witness in reference to matters involved in the suit in which he is called, showing a corrupt disposition, for a pecuniary consideration, to conceal or pervert the truth in the matter as to which he testifies, are admissible for the purpose of impeachment.

Alward v. Oaks, 63 Minn. 190, 65 N. W. 270. So, defendant in an action for personal injuries is not concluded by the answers of plaintiff's witness on cross-examination denying a conversation with a third party to show his willingness to sell his testimony, but may call another witness to show his *animus*. *Hope v. West Chicago Street R. Co.* 82 Ill. App. 311. But in *McNeill v. Metropolitan Street R. Co.* 20 Misc. 426, 45 N. Y. Supp. 1030, it is held that plaintiff in an action for personal injuries against a street-car company is bound by the testimony of the conductor on cross-examination, denying that he stated to plaintiff's attorney that he had been offered money by the company to stand by his statement of the case, and that if plaintiff wanted him to make a statement he would have to pay him that amount, and cannot contradict him for the purpose of affecting his credibility. But it is questionable if the authorities cited in this decision sustain its conclusion.

In *Louisville & N. R. Co. v. Ritter*, 85 Ky. 368, 3 S. W. 591, it is held that a witness in an action for personal injuries who is claimed to have made a statement that he had desired to obtain evidence of certain facts and that money was no object, and who, on his attention being called thereto on cross-examination, denies having made such statement, cannot be impeached by proof thereof,—especially by the testimony of a witness not mentioned as the one to whom it was made, where he does not testify as to such facts.

A conversation of the general manager of the corporation defendant in a libel suit, tending to show his motive in publishing the alleged libelous article, is not a mere collateral matter; and evidence in rebuttal to show that the denial of such manager upon cross-examination, that such conversation took place, was untrue, is admissible to impeach his

credibility as a witness in regard to the issue of malice. *Post Pub. Co. v. Hallam*, 8 C. C. A. 201, 16 U. S. App. 613, 59 Fed. 530.

Likewise a witness who, on cross-examination, has testified that he has never been arrested or convicted of a crime, may, for the purpose of discrediting him, be contradicted by court records showing that he has been tried and convicted of a crime, the question whether or not a witness has been convicted of the crime not being a collateral one in the sense that the party cross-examining him is bound by his answer. *Helwig v. Lascowski*, 82 Mich. 619, 10 L.R.A. 378, 46 N. W. 1033.

As to impeachment by proof of conviction, see *supra*, subdivision C, § 4.

E. IMPEACHMENT OF ONE'S OWN WITNESS.

1. In general.

The general rule is that a party who calls a witness to support or prove his case cannot discredit him by evidence of general bad character or by evidence introduced for the sole purpose of impeaching him.¹

But this general rule must be understood to mean that the witness is not to be impeached directly on account of his character for truth;² and the party can prove the truth of particular matters by other witnesses, even though he may thereby directly contradict his own witness, the distinction being between an impeachment generally and a contradiction in respect to a particular fact.³ And he may thus contradict his witness even though the evidence of such other witnesses may collaterally show that the witness contradicted is unworthy of belief.⁴

In many states the matter is regulated by statute.⁵ In some states contradiction is permitted only in case of surprise, or where the party is compelled to produce the witness or has been entrapped into introducing him.⁶ But in other states the rule is extended to permit impeachment by proof of inconsistent statements.⁷ For the last class of proof a foundation must be laid by interrogating the witness in regard to the contradictory statements.⁸

¹ *Stearns v. Merchants' Bank*, 53 Pa. 490; *Queen v. State*, 5 Harr. & J. 232; *Baltimore & O. R. Co. v. State*, 41 Md. 295; *Ensor v. Bolgiano*, 67 Md. 190, 9 Atl. 529; *Brown v. Wood*, 19 Mo. 475; *Dunn v. Dunaker*, 87 Mo. 597; *Fearey v. O'Neill*, 149 Mo. 473, 73 Am. St. Rep. 440, 50 S. W. 918; *Bradford v. Bush*, 10 Ala. 386; *Winston v. Moseley*, 2 Stew. (Ala.) 137; *Brewer v. Porch*, 17 N. J. L. 377; *Bennett v. State*, 24 Tex. App. 73, 5 Am. St. Rep. 875, 5 S. W. 527; *Rockwood*

v. Poundstone, 38 Ill. 199; and *Milsap v. People*, 2 Colo. 351; *Smith v. Briscoe*, 65 Md. 561, 5 Atl. 334; *Bank of Northern Liberties v. Davis*, 6 Watts & S. 285; *Hunt v. Fish*, 4 Barb. 324; *Hunter v. Wet-sell*, 84 N. Y. 549, 38 Am. Rep. 544; *Thompson v. Blanchard*, 4 N. Y. 303; *Varick v. Jackson*, 2 Wend. 166, 19 Am. Dec. 571; *Pollock v. Pollock*, 71 N. Y. 137; *Lawrence v. Barker*, 5 Wend. 301; *People v. Safford*, 5 Denio, 112; *McArthur v. Sears*, 21 Wend. 190; *Com. v. Starkweather*, 10 Cush. 59; *Adams v. Wheeler*, 97 Mass. 67; *Brolley v. Lapham*, 13 Gray, 294; *Brooks v. Weeks*, 121 Mass. 433; *Stockton v. Demuth*, 7 Watts, 39, 32 Am. Dec. 735; *Self v. State*, 28 Tex. App. 398, 13 S. W. 602; *Griffin v. Wall*, 32 Ala. 149; *Thorn v. Moore*, 21 Iowa, 285; *White v. State*, 10 Tex. App. 381; *Helm v. Handley*, 1 Litt. (Ky.) 219; *Sisson v. Conger*, 1 Thomp. & C. 564; *Sanchez v. People*, 22 N. Y. 147; *Com. v. Hudson*, 11 Gray, 64; *Com. v. Welsh*, 4 Gray, 535; *Powles v. Dilley*, 9 Gill, 222; *Coulter v. American Merchants' Union Exp. Co.* 56 N. Y. 585; *Becker v. Koch*, 104 N. Y. 394. 58 Am. Rep. 515, 10 N. E. 701; *United States v. Watkins*, 3 Cranch. C. C. 441, Fed. Cas. No. 16,649; *Perry v. Massey*, 1 Bail. L. 32; *Bul-lard v. Pearsall*, 53 N. Y. 230; *Adams v. Wheeler*, 97 Mass. 67; *Brown v. Bellows*, 4 Pick. 194; *Whitaker v. Salisbury*, 15 Pick. 544; *Olmstead v. Winsted Bank*, 32 Conn. 278, 85 Am. Dec. 260.

A party is presumed to know the character of the witnesses he introduces, and, having presented them, the law will not permit him afterwards to impeach their general reputation for truth, or to impugn their credibility, by general evidence tending to show them unworthy of belief. *Thompson v. Blanchard*, 4 N. Y. 303; *Bank of Northern Liberties v. Davis*, 6 Watts & S. 285.

A party may not complain that he is held to the effect of the evidence which he vouches for, by producing the witnesses who give it. *Fillmore v. Union P. R. Co.* 2 Wyo. 94.

And the court has no discretion to allow such impeachment. *Cox v. Eayres*, 55 Vt. 24, 45 Am. Rep. 583.

A party cannot impeach a witness called by him by evidence of conversations had between himself and the witness. *Mason v. Corbin*, 88 Hun. 540, 34 N. Y. Supp. 773. And a witness for plaintiff who has testified on cross-examination to the truth of a circular issued by the defendant corporation, of which he is a member, cannot be contradicted by plaintiff by proof of contradictory declarations among members of the company. *Brush v. Manhattan R. Co.* 44 N. Y. S. R. 111, 17 N. Y. Supp. 540. But the rule that a party cannot be impeached by the party by whom he is called does not apply where it sought to disprove testimony drawn out on cross-examination by the adverse party. *Smith v. Utesch*, 85 Iowa, 381, 52 N. W. 343. And a party may show that her own witness was mistaken in reference to any matter favorable to her to which the witness has testified and elicit from him if possible the extent and character of his recollection. *Feibelman v. Manchester F. Assur. Co.* 108 Ala. 180, 19 So. 540.

And one who puts a witness on the stand, but excuses him without asking him any questions that are material to the issues on trial, is not thereby precluded, if the witness is afterwards called and examined by the opposite party, from cross-examining him and discrediting him by proving his contradictory statements out of court. *Fall Brook Coal Co. v. Hewson*, 158 N. Y. 150, 43 L.R.A. 676, 52 N. E. 1095. A party does not, by cross-examining a witness as to incidents attending the testimony given by him in chief, make him her own witness so as to prevent her from contradicting him as to a fact or circumstance to which he has not previously testified, stated by him in answer to a question which did not call therefor. *Colwell v. Colwell*, 14 App. Div. 80, 43 N. Y. Supp. 439. Plaintiff, in an action to recover rent under an original lease the possession or execution of which is denied by defendants, does not make an agent of defendants, to whom the lease was delivered, his own witness so as to preclude his contradiction, where he is compelled to call him to account for its nonproduction. *Morris v. Guffey*, 188 Pa. 534, 41 Atl. 731. But a party to an action who puts in evidence a deposition taken by the opposite party thereby makes the witness his own, within the rule relating to the contradiction of one's own witness. *McCormick Harvesting Mach. Co. v. Laster*, 81 Ill. App. 316. And one who, on cross-examination of a witness of an adverse party, prefers to rely upon, and reads, the testimony of such witness on his cross-examination on a former trial, thereby makes such witness, and consequently his testimony, his own. *Tourtlotte v. Brown*, 4 Colo. App. 377, 36 Pac. 73. A witness may be contradicted by the party taking his deposition where the deposition is introduced by the opposite party. *Bloomington v. Osterle*, 139 Ill. 120, 28 N. E. 1068. But in *Salt Springs Nat. Bank v. Fancher*, 92 Hun, 327, 36 N. Y. Supp. 742, it is held that the plaintiff in an action to set aside a conveyance as fraudulent does not make the principal debtor his own witness by introducing in evidence his deposition taken in supplementary proceedings, so as to affect his right to cross-examine him and prove by him any facts pertinent to the issue, where he is afterwards called as a witness by defendants. And one does not make a witness of the adverse party his own by putting in evidence one of two depositions of such witness taken at the instance of the adverse party, for the purpose of impeaching him by showing statements therein contradictory to those in the other deposition used by the other party. *Thompson v. Gregor*, 11 Colo. 531, 19 Pac. 461.

² *Brown v. Bellows*, 4 Pick. 179; *Bullard v. Pearsall*, 53 N. Y. 230; *Perry v. Massey*, 1 Bail. L. 32.

³ *Bok v. Vincent*, 12 Abb. Pr. 137; *Edwards v. Crenshaw*, 30 Mo. App. 510; *Pickard v. Collins*, 23 Barb. 444; *Thompson v. Blanchard*, 4 N. Y. 303; *Meyer Bros. Drug Co. v. McMahan*, 50 Mo. App. 18; *Brown v. Wood*, 19 Mo. 475; *Price v. Lederer*, 33 Mo. App. 436; *United States v. Watkins*, 3 Cranch, C. C. 441, Fed. Cas. No. 16,649; *Franklin*

Bank v. Pennsylvania, D. & M. Steam Nav. Co. 11 Gill & J. 28, 35, 33 Am. Dec. 687; *Sewell v. Gardner*, 48 Md. 178; *Tobin v. Chicago City R. Co.* 17 Ill. App. 82; *Mitchell v. Sawyer*, 115 Ill. 650, 5 N. E. 109; *Olmstead v. Winsted Bank*, 32 Conn. 278, 85 Am. Dec. 260; *Spencer v. White*, 23 N. C. (1 Ired. L.) 236; *Brown v. Bellows*, 4 Pick. 179; *Com. v. Starkweather*, 10 Cush. 59; *Bradley v. Ricardo*, 8 Bing. 57, 1 Moore & S. 133, 1 L. J. C. P. N. S. 36; *Adams v. Wheeler*, 97 Mass. 67; *Whitaker v. Salisbury*, 15 Pick. 544; *Darling v. Thompson*, 108 Mich. 215, 65 N. W. 754; *Lawrence v. Barker*, 5 Wend. 301; *First Nat. Bank v. Weston*, 24 App. Div. 230, 48 N. Y. Supp. 403; *Skipper v. State*, 69 Ga. 63; *Burkhalter v. Edwards*, 16 Ga. 593, 60 Am. Dec. 744; *Cronan v. Roberts*, 65 Ga. 678; *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544; *Norwood v. Kenfield*, 30 Cal. 393; *Kendrick v. Dellinger*, 117 N. C. 491, 23 S. E. 438; *Blackwell v. Wright*, 27 Neb. 269, 20 Am. St. Rep. 662, 43 N. W. 116; *Moffatt v. Tenny*, 17 Colo. 189, 30 Pac. 348; *Thorp v. Leibrecht*, 56 N. J. Eq. 499, 39 Atl. 361.

▲ receiver of a corporation who produces books of account of the corporation to prove errors and falsifications of the accounts therein, upon the issue as to whether or not dividends were paid out of net earnings, is not estopped from contradicting entries therein, where he represents the creditors as well as the corporation. *Whittaker v. Amwell Nat. Bank*, 52 N. J. Eq. 400, 29 Atl. 203. And statements of plaintiff's witness on cross-examination by defendant, that he received no authority from the defendant to order the particular goods from plaintiff for which the latter is seeking to recover, does not qualify his testimony as to the facts showing a general authority to order goods so as to conclude the plaintiff by the question of his authority to buy the goods in question. *Bannon v. Levy*, 20 Misc. 581, 46 N. Y. Supp. 353. The testimony by a witness for the defendant, that a claim sought to be recovered in offset by the defendant was assigned to the defendant in trust for the benefit of a third person, does not preclude the defendant from showing that by a subsequent arrangement the assignment was made to him individually. *First Nat. Bank v. Post*, 66 Vt. 237, 28 Atl. 989. In an action upon a promissory note, where the defense is that the signature was forged, a witness who, upon a former trial, testified for the plaintiff that he was present and saw the note signed by the alleged maker upon a certain day at a certain time and place, may, when such evidence is withheld by the plaintiff, be called by the defendant, who will not be bound by his testimony but may show by other witnesses that the alleged maker was elsewhere on the day named. *Brown v. Tourtelotte*, 24 Colo. 204, 50 Pac. 195.

And the doctrine that a party may contradict, though not impeach, his own witness, is applicable where he is himself the witness, where the circumstances are consistent with honesty and good faith. *Hill v. West End Street R. Co.* 158 Mass. 458, 33 N. E. 582.

- ⁴ *Tobin v. Chicago City R. Co.* 17 Ill. App. 82; *Rockwood v. Poundstone*, 38 Ill. 199; *Swamscot Mach. Co. v. Walker*, 22 N. H. 457, 55 Am. Dec. 172; *Bullard v. Pearsall*, 53 N. Y. 230.
- ⁵ See statutes in Arkansas, California, Florida, Idaho, Indiana, Indian Territory, Kentucky, Massachusetts, Montana, New Mexico, New Hampshire, Oregon, Pennsylvania, Wyoming. In Texas it is provided that the party producing a witness may attack his testimony in any other manner except by proof of his bad character.
- ⁶ Thus in *Miller v. Cook*, 124 Ind. 101, 24 N. E. 577, it is held that the rule permitting a party to contradict his own witness, being statutory, applies only where the testimony given is a surprise to the party calling him and is prejudicial. See also *Oldfather v. Zent*, 21 Ind. App. 307, 52 N. E. 236, stating that the rule does not apply where the witness merely fails to testify as expected.
- So, mere failure of a witness to testify to facts sought to be proved by her, by denial of knowledge thereof, is not prejudicial to the party calling her so as to permit her impeachment by proof of statements made by her as to such facts which she denies making, under the Indiana statute. *Blough v. Parry*, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560. And a party cannot impeach the testimony of his own witness contained in a deposition by showing his contradictory statements made out of court, where there is no element of surprise or imposition justifying it. *Dunn v. Dunnaker*, 87 Mo. 597.
- A party who calls as a witness the son-in-law of the adverse party cannot contradict him or impugn his credibility by showing that in an examination by his attorney, which was not, however, for the preparation of the case for trial, he made statements inconsistent with his testimony, as he should have expected the witness to be friendly to the other party and cannot be considered as taken by surprise. *Ernhart v. Hiller*, 16 Lanc. L. Rev. 51. And so, a witness called to prove a forgery, although she has all along been insisting that it was genuine, cannot, upon testifying adversely to the party calling her, be impeached by such party by proof of bad character, under Indiana Rev. Stat. 1881, § 507, providing that a party cannot impeach his own witness by such proof unless it was indispensable that the party should produce him, or in case of manifest surprise. *Diffenderfer v. Scott*, 5 Ind. App. 243, 32 N. E. 87.
- A witness whose testimony has been merely weakened by his admission on cross-examination of having made an affidavit somewhat modifying his testimony on direct examination, cannot, on redirect examination, be interrogated with regard to his testimony in another case inconsistent with such affidavit, merely for the purpose of giving strength and color to his present direct testimony, as the rule permitting such examination in case of surprise does not extend to such surprise of cross-examination in regard to declarations inconsistent with affidavits used to weaken perfectly consistent direct testimony. *Hine v. Cushing*, 53 Hun, 519, 6 N. Y. Supp. 850.

- Under the Georgia statute a direct impeachment of a witness is allowable where the party has been entrapped into producing the witness. *Skipper v. State*, 59 Ga. 65. But mere contradictory statements are not sufficient: they must have deceived and led the party to introduce the witness. *Dixon v. State*, 86 Ga. 754, 13 S. E. 87.
- So, in Missouri, there may be a direct impeachment where the party has been entrapped. *State use of Guthrie v. Martin*, 52 Mo. App. 511; *Fearey v. O'Neill*, 149 Mo. 467, 73 Am. St. Rep. 440, 50 S. W. 918.
- ⁷ *Walkup v. Com.* 14 Ky. L. Rep. 337, 20 S. W. 221; *Fairly v. Fairly*, 38 Miss. 280; *Shelton v. Hampton*, 28 N. C. (6 Ired. L.) 216; *Stearns v. Merchants' Bank*, 53 Pa. 490; *Price v. Lederer*, 33 Mo. App. 426; *Bradford v. Bush*, 10 Ala. 386; *De Lisle v. Priestman*, 1 Browne (Pa.) 176; *Perry v. Massey*, 1 Bail. L. 32; *Southwestern Coal & Improv. Co. v. Rohr*, 15 Tex. Civ. App. 404, 39 S. W. 1017; *Farr v. Thompson*, Cheves, L. 37; *Rockwood v. Poundstone*, 38 Ill. 199; *Smith v. Briscoe*, 65 Md. 561, 5 Atl. 334; *Selover v. Bryant*, 54 Minn. 434, 21 L.R.A. 418, 40 Am. St. Rep. 349, 56 N. W. 58. And see note to this last case in 21 L.R.A. on page 423.
- And in *Lindquist v. Dickson*, 98 Minn. 369, 6 L.R.A.(N.S.) 729, 107 N. W. 958, 8 A. & E. Ann. Cas. 1024, it was held that a party who has called a witness and is surprised by his adverse testimony may, in the discretion of the trial court, be allowed to cross-examine him, and, after laying the proper foundation, to show that he had previously made statements contrary to his testimony.
- See statutes in Alabama (in case witness proves adverse), Arkansas, Florida, Idaho, Indiana, Indian Territory, Kentucky, Massachusetts, Montana, New Mexico (where witness in the opinion of the judges proves adverse), Oregon, Vermont (when in the opinion of the court a witness is adverse he may by leave of court show the witness's inconsistent statements), and Wyoming. And under the Texas statutes a party may attack the testimony of his own witness in any other manner, except by proof of bad character.
- The right to show inconsistent statements is limited to where the witness proves adverse, by the Alabama statutes, and where, in the opinion of the judges, he proves adverse, in the New Mexico statutes, and under the Vermont statutes, where in the opinion of the court he is adverse, the party producing him may, by leave of court, show inconsistent statements.
- The determination as to whether or not a witness is so adverse to the party producing him as to authorize the latter to impeach him under the Florida statutes is largely in the discretion of the trial judge. *Williams v. Dickenson*, 28 Fla. 90, 9 So. 847.
- And testimony of a witness for defendant on cross-examination, that he does not know that he had made different statements as to the defective condition of his engine from those given at the trial, may be contradicted by plaintiff, although the witness was called as such by

both parties, under Ind. Rev. Stat. 1894, § 515, providing that a party may contradict his own witness by showing that he has made different statements. *Ohio & M. R. Co. v. Stein*, 140 Ind. 61, 39 N. E. 246. And a party whose witness testifies to a fact prejudicial to him, though he does not remember having made contradictory statements on a former occasion before a coroner, may contradict him by showing by other witnesses that he did make such statement. *Wren v. Louisville, St. L. & T. R. Co.* 14 Ky. L. Rep. 324, 20 S. W. 215.

And a plaintiff in an action for slander in charging that silk furnished by him to his workmen contained arsenic, resulting in workmen leaving his employ, who has called a witness to show that the machine of a workman was removed from her house after such words were spoken, may contradict the testimony of such witness, that she does not fix the time such words were spoken, by evidence that on a former trial she testified that the words were spoken before such machine was removed and the workmen stopped work. *Elmer v. Fessenden*, 154 Mass. 427, 28 N. E. 299. A party who calls a witness whose testimony not only fails to prove, but wholly disproves, his case, may ask him if he has not made a statement to him conflicting with his testimony and which, if true, would tend to prove his case. *George v. Triplett*, 5 N. D. 50, 63 N. W. 691.

So, one who puts a witness on the stand, but excuses him without asking him any questions that are material to the issues on the trial, is not thereby precluded, if the witness is afterwards called and examined by the opposite party, from examining him and discrediting him by proving his contradictory statements out of court. *Fall Brook Coal Co. v. Hewson*, 158 N. Y. 150, 43 L.R.A. 676, 52 N. E. 1095.

And a party who, on the issue of fraud in the making of an assignment, calls the assignor as a witness, may nevertheless show that a portion of his witness's evidence is untrue by comparing it with other portions of his evidence. *Becker v. Koch*, 104 N. Y. 394, 10 N. E. 701.

And plaintiff who has taken the deposition of the defendant and read some portions of it in evidence, the remainder being read by defendant, is not precluded from introducing declarations of the defendant contradictory of the statements in his deposition, as, under N. Y. Code Civ. Proc. § 838, providing that the testimony of a party taken at the instance of the adverse party may be rebutted by other evidence, plaintiff may prove the fact of his case by any competent evidence, although such evidence may operate to contradict statements in defendant's deposition. *Kelly v. Jay*, 79 Hun, 535, 29 N. Y. Supp. 933. But a party cannot offer proof of prior contradictory statements by the witness called by him, although such witness is a reluctant one, where the only effect is to impeach the witness, and not to give material evidence on any issue in the case. *Ontario v. Union Bank*, 21 Misc. 770, 47 N. Y. Supp. 927 (modified on other point in 52 N. Y. Supp. 328).

While a party may not impeach his own witness, yet where he is disappointed in his witness or surprised he may ask him as to contradictory statements made by him for the purpose of probing his recollection. *Humble v. Shoemaker*, 70 Iowa, 223, 30 N. W. 492; *Spaulding v. Chicago, St. P. & K. C. R. Co.* 98 Iowa, 205, 67 N. W. 227 (particularly where it is evident that he is inclined to shape his testimony to aid the adverse party); *Hildreth v. Aldrich*, 15 R. I. 163, 1 Atl. 249 (but he cannot prove such statements by other witness). But a witness whose testimony has been merely weakened on cross-examination by his admission of having made an affidavit somewhat modifying his testimony on direct examination cannot be asked on redirect examination with reference to his testimony in another case where the party calling his is not surprised by his testimony, the witness is not hostile, and the statements in such other case are not inconsistent with his present testimony, as he does not come within the rule that where a party calling a witness is surprised by testimony contrary to his expectations he may interrogate him as to previous declarations inconsistent with his testimony for the purpose of probing his recollection, recalling to his mind statements he has previously made, and drawing out an explanation of his apparent inconsistency. *Hine v. Cushing*, 53 Hun, 519, 6 N. Y. Supp. 850. And defendant's counsel is properly refused permission to exhibit to defendant's witness, who has testified that he did not hear a switch tender warn the plaintiff of the approach of the train by which he was struck, a paper signed by the witness a few days after the accident, made out from his verbal statements to some of the officers of the defendant, from which it appears that he did hear such warning, where the witness, after having the fact that he made the written statement called to his attention, still expressed his opinion that he did not hear any such warning. *Pittsburg, C. C. & St. L. R. Co. v. Lewis*, 18 Ky. L. Rep. 957, 38 S. W. 482.

A witness who merely denies making statements out of court favorable to the party producing him cannot be contradicted by proof of such statements under the provision of the Oregon Civil Code permitting the party producing a witness to contradict him by other evidence and to show that he has made at other times statements inconsistent with his present testimony, as that provision is intended only to prevent the party from being prejudiced by the evidence of his own witness and was not intended to permit inquiries about matters regarding which the witness does not testify, or gives unsatisfactory testimony, and the giving of proof of his statements in reference thereto at another time. *Langford v. Jones*, 18 Or. 307, 22 Pac. 1064.

That a party cannot discredit or contradict his own witness by proof of contradictory statements, see *Griffin v. Chicago*, 57 Ill. 317; *Collins v. Hoehle*, 99 Wis. 639, 75 N. W. 416; *Dunlap v. Richardson*, 63 Miss. 447 (unless shown to be deceived by the fraud or artifice of the witness); *Re Kennedy*, 104 Cal. 429, 38 Pac. 93 (although the witness

has not testified as he led the party to believe he would); *Wheeler v. Thomas*, 67 Conn. 577, 35 Atl. 499 (by proof of subsequent contradictory statements although he may show fact to which he testifies is different). So, the husband of plaintiff in an action to recover moneys alleged to have been placed in the hands of defendant's intestate as plaintiff's agent, who testifies in chief to facts tending to show that deceased received the money and agreed to manage it as plaintiff's agent, and denies on cross-examination that he had stated that deceased had paid it back, cannot be contradicted or impeached by proof that he had in fact made such statements. *Lamb v. Ward*, 114 N. C. 255, 19 S. E. 230.

And a tenant sued jointly with his landlord, who is called by plaintiff and testifies that he was not the landlord's agent in entering into the contract sued on, cannot be impeached by showing that he made former contradictory statements, under Vermont Rev. Laws, § 1009, providing that a party to a civil action or proceeding may compel an adverse party to testify as a witness in his behalf "in the same manner and subject to the same rules as other witnesses." *Good v. Knox*, 64 Vt. 97, 23 Atl. 520.

* In the statutory provisions of Florida, Massachusetts, New Mexico, Vermont, and Wyoming, there is special provision made for the laying of a foundation, although the general provision in the other statutes that a foundation must be laid for impeaching a witness by proof of inconsistent statements would seem necessarily to apply to a party's own witness, as well as to a witness of the adverse party. See note to *Selover v. Bryant*, 21 L.R.A. 418, 428. See also cases *supra*, subdivision A, § 1.

2. Compulsory witness.

The rule that a party cannot impeach his own witness has no application when the party cannot avoid making a person his witness, as in the case of an attesting or subscribing witness to a deed or will;¹ since such a witness can hardly be called the party's witness, but is rather the witness of the law.²

¹ *Whitman v. Morey*, 63 N. H. 448, 2 Atl. 899; *Hildreth v. Aldrich*, 15 R. I. 163, 1 Atl. 249; *Cox v. Eayres*, 55 Vt. 24, 45 Am. Rep. 583; *Thornton v. Thornton*, 39 Vt. 122; *Duckwall v. Weaver*, 2 Ohio, 13; *Whitaker v. Salisbury*, 15 Pick. 534; *Bank of Northern Liberties v. Davis*, 6 Watts & S. 285; *Aldrich v. Nimmons*, 2 Rich. Eq. 291, 46 Am. Dec. 53; *Thompson v. Owen*, 174 Ill. 229, 45 L.R.A. 682, 51 N. E. 1046.

² *Cowden v. Reynolds*, 12 Serg. & R. 281; *Crowell v. Kirk*, 14 N. C. (3 Dev. L.) 355; *Lowe v. Joliffe*, 1 W. Bl. 366.

And he may of course contradict such a witness. *Funke v. Cone*, 65 Mich. 581, 32 N. W. 826 (assignor called by complainants in an action to

enforce a trust under general assignment may be contradicted when necessary to ascertain the facts). A party who is compelled by a ruling of the court to call an adverse witness to give testimony that might have been called out on cross-examination is not bound by his statements, but may contradict them by other witnesses. *Pickard v. Bryant*, 92 Mich. 430, 52 N. W. 788. And plaintiff compelled, in an action to recover rent under a written lease the possession or execution of which is denied by the defendants, to call as a witness their agent, to whom it has been delivered, to account for the nonproduction of the paper, does not thereby make such witness his own so as to preclude his contradiction. *Morris v. Guffey*, 188 Pa. 534, 41 Atl. 731.

And may impeach him by proof of bad character. See statutes of Indian Territory, Indiana, Arkansas, and Kentucky, which provide that a party cannot impeach his own witness by proof of bad character except where it is indispensable to produce him.

But, in *Brown v. Bulkley*, 14 N. J. Eq. 294, it was stated that the rule that, because a party cannot avoid making an individual his witness, he was thereby at liberty to impeach his veracity, was by no means well settled.

3. Hostile or unwilling witness.

The hostility of a witness to the party calling him may always be shown.¹ And the court may allow the examination in chief of a hostile witness to assume the form of a cross-examination.²

¹ *John Morris Co. v. Burgess*, 44 Ill. App. 27; *Spaulding v. Chicago*, St. P. & K. C. R. Co. 98 Iowa, 205, 67 N. W. 227; *Mack v. Austin*, 26 Misc. 198, 55 N. Y. Supp. 446; *Hard v. Densmore*, 28 App. Div. 365, 51 N. Y. Supp. 157; *Lewis v. Baker*, 162 Pa. 510, 29 Atl. 708; *Cook v. Carroll Land & Cattle Co.* — Tex. Civ. App. —, 39 S. W. 1006.

² *Bank of Northern Liberties v. Davis*, 6 Watts & S. 285; *Gerrish v. Gerish*, 63 N. H. 128; *Bundy v. Hyde*, 50 N. H. 116.

Yet the mere fact that a witness has failed to testify as expected is not alone sufficient; he must be shown to have given damaging testimony before he can be impeached. *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106; *People v. Jacobs*, 49 Cal. 384.

Although a witness may be hostile, his evidence cannot be wholly disregarded. *Garbutt v. Bank of Prairie du Chien*, 22 Wis. 384.

4. Opponent as witness.

Where the adverse party is called and examined by his opponent, he is placed upon the same footing as other witnesses, and his evidence, as a general rule, cannot be impeached.¹

But the party calling his opponent as a witness is not precluded from proving a fact to be otherwise than as testified to by such witness.²

And the general rule denying the right to impeach an adverse party called as a witness does not prevent proof of contradictory statements out of court, where such statements would have been admissible in chief as admissions against interest.³

¹ *United States L. Ins. Co. v. Voeke* (*United States L. Ins. Co. v. Kielgast*) 129 Ill. 557, 6 L.R.A. 65, 22 N. E. 467; *Bowman v. Ash*, 143 Ill. 649, 32 N. E. 486; *Graves v. Davenport*, 50 Fed. 881; *Helms v. Green*, 105 N. C. 251, 18 Am. St. Rep. 893, 11 S. E. 470; *Paxton v. Boyce*, 1 Tex. 317; *Clafin v. Dodson*, 111 Mo. 195, 19 S. W. 711; *Chandler v. Fleeman*, 50 Mo. 239; *Dunn v. Dunnaker*, 87 Mo. 597; *Fearey v. O'Neill*, 149 Mo. 467, 73 Am. St. Rep. 440, 50 S. W. 918; *Gabbett v. Sparks*, 60 Ga. 582; *Pickard v. Collins*, 23 Barb. 444; *Warren v. Gabriel*, 51 Ala. 235; *Branch v. Levy*, 14 Jones & S. 428; *Tourtelotte v. Brown*, 4 Colo. App. 377, 36 Pac. 73.

And the fact that he may be subsequently recalled by one side or the other does not affect the rule that his credibility cannot be impeached by the party first calling him. *Olive v. Olive*, 95 N. C. 485.

But, in *Dravo v. Fabel*, 25 Fed. 116, 132 U. S. 487, 33 L. ed. 421, 10 Sup. Ct. Rep. 170, it is stated that a party called by his adversary is to be considered as a hostile witness, and thus stands in a position differing from that of other witnesses; the party calling him not being bound by his statements, which may be contradicted to such an extent as almost to amount to an impeachment and an incidental discredit.

So, in divorce proceedings where the plaintiff called the defendant as a witness to prove desertion, the court held that, although the plaintiff could not impeach defendant's character for truth, yet specific facts could be disputed although sworn to by him, as such witness was both a hostile and a deeply interested witness, and the court had a right to confront his statement of his mental conclusion with the facts and circumstances of his conduct. *Cross v. Cross*, 108 N. Y. 628, 15 N. E. 333.

So, where a party who called his adversary, relying upon his evidence upon an earlier trial, was entrapped by him, he may impeach his credibility. *Cox v. Prater*, 67 Ga. 588; *Taylor v. Morgan*, 61 Ga. 46.

And in an action on an accident insurance policy, it was held in *Corbett v. Physicians' Casualty Asso.* 135 Wis. 505, 16 L.R.A.(N.S.) 177, 115 N. W. 365, that the plaintiff may call and examine upon the trial, as a witness, an officer of the defendant corporation, as under cross-examination, and thereafter rebut the evidence of such witness by counter or impeaching testimony, or by proof that he has theretofore made statements inconsistent with those made on his examination.

In Georgia it is provided by statute that the opposite party may be made a witness and he may be impeached as though testifying in his own behalf. And in Wisconsin it is provided that the adverse party, or the agent or officer of a corporation, etc., may be examined as if under cross-examination, at the instance of the opposite party, but the party calling for such examination shall not be concluded thereby and may rebut the evidence given thereon by counter or impeaching testimony. So, in New Hampshire, the statute provides that when one party offers the testimony of the nominal or real adverse party he is not thereby precluded from cross-examining, contradicting, or impeaching him. So, also, under the Ohio statutes a party may be examined as if under cross-examination, as any other witness, but the party calling for such examination is not concluded thereby but may rebut it by counter-testimony.

* *Rindskoph v. Kuder*, 145 Ill. 607, 34 N. E. 484; *Pickard v. Collins*, 23 Barb. 444; *Cross v. Cross*, 108 N. Y. 628, 15 N. E. 133; *Hankinson v. Vantine*, 152 N. Y. 20, 46 N. E. 292; *Helms v. Green*, 105 N. C. 251, 18 Am. St. Rep. 893, 11 S. E. 470; *Chester v. Wilhelm*, 111 N. C. 314, 16 S. E. 229; *Paxton v. Boyce*, 1 Tex. 317; *Cook v. Carroll Land & Cattle Co.* — Tex. Civ. App. —, 39 S. W. 1006; *Smith v. Ehanert*, 43 Wis. 181.

Thus, plaintiffs in an action to set aside a mortgage as in fraud or creditors, who made a defendant their witness, are not precluded from showing by other witnesses that the transaction was fraudulent and for the purpose of defrauding the creditors of the witness, and that defendants participated in the fraud, although defendant testified to the good faith of the transaction. *Imhoff v. McArthur*, 146 Mo. 371, 48 S. W. 456. And a plaintiff who has taken the deposition of defendant and read some portion of it in evidence, the remainder being read by defendant, is not precluded from introducing declarations of the defendant contradictory of the statements in his deposition, as, under New York Code of Civil Procedure, § 838, providing that the testimony of a party taken at the instance of the adverse party may be rebutted by other evidence, plaintiff may prove the facts of his case by any competent evidence, although such evidence may operate to contradict the statements in defendant's deposition. *Kelly v. Jay*, 79 Hun, 535, 29 N. Y. Supp. 933. So also, where the plaintiff, whose ownership of notes sued on is denied, is called as a witness by defendant, and testifies that she had contributed out of her separate earnings a certain part to the purchase of the note, and that her father furnished the balance, defendant is not precluded from showing that her husband owned the note. *Gardner v. Connelly*, 75 Iowa, 205, 39 N. W. 650.

Plaintiff by the introduction in evidence of the ante-trial examination of defendant, even though it may as to part thereof make him his own witness, is not thereby precluded from directly and specifically negating part of such examination where that is the only possible way

of establishing a different state of facts, and such evidence is not objectionable as impeaching the witness. *Crocker v. Agenbroad*, 122 Ind. 585, 24 N. E. 169.

³ *Carney v. Hennessey*, 77 Conn. 577, 60 Atl. 129; *Gibbs v. Linabury*, 22 Mich. 479, 7 Am. Rep. 675; *Pickard v. Collins*, 23 Barb. 444; *Griffin v. Whitson*, 3 Kan. App. 437, 43 Pac. 813; *Thomas v. McDanel*, 88 Iowa, 374, 55 N. W. 499; *Call v. Pike*, 68 Me. 217; *Mason v. Poulson*, 43 Md. 161; *Gould v. John Hancock Mut. L. Ins. Co.* 114 App. Div. 312, 99 N. Y. Supp. 833; *Koester v. Rochester Candy Works*, 194 N. Y. 92, 19 L.R.A.(N.S.) 783, 87 N. E. 77, 16 A. & E. Ann. Cas. 589; reversing 122 App. Div. 894, 106 N. Y. Supp. 1134; *Perry v. Massey*, 1 Bail. L. 32; *Lambert v. Armentrout*, 65 W. Va. 375, 22 L.R.A.(N.S.) 556, 64 S. E. 260.

And, in *Jamison v. Bagot*, 106 Mo. 240, 16 S. W. 697, it was held that where plaintiff had introduced defendant's deposition made at another trial, other admissions made by defendant, contradicting what was said in such deposition, were also properly admitted.

For a full discussion of the question of the right to impeach one's own witness, with a review of all the authorities, see note in 21 L.R.A. 418.

F. CORROBORATION OF IMPEACHED WITNESS.

The authorities are nearly unanimous in holding that the mere fact that a witness's testimony is contradicted by opposing testimony does not warrant the introduction of evidence as to his reputation for truth and veracity. His credibility must be attacked.¹ But where his credibility has been directly attacked by proof as to character or facts affecting it, evidence is admissible to sustain him in respect thereto.² As to whether general good character or reputation for truth and veracity may be shown where a witness has been impeached by proof of contradictory statements the authorities are divided.³ Prior statements consistent with present testimony are usually inadmissible as sustaining evidence,⁴ unless it has been charged that such present testimony is the result of recent fabrication or given under the influence of a motive which did not exist at the time of the making of such prior statements.⁵ A witness may sometimes be corroborated by collateral documentary evidence or collateral testimony.⁶

The sustaining witness must, in order to testify as to character, show his knowledge thereof.⁷

¹ *Owens v. White*, 28 Ala. 413; *Mobile & G. R. Co. v. Williams*, 54 Ala. 168; *Moon v. Crowder*, 72 Ala. 79; *People v. Bush*, 65 Cal. 129, 3

Pac. 590, 5 Am. Crim. Rep. 459; *Rogers v. Moore*, 10 Conn. 14; *Saussey v. South Florida R. Co.* 22 Fla. 327; *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18; *Miller v. Western & A. R. Co.* 93 Ga. 480, 21 S. E. 52; *Anderson v. Southern R. Co.* 107 Ga. 500, 33 S. E. 644; *Tedens v. Schumers*, 112 Ill. 263; *Chicago & A. R. Co. v. Fisher*, 31 Ill. App. 36; *Pruitt v. Cox*, 21 Ind. 15; *Brann v. Campbell*, 86 Ind. 516; *Fitzgerald v. Goff*, 99 Ind. 28; *Vance v. Vance*, 2 Met. (Ky.) 581; *Vernon v. Tucker*, 30 Md. 459; *Atwood v. Dearborn*, 1 Allen, 483, 79 Am. Dec. 755; *Mathias v. O'Neill*, 94 Mo. 520, 6 S. W. 253; *Young v. Johnson*, 123 N. Y. 226, 25 N. E. 363; *First Nat. Bank v. Blake-man*, 19 Okla. 106, 12 L.R.A.(N.S.) 364, 91 Pac. 868; *Osmun v. Wint-ers*, 25 Or. 260, 35 Pac. 250; *Braddee v. Brownfield*, 9 Watts, 124; *American F. Ins. Co. v. Hazen*, 110 Pa. 530, 1 Atl. 605; *Farr v. Thompson*, Cheves, L. 37; *Tomson v. Heidenheimer*, 16 Tex. Civ. App. 114, 40 S. W. 425; *Timmony v. Burns*, — Tex. Civ. App. —, 42 S. W. 133 (where the witness was a party and also a stranger); *Stevensou v. Gunning*, 64 Vt. 601, 25 Atl. 697; *Spurr v. United States*, 31 C. C. A. 202, 59 U. S. App. 663, 87 Fed. 701; *Louisville & N. R. Co. v. McClish*, 53 C. C. A. 60, 115 Fed. 268.

And so, evidence as to the good character of a witness for truth and ver- acy and fair dealing is not admissible when his general character is not assailed, although the case may turn upon the credit given to his testimony. *First Nat. Bank v. Commercial Assur. Co.* 33 Or. 43, 52 Pac. 1050.

So, a witness whose character is attacked only by an inference of fraud, immorality, or crime, arising as a consequence of a contradiction of his testimony upon an issue in the case, cannot be supported by proof of good character. *Diffenderfer v. Scott*, 5 Ind. App. 243, 32 N. E. 87. Nor is the mere fact of such conflict or contradiction ground for the admission of prior consistent statements for the purpose of cor- roboratorion. *Hodges v. Bales*, 102 Ind. 494, 1 N. E. 692; *Berlin v. Kern*, 6 Northampton Co. Rep. 299.

Nor is evidence in support of the character of a witness admissible be- fore impeaching evidence has been adduced by the adverse party, and cannot be so introduced for the convenience of nonresident witnesses who are to give the supporting evidence. *Travelers Ins. Co. v. Shep- pard*, 85 Ga. 751, 12 S. E. 18. But in *Barkly v. Copeland*, 74 Cal. 1, 15 Pac. 307, it is held that the admission of corroborative evidence before the putting in of impeaching evidence is not error requiring the reversal of the judgment, where the objecting party subsequently introduced impeaching evidence authorizing the introduction of such corroboration.

Evidence of the general good reputation in the community where he lives, of plaintiff in an action for slander, is inadmissible to sustain him, where it is questioned in no way but by inquiries made upon cross- examination as to specific facts that may tend to weaken his good character. *Hitchcock v. Moore*, 70 Mich. 112, 37 N. W. 914. And evi-

dence to sustain the character of a witness for truth is not admissible where no attack has been made on his character, although he has been cross-examined with a view to showing that the injury complained of had probably been sustained by him before the accident under investigation. *Reynolds v. Richmond & M. R. Co.* 92 Va. 400, 23 S. E. 770. Likewise it is held in *First Nat. Bank v. Commercial Assur. Co.* 33 Or. 43, 52 Pac. 1050, that questions asked a witness for defendant upon cross-examination in an action upon a fire insurance policy, concerning an attempted barter of the knowledge he possessed of the burning of the property insured, tend to show his bias towards the defendant and to discredit his testimony, but did not impeach his general character so far as to let in testimony of his good reputation for truth and fair dealing.

Nor is the character of a witness for defendant railroad company put in issue so as to authorize the introduction of evidence as to his character for veracity by an allegation in plaintiff's petition, and testimony in support thereof to the effect that such witness, as agent for defendant, committed an assault which resulted in the death of plaintiff's intestate. *Anderson v. Southern R. Co.* 107 Ga. 500, 33 S. E. 644.

But in the following cases a contra holding was made, and the evidence of reputation admitted: *State v. Desforges*, 48 La. Ann. 73, 18 So. 912; *George v. Pilcher*, 28 Gratt. 299, 26 Am. Rep. 350; *Davis v. State*, 38 Md. 75.

And in *Newton v. Jackson*, 23 Ala. 335, evidence in support of the witness's reputation was admitted, even though the testimony which was opposed was on an immaterial point.

So, in *State v. DeWolf*, 8 Conn. 93, 20 Am. Dec. 90, where a witness was deaf and dumb, the evidence was admitted on the ground that she was practically a stranger to all, except her relatives and a few similarly afflicted persons.

And in *Merriam v. Hartford & N. H. R. Co.* 20 Conn. 354, 52 Am. Dec. 344, evidence was admitted where the witness was a stranger in that locality.

And in *San Antonio & A. P. R. Co. v. Robinson*, 79 Tex. 608, 15 S. W. 584, it is held that a plaintiff may introduce in rebuttal testimony confirmatory of his testimony in chief upon a point in issue, when defendant has introduced evidence in opposition to his testimony in chief.

In some states it is provided by statute that, where character is not involved, sustaining evidence as to good character is inadmissible until the witness has been impeached. See statutes of Arkansas, California, Idaho, Indian Territory, Kentucky, Montana, and Oregon. And in Georgia it is provided that a witness impeached by proof of contradictory statements may be sustained by proof of general good character.

As to corroboration in case of proof of contradictory statements, see *infra*, note 3.

² Thus, a witness whose character has been attacked by proof of specific acts can sustain himself by proof of his general good character since such acts were committed. *Central R. & Bkg. Co. v. Dodd*, 83 Ga. 507, 10 S. E. 206. And the good character of a witness who, upon cross-examination, admits his conviction and confinement in a penitentiary for a crime involving moral turpitude, may be established by the party calling him by evidence of his general reputation for truth. *Wick v. Baldwin*, 51 Ohio St. 51, 36 N. E. 671. A witness impeached by proof of conviction of a crime may be sustained by evidence of his reputation for truth. *Gertz v. Fitchburg R. Co.* 137 Mass. 77, 50 Am. Rep. 285. And an exconvict may be permitted to testify that he was a "trustee," as an offset to his conviction. *Tennessee Coal, I. & R. Co. v. Haley*, 29 C. C. A. 328, 52 U. S. App. 560, 85 Fed. 534. Plaintiff in a libel suit may rebut evidence of his bad reputation for integrity in politics by proof of his general character for integrity. *Post Pub. Co. v. Hallam*, 8 C. C. A. 201, 16 U. S. App. 613, 59 Fed. 530. So, the offer in evidence by defendant in an action for personal injuries, of the doctor's receipt, for the purpose of contradiction by showing that it was written by the plaintiff whose arm was injured, and whose testimony as to who dressed his arm and the giving of the receipt by the doctor was drawn out on cross-examination and is irrelevant to the issue, is an attack upon the character of plaintiff for truth and honesty which authorizes the introduction of evidence of his general reputation for truth and veracity. *Texas & P. R. Co. v. Raney*, 86 Tex. 363, 25 S. W. 11. And where there is introduced the certified copy of conviction of perjury of a party examined in his own behalf, which contains a statement that a copy of a pardon was filed, he is entitled to show the circumstances under which the pardon was granted. *Sisson v. Yost*, 35 N. Y. S. R. 136, 12 N. Y. Supp. 373. And proof of declarations of a party as to his own witness to the effect that he was perfectly good but sometimes a little slippery, and that he could not rely upon what he told him and could place no confidence in what he said, is an impeachment of his witness's character for truth and veracity which authorizes the introduction of sustaining evidence that his character for truth and veracity is good. *Prentiss v. Roberts*, 49 Me. 127. See also *supra*, note 1.

But in the criminal case of *People v. Gay*, 7 N. Y. 378, it is held that testimony brought out on cross-examination of a witness, that he has been prosecuted for perjury and was committed to jail for trial, is not impeachment of his general character for truth which will authorize the introduction of sustaining evidence as to general good character of the witness for truth. And in *Hannah v. McKellip*, 49 Barb. 342, it is held that proof of general character for truth and veracity is inadmissible to sustain a witness sought to be impeached only

by asking him on cross-examination as to his having been charged with false swearing.

² That a witness may be so sustained, see *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Carroll County Comrs. v. O'Connor*, 137 Ind. 622, 35 N. E. 1006; *Berryman v. Cox*, 73 Mo. App. 67; *Walker v. Phoenix Ins. Co.* 62 Mo. App. 209. But in the criminal case of *State v. Cooper*, 71 Mo. 442, it is held that such evidence is not admissible after the witness has been asked as to the making of certain statements, but before evidence has been introduced to contradict him. In Georgia it is provided by statute that a witness impeached by proof of contradictory statements may be sustained by proof of general good character. See also *Clark v. Bond*, 29 Ind. 555; *Isler v. Dewey*, 71 N. C. 14; *Paine v. Tilden*, 20 Vt. 554; *Sweet v. Sherman*, 21 Vt. 23; *Hadjo v. Gooden*, 13 Ala. 718. And see the criminal cases of *Towns v. State*, 111 Ala. 1, 20 So. 598; *Holley v. State*, 105 Ala. 100, 17 So. 102; *Mercer v. State*, 40 Fla. 216, 24 So. 154. And in *George v. Pilcher*, 28 Gratt. 299, 26 Am. Rep. 350, in which, however, the impeachment was by cross-examination and the disproving by another witness of a material fact, it is said that whenever the character of a witness for truth and veracity is attacked either by direct evidence of want of truth, or by cross-examination or by proof of contradictory statements in regard to material facts, or by disproving by other witnesses material facts stated by him in his examination, or in general, whenever his character for truth is impeached in any way known to the law, the party calling him may sustain him by evidence of his general reputation for truth.

But to the contrary, see *Russell v. Coffin*, 8 Pick. 143; *Brown v. Mooers*, 6 Gray, 451; *Wertz v. May*, 21 Pa. 274; *Chapman v. Cooley*, 12 Rich. L. 654; *Vance v. Vance*, 2 Met. (Ky.) 581; *Com. v. Tucker*, 189 Mass. 457, 7 L.R.A.(N.S.) 1056, 76 N. E. 127; *Shepard v. Yocum*, 10 Or. 402, overruling *Glaze v. Whitely*, 5 Or. 164; *First Nat. Bank v. Commercial Assur. Co.* 33 Or. 43, 52 Pac. 1050; *Gulf, C. & S. F. R. Co. v. Younger*, — Tex. Civ. App. —, 40 S. W. 423. But in criminal cases in Texas the courts have held that a witness may be so corroborated. *Ledbetter v. State*, — Tex. Crim. Rep. —, 29 S. W. 479; *Tipton v. State*, 30 Tex. App. 530, 17 S. W. 1097; *Crook v. State*, 27 Tex. App. 198, 11 S. W. 444.

See further *State v. Rice*, 49 S. C. 418, 27 S. E. 452; *Webb v. State*, 29 Ohio St. 351; *Frost v. McCargar*, 29 Barb. 617; *People v. Bush*, 65 Cal. 129, 3 Pac. 590. And in *People v. Hulse*, 3 Hill. 309, it was held that in a prosecution for rape an attempt to discredit the testimony of the complainant by showing on her cross-examination that her story was improbable in itself, by disproving some of the facts she testified to, by evidence of her conduct inconsistent with the idea of the offense having been committed, and by calling witnesses to show that the account she had given out of court did not correspond with her statements under oath, was not an attack upon her character au-

thorizing the introduction of evidence of general good character to sustain her.

In *Garr, S. & Co. v. Shaffer*, 139 Ind. 191, 38 N. E. 811, it is held that in an action for replevin evidence cannot be given to sustain the character of one who has become a party by cross action for the return of certain items of the property, where her testimony has been impeached by admissions made by her out of court contrary to her evidence on the trial, because such admissions bind no one but her and are not admissible in the part of the action to which she is not a party, and as to her are not impeaching, but original evidence against her which does not authorize the introduction of such sustaining evidence.

Mere conflict or contradiction between witnesses does not usually authorize the introduction of sustaining evidence. See *supra*, note 1.

4 *Marx v. Leinhauff*, 93 Ala. 453, 9 So. 818; *Adams v. Thornton*, 82 Ala. 260, 3 So. 20 (testimony on former trial); *Baxter v. Camp*, 71 Conn. 245, 42 L.R.A. 514, 41 Atl. 803; *Hodges v. Bales*, 102 Ind. 494, 1 N. E. 692; *Clever v. Hilberry*, 116 Pa. 431, 9 Atl. 647; *Rhutasel v. Stephens*, 68 Iowa, 627, 27 N. W. 786; *Dudley v. Bolles*, 24 Wend. 465. So, statements made by a judgment debtor at a remote period, to the same effect as his testimony, are inadmissible in an action by one whose title is claimed to have been acquired in fraud of creditors, to recover property seized by the sheriff under a writ, for the purpose of contradicting the effect of statements inconsistent with his testimony, or of impeachment of bad character. *Mason v. Vestal*, 88 Cal. 396, 26 Pac. 213. And evidence that a witness whose testimony is admitted to be true made statements out of court similar to what he has testified to is inadmissible to rebut contradictory statements which he admitted he had made on several occasions out of court, or to corroborate his testimony as given. *Lavigne v. Lee*, 71 Vt. 167, 42 Atl. 1093. Where a stenographer has testified that a witness had testified differently before an auditor, it is not permissible to show that in another action he had testified in the same way as at the present trial. *Chase v. Perley*, 148 Mass. 289, 19 N. E. 398. See further *Ewing v. Keith*, 16 Utah, 312, 52 Pac. 4; *Texas & P. Coal Co. v. Lawson*, 10 Tex. Civ. App. 491, 31 S. W. 843.

The general rule is stated in *Silva v. Pickard*, 10 Utah, 78, 37 Pac. 86, and *Ewing v. Keith*, 16 Utah, 312, 52 Pac. 4, to be that the declarations of the party made out of court are not admissible to corroborate his sworn testimony, except in extreme cases where their rejection would work a real and manifest wrong; and in no case should they be admitted if it appears that he had any interest or motive in making them, if he was subject to disturbing influences, or if the ultimate effect and operation arising from a change of circumstances could have been foreseen. And proof of prior statements of a witness consistent with his present testimony are not rendered admissible to corroborate him by the introduction of evidence of inconsistent state-

ments made by him, where it does not appear that at the time of the making of such prior statements he stood in any different relation to the cause than he now stands. *Reed v. Spaulding*, 42 N. H. 114.

And where there is no evidence tending to show that the witness's present testimony is a fabrication of recent date, evidence of consistent statements is inadmissible to support him. *Crooks v. Bunn*, 136 Pa. 368, 20 Atl. 529; *Bradley v. Freed*, — Tenn. —, 51 S. W. 124; *Loomis v. New York, N. H. & H. R. Co.* 159 Mass. 39, 34 N. E. 82; *Stolp v. Blair*, 68 Ill. 541. A witness contradicted as to a material point of his testimony and by proof of a statement out of court inconsistent with his testimony cannot be corroborated by a letter purporting to show a statement of the matter similar to his present testimony, where it does not appear that the letter was written when the transaction was recent, nor does it appear but that it might have been prepared with direct reference to the litigation. *Robb v. Hackley*, 23 Wend. 50. Evidence that a witness had previously told the same story that he tells on the stand is not admissible in corroboration where his credibility is attacked on the ground that he had attempted to blackmail a third person, since such unsuccessful attempted blackmail would not tend to create and show malice against a party to the suit within the rule that where a witness's credibility is attacked for alleged ill-will or corrupt motive, similar statements made previous to the existence of such ill-will or motive are admissible in corroboration. *Train v. Taylor*, 51 Hun, 215, 4 N. Y. Supp. 492. And evidence of prior declarations made shortly after the occurrence and long before the testimony is given on the trial, which testimony is contradicted by proof of prior inconsistent declarations, is inadmissible in corroboration thereof where the contradiction simply goes to the credit to be given to the recollection of the witness, as such evidence is admissible in corroboration only where the testimony on the trial is charged to be a fabrication made out of whole cloth under the influence of a motive which has come to operate since the occurrence. *Dechert v. Municipal Electric Light Co.* 39 App. Div. 490, 57 N. Y. Supp. 225. So, a witness whose credibility has been affected by evidence merely that he was not present at a certain accident, to the details of which he testifies, cannot be sustained by proof of an unsworn statement made by him shortly after such accident to the effect merely that he was present thereat, but in which none of the details were related and which therefore in no way tends to corroborate him as to such details, as he does not come within the rule that where a witness has been impeached by testimony tending to show corrupt motives and fabrication the fact that he has made the same statements shortly after the occurrence and before a motive to fabricate existed can be shown as tending to support his integrity and the accuracy of his recollection. *Baltimore City Pass. R. Co. v. Knee*, 83 Md. 77, 34 Atl. 252.

And the mere making of contradictory statements on cross-examination

was held in *Com. v. Tucker*, 189 Mass. 457, 7 L.R.A.(N.S.) 1056, 73 N. E. 127, not to justify the admission of evidence of prior statements to support the witness by corroborating the testimony given on direct examination, although the contradiction consisted of the admission of the making of prior statements in conflict with the testimony given, so that it may be contended that the testimony is a matter of recent contrivance.

Statements made by members of an association to a bank as to the passage of a resolution limiting the purchase of wool by the association to a certain amount for a designated year, by which the bank was induced to extend further credit, are inadmissible in corroboration of evidence that such resolutions had been passed, as their own interest was being served at the time by making such statements. *Silva v. Pickard*, 10 Utah, 78, 37 Pac. 86. But in *Graham v. McReynolds*, 90 Tenn, 673, 18 S. W. 272, it is held that where it is sought to impeach a witness by proving former contradictory statements, confirmatory statements previously made cannot be excluded on the ground that they are self-serving declarations.

In *Kelly-Goodfellow Shoe Co. v. Liberty Ins. Co.* 8 Tex. Civ. App. 227, 28 S. W. 1027, it is held, however, that in an action on a fire insurance policy a witness who has testified that the insured attempted to hire him to burn the insured property may be supported by evidence that he had made similar statements before, where his testimony is directly contradicted and evidence introduced that he had stated that detectives had been trying to get him to swear to the statements testified to by him.

A witness who on cross-examination states that he can think of no other reason for failing to testify on his first examination to a fact testified to by him when recalled, than that he forgot such fact and afterwards saw it in the minutes taken in a previous examination, may be supported by introducing in evidence the part of such minutes showing that he testified as stated by him. *Vilas Nat. Bank v. Newton*, 25 App. Div. 62, 48 N. Y. Supp. 1009.

In North Carolina it is held that a witness whose testimony is impeached may be corroborated by showing that he has previously made similar statements about the transaction. *Wallace v. Grizzard*, 114 N. C. 488, 19 S. E. 760. See also *Burnett v. Wilmington, N. & N. R. Co.* 120 N. C. 517, 26 S. E. 819 (and the witness himself is competent to testify to the consistent statements); *Rittenhouse v. Wilmington Street R. Co.* 120 N. C. 544, 26 S. E. 922 (written statement signed soon after occurrence of accident).

See *supra*, subdivision A, § 1, note 3, as to giving opportunity for explanation.

⁶ *Barkly v. Copeland*, 74 Cal. 1, 15 Pac. 307; *Lewy v. Fischl*, 65 Tex. 311; *McLain v. British & F. M. Ins. Co.* 16 Misc. 336, 38 N. Y. Supp. 77; *Glass v. Bennett*, 89 Tenn. 478, 14 S. W. 1085; *Baber v. Broadway &*

S. Ave. R. Co. 9 Misc. 20, 29 N. Y. Supp. 40; *Herrick v. Smith*, 13 Hun, 448; *French v. Merrill*, 6 N. H. 465.

⁶ Thus, where on cross-examination the defendants seek to impeach a mortgagee by showing that she paid no consideration for the mortgage, as she testified, her bank book is admissible in support of her statement as to the payment of such consideration. *Wright v. Towle*, 67 Mich. 255, 34 N. W. 578. And likewise in *Harbison v. Hall*, 124 N. C. 626, 32 S. E. 964, it was held that evidence in an action for goods sold and delivered, of the system of entries in the vendor's books when checks and money were received, and that an investigation of the books failed to show any evidence of payment, is admissible to corroborate their testimony that the account is unpaid, where the vendee testified that he has paid the entire amount.

But in *New Jersey Zinc & Iron Co. v. Lehigh Zinc & Iron Co.* 59 N. J. L. 189, 35 Atl. 915, it is held that books of science referred to by a witness on cross-examination as partly the basis of his opinion, are inadmissible to corroborate him. And that a witness cannot be corroborated on a hearing before the police commissioners of a city of charges preferred against a member of the police force, as to facts stated by her, by entries made in her own books,—especially where they are suspicious in themselves because no such books were kept until just previous to the transaction in question, see *Re Smith*, 85 Hun, 359, 32 N. Y. Supp. 943. And a memorandum made by the cashier of a bank as to the nature of a transaction by which a note was received by the bank, vouched for by no one but himself, is inadmissible to establish his credibility after the introduction of his contradictory testimony on a former trial in regard to such transaction. *State Nat. Bank v. Weed*, 39 App. Div. 602, 57 N. Y. Supp. 706.

Where a person on cross-examination has testified to the contents of a written order, the order may be properly introduced to sustain what he has said about its contents. *Wiggins v. Guthrie*, 101 N. C. 661, 7 S. E. 761. And where defendant testified in his own behalf that a part of the consideration of a note was \$2,400, the purchase price of the land in controversy, and his testimony was impeached, it was competent, for the purpose of corroborating him, to admit in evidence a deed made not many years before to a person under whom the plaintiff claimed, in which the consideration was stated to be \$2,400. *Hinton v. Pritchard*, 98 N. C. 355, 4 S. E. 462.

Testimony of a juror that a witness did not give certain testimony on the trial of the case is admissible to corroborate such witness, who has denied making those statements, on cross-examination, after other witnesses have testified that he did make them. *Bronson v. Leach*, 74 Mich. 713, 42 N. W. 174. And where plaintiff has testified that a third person stated that defendant set fire to a building, in the presence of the latter, who made no response, and this third person being sworn in defendant's behalf having denied making the statement, plaintiff, to support his own credit, may prove by another witness that he was

present and heard the statements by defendant's witness to which plaintiff testified. *Bray v. Latham*, 81 Ga. 640, 8 S. E. 64.

Evidence, however, that a company sued by a servant for injuries sustained in its employment was protected by insurance against loss from accidental injuries suffered by its workmen, offered as tending to prove that its general manager had no motive to testify untruthfully, is inadmissible when it is not shown that he knew of the fact of such insurance. *McQuillan v. Willimantic Electric Light Co.* 70 Conn. 715, 40 Atl. 928.

7 *Cook v. Hunt*, 24 Ill. 536. But a witness cannot be sustained as to credibility by allowing another witness to testify to his individual opinion on such question. *Savannah, F. & W. R. Co. v. Wideman*, 99 Ga. 245, 25 S. E. 400.

The testimony of witnesses living in the neighborhood of a witness whose character for truth and veracity is attempted to be impeached, that they never heard her character in that respect questioned, is competent, as well as the testimony of witnesses who state that they know her reputation and that it is good. *Stevens v. Blake*, 5 Kan. App. 124, 48 Pac. 888. And a sustaining witness is competent to testify to the character for truth and veracity of an impeached witness where he states that he has known such witness for several years, although he further states that he has never heard his character called in question or discussed. *Davis v. Franke*, 33 Gratt. 414. See also criminal cases of *State v. Nelson*, 58 Iowa, 208, 12 N. W. 253; *Hodgkins v. State*, 89 Ga. 761, 15 S. E. 695. But an impeached witness cannot be sustained by testimony of people who are not familiar with his reputation, that they never heard it assailed. *Magee v. People*, 139 Ill. 138, 28 N. E. 1077.

In *Artope v. Goodall*, 53 Ga. 318, where the trial court had refused to permit a sustaining witness to be asked whether he would believe the impeached witness under oath where he stated that his character had been exemplary in some things and not in others, but that he did not know the general opinion of the people about him, it is said that if the sustaining witness is not able to say that the general character of the impeached witness is not bad, he should at least be required to state that it is not such as to render him unworthy of credit on his oath, before he can give his own declaration that from this character he would believe him under oath.

In *First Nat. Bank v. Wolff*, 79 Cal. 69, 21 Pac. 551, 748, it is held that the striking out of the testimony of a sustaining witness who on cross-examination states that he had never heard the witness's reputation discussed, nor talked with anyone about it, is error where he has testified on direct examination that he knows his reputation for truth, honesty, and integrity, and that it is good, and that he would believe him under oath.

A sustaining witness is competent to testify that he would believe the

impeached witness under oath, where he states that he has been acquainted with him for ten years, is well acquainted in his neighborhood and has heard his character questioned, although he states that he does not know "from the speech of people" what his character for truth and veracity is. *Adams v. Greenwich Ins. Co.* 70 N. Y. 166. And a witness who testifies that he knows the impeached witness and the persons with whom he associates may be asked whether he would believe him under oath, although he further states that he has never heard his character for truth and veracity spoken of. *People v. Davis*, 21 Wend. 315. See also *National Bank v. Scriven*, 63 Hun, 375, 18 N. Y. Supp. 277.

A sustaining witness who testifies that he has known the impeached witness fifteen years and has never heard his reputation questioned except by persons connected with him in business, cannot be asked whether he would believe him on oath, judging from his knowledge of his general reputation for truth, as there is no sufficient foundation laid by asking his knowledge of his character. *Lyman v. Philadelphia*, 56 Pa. 488. And a witness called to support the credibility of another, attacked by proof of bad character for truth and veracity, is improperly permitted to testify that he would believe the impeached witness under oath, where he qualified only by testifying that he had lived in the same neighborhood for some years and had never heard his character for truth discussed or talked about except by one person. *Sloan v. Edwards*, 61 Md. 89. So, a sustaining witness who testifies that he lives 4 or 5 miles from the impeached witness, has known him for four or five years and has never heard a word said against him as a man of truth and veracity, but who says he cannot say that he knows his character for truth and veracity among his neighbors, cannot be permitted to testify whether he would believe such witness under oath. *Clay v. Robinson*, 7 W. Va. 348. Distinguishing the criminal case of *Lemons v. State*, 4 W. Va. 755, 6 Am. Rep. 293, on which it was held that a person well acquainted with a witness in the community in which he lives, whose character for truth and veracity has been impeached, is a competent witness to sustain the impeached witness and rebut the evidence of bad character, although he has never heard his character in that respect called in question or spoken of.

In *Morss v. Palmer*, 15 Pa. 51, it is said that sustaining evidence where the character of a witness for truth and veracity has been attacked is not to be confined to the neighborhood where he now lives, but may be permitted as to his character at a former place of residence some years before.

In *Barnwell v. Hannegan*, 105 Ga. 396, 31 S. E. 116, it is held that a witness called to support a witness attempted to be impeached by proof of general bad character can be questioned only as to the general good character of the impeached witness, and not as to his character as to truth and veracity, under Georgia Civ. Code, § 5293, providing that a witness may be impeached as to his general bad character, and may be sustained by similar proof of character.

X.—OFFERS OF EVIDENCE AND OBJECTIONS.

1. Necessity for an offer.
 - a. To save exception to the exclusion of oral evidence.
 - b. To make matter evidence.
2. Substance of an offer, generally.
3. Repeating the offer.
4. Offer in hearing of jury.
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9. Offer of document.
 - a. In general.
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10. Precluding offer by admitting fact.
11. Opening the door for the adversary.
 - a. By error, without objection.
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12. Opening the door for one's self.
13. Retracting.
14. The necessity for an objection.
15. The substance of objection.
16. Time for objecting.
17. Right to call for ground of objection.
18. Cross-examining as to competency.
19. Counter proof as to competency.
20. Arguing as to admissibility.
21. Repeating the objection.
22. Waiving objections.

[To sustain an exception to the rejection of evidence, counsel should make his offer in such plain and unequivocal terms as to leave no room for doubt as to what is intended. If he leaves the offer fairly open to two constructions, he cannot insist in a court of review on the construction most favorable to himself, unless it is justly inferable that he was so understood by the judge who rejected the evidence.]

1. Necessity for an offer.

a. *To save exception to the exclusion of oral evidence.*—One who desires to preserve the question of the admissibility of evidence which he seeks to introduce by questioning a witness must, upon objection to his question and the ruling of the court refusing to receive the testimony, offer the evidence which he desires to have admitted.¹

This rule does not prevail, however, when an offer would be useless and could merely avail for a reputation of the ruling upon objection to the question;² nor does it prevail when the question is asked under such conditions that the examiner may not be supposed to know what the witness would respond.³

1 Alabama—*Tolbert v. State*, 87 Ala. 27, 6 So. 284.

Arizona—*Tietjen v. Snead*, 3 Ariz. 195, 24 Pac. 324.

California—*Houghton v. Clarke*, 80 Cal. 417, 22 Pac. 288.

Georgia—*Windsor v. Del Bondio*, 99 Ga. 749, 27 S. E. 750.

Illinois—*Gaffield v. Scott*, 33 Ill. App. 317; *Hobbie v. Ogden*, 72 Ill. App. 242; *Chicago & E. R. Co. v. Binkopski*, 72 Ill. App. 22.

Indiana—*Mitchell v. Chambers*, 55 Ind. 289; *Kern v. Bridwell*, 119 Ind. 226, 21 N. E. 664; *Cincinnati, I. St. L. & C. R. Co. v. Lutes*, 112 Ind. 276, 11 N. E. 784, 14 N. E. 706.

Iowa—*Paddleford v. Cook*, 74 Iowa, 433, 38 N. W. 137; *Donnelly v. Burckett*, 75 Iowa, 613, 34 N. W. 330; *Jenks v. Knott's Mexican Silver Min. Co.* 58 Iowa, 549, 12 N. W. 588.

Kansas—*State v. Barker*, 43 Kan. 262, 23 Pac. 575.

Kentucky—*Todd v. Louisville & N. R. Co.* 10 Ky. L. Rep. 864, 11 S. W. 8; *Reid v. Lilly*, 15 Ky. L. Rep. 474, 23 S. W. 955.

Maryland—There seems to be a slight variation in the rule in Maryland, where it has been held that a judgment may be reversed for refusing to permit a witness to answer a question in itself proper and pertinent, although the object for which the evidence was offered was not stated, and although it does not appear from the record what would have been the answer of the witness. *Calvert County Comrs. v. Gantt*, 78 Md. 286, 28 Atl. 101, affirmed in 78 Md. 291, 29 Atl. 610.

Massachusetts—*Smethurst v. Proprietors of Independent Cong. Church*, 148 Mass. 261, 22 L.R.A. 695, 19 N. E. 387; *Geary v. Stevenson*, 169 Mass. 23, 47 N. E. 508.

Missouri—*Best v. Hoeffner*, 39 Mo. App. 682; *Jackson v. Hardin*, 83 Mo. 175.

Nebraska—*Masters v. Marsh*, 19 Neb. 458, 27 N. W. 438; *Yates v. Kinney*, 25 Neb. 120, 41 N. W. 128; *Burns v. Fairmont*, 28 Neb. 866, 45 N. W. 175; *Barton v. McKay*, 36 Neb. 632, 54 N. W. 968; *Davis v.*

- Getchell, 32 Neb. 792, 49 N. W. 776; *Morsch v. Besack*, 52 Neb. 502, 72 N. W. 953; *Farmers' & M. Ins. Co. v. Dobney*, 62 Neb. 213, 97 Am. St. Rep. 624, 86 N. W. 1070.
- Nevada—*State v. Lewis*, 20 Nev. 333, 22 Pac. 241.
- New York—*Re Bateman*, 145 N. Y. 623, 40 N. E. 10; *Daniels v. Patterson*, 3 N. Y. 47; *Feldman v. McGraw*, 1 App. Div. 574, 37 N. Y. Supp. 434; *Millard v. Holland Trust Co.* 90 Hun, 607, 35 N. Y. Supp. 948.
- North Carolina—*Overman v. Coble*, 35 N. C. (13 Ired. L.) 1.
- North Dakota—*Brundage v. Mellon*, 5 N. D. 72, 63 N. W. 209; *Halley v. Folsom*, 1 N. D. 325, 48 N. W. 219.
- Ohio—*Meeker v. Browning*, 17 Ohio C. C. 548, 9 Ohio C. D. 108. But see *Zieverink v. Kemper*, 50 Ohio St. 208, 34 N. E. 250.
- Oregon—*Kelley v. Highfield*, 15 Or. 277, 14 Pac. 744, *Tucker v. Constable*, 16 Or. 407, 19 Pac. 13.
- South Carolina—*Taylor v. Dominick*, 36 S. C. 368, 15 S. E. 591.
- South Dakota—*Tootle v. Petrie*, 8 S. D. 19, 65 N. W. 43; *Hanson v. Red Rock Twp.* 7 S. D. 38, 63 N. W. 156.
- Texas—*Cunningham v. Austin & N. W. R. Co.* 88 Tex. 534, 31 S. W. 629.
- Vermont—*Carpenter v. Willey*, 65 Vt. 168, 26 Atl. 488.
- Virginia—*Martz v. Martz*, 25 Gratt. 361, 367.
- Wisconsin—*Dreher v. Fitchburg*, 22 Wis. 675, 90 Am. Dec. 91; *John R. Davis Lumber Co. v. First Nat. Bank*, 90 Wis. 464, 63 N. W. 1018.
- United States—*Ladd v. Missouri Coal & Min. Co.* 14 C. C. A. 246, 32 U. S. App. 93, 66 Fed. 880.
- It is sometimes said, however, that the offer must be made at such time that the court will have the benefit of it in knowing what testimony is sought to be elicited before ruling on the objections to the questions, and if not made until after the objection has been sustained an exception taken would come too late. *Chicago & I. Coal R. Co. v. DeBaum*, 2 Ind. App. 281, 28 N. E. 447; *Young v. Otto*, 57 Minn. 307, 59 N. W. 199. See *Watkins v. Edgar*, 77 Mo. App. 148; where the court refused to permit counsel to state the substance of the evidence which he expected to adduce in answer to a question objected to by opposing counsel.
- However, if the question concern the competency of the witness, and not the substance of his testimony, it is unnecessary that there should be a statement of what it is proposed to prove by him, when this is unnecessary to enable the trial court to pass upon the question of his competency. *State ex rel. Steigerwald v. Thomas*, 111 Ind. 515, 13 N. E. 35; *Sullivan v. Sullivan*, 6 Ind. App. 65, 32 N. E. 1132.
- ² *Brundage v. Mellon*, 5 N. D. 72, 63 N. W. 209; *Starr v. Hunt*, 25 Ind. 313; *Feldman v. McGraw*, 1 App. Div. 574, 37 N. Y. Supp. 434.
- ³ *Cunningham v. Austin & N. W. R. Co.* 88 Tex. 534, 31 S. W. 629; *Comstock v. Grindle*, 121 Ind. 459, 23 N. E. 494.

b. To make matter evidence.—In addition to the question of the necessity of an order in order to present an error of the trial court in excluding oral evidence, for consideration by the appellate tribunal, is the problem concerning the necessity of a formal offer of specific evidence for the purpose of entitling it to consideration by the jury.

Although a formal offer of documentary evidence is undoubtedly preferable it is by no means a necessity, for if matter which is before the court is treated by the parties as evidence it may be so considered, although not formally offered.¹

¹ O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269; McChesney v. Chicago, 152 Ill. 543, 38 N. E. 767; Cothran v. Ellis, 125 Ill. 496, 16 N. E. 646; Charles v. Patch, 87 Mo. 450; Zieverink v. Kemper, 50 Ohio St. 208, 34 N. E. 250; Bevington v. State, 2 Ohio St. 161. In Wright v. Roseberry, 81 Cal. 87, 22 Pac. 336, where the court ordered that the witness who had produced documents leave them in the custody of the court until the conclusion of the case, thereupon to be returned to the witness at his office, and the parties examined and cross-examined the witness concerning the documents, as both the court and counsel understood that the documents were in evidence it was said they should be so considered.

A like rule applies in election controversies, to boxes and ballots contained therein. Convery v. Conger, 53 N. J. L. 468, 22 Atl. 43, 459; Re White's Contested Election, 4 Pa. Dist. R. 363.

But the mere marking of a document as an exhibit by the stenographer does not make the document evidence. Casteel v. Millison, 41 Ill. App. 61.

Documents or other things marked for identification do not thereby become evidence, but must be formally introduced. Byerley v. Sun Co. 181 Fed. 138.

2. Substance of an offer, generally.

The offer of testimony should be clear ¹ and without vagueness or uncertainty, should separate matter which it is proper for the jury to consider from that which it is improper for them to regard,² state only the former so fully that its propriety is apparent,³ and specifically point out ⁴ the evidence sought to be introduced. The offer must be confined to a statement of the answer which it is expected the same witness will make to the question objected to,⁵ must correspond to the question,⁶ and, although it may be explained, may not be enlarged by a statement of its

purpose.⁷ If an offer includes both competent and incompetent evidence, all may be excluded,⁸ or the part that is competent may be admitted.⁹

¹ *Pendleton v. Smissaert*, 1 Colo. App. 508, 29 Pac. 521; *Lincoln Nat. Bank v. Davis*, 32 Neb. 1, 48 N. W. 892.

An offer "to prove that he was told previously to his removal that they would take the property and that he might leave it" by a lessee, was held "too vague" in an action to recover rent after the abandonment of the leased premises. *Reeves v. McComeskey*, 168 Pa. 571, 32 Atl. 96.

² *Herndon v. Black*, 97 Ga. 327, 22 S. E. 924; *Shewalter v. Bergman*, 123 Ind. 155, 23 N. E. 686; *Mueller v. Jackson*, 39 Minn. 431, 40 N. W. 565; *Wamsley v. Darragh*, 14 Misc. 566, 35 N. Y. Supp. 1075; *Mundis v. Emig*, 171 Pa. 417, 32 Atl. 1135; *First Nat. Bank v. North*, 2 S. D. 480, 51 N. W. 96. In *Cincinnati, I. St. L. & C. R. Co. v. Roesch*, 126 Ind. 445, 26 N. E. 171, an offer to prove both competent and incompetent evidence blended together and offered as a whole was insufficient, and the objection was properly sustained.

And so, in a suit brought by the assignees of a bank to collect an unpaid subscription to the capital stock, an offer to prove an assessment or order made by a judge at chambers during vacation authorizing the assignees to collect the unpaid subscription, accompanied by an offer to prove a petition and citation which were not pertinent to the issue, was held properly to have been rejected in *Citizens & M. Sav. Bank & T. Co. v. Gillespie*, 115 Pa. 564, 9 Atl. 73.

Likewise in *Reynolds v. Franklin*, 47 Minn. 145, 49 N. W. 648, wherein the value of land was in question, an offer to prove what defendant had authorized a certain real estate broker to sell the land for, that the broker advertised and offered it for sale at that price without finding a purchaser, and that one person in particular to whom it was offered at that price examined and refused it, was properly rejected, as the fact that a certain person had refused it was inadmissible.

So, in *Clark v. Ryan*, 95 Ala. 406, 11 So. 22, in a suit to recover for breach of a contract of hire, because of the discharge of plaintiff, an offer to prove that he was given to the excessive use of intoxicating liquors and had been indicted for drunkenness was properly rejected, as evidence that he had been indicted for drunkenness was not legal evidence.

The same rule applies to offers of documentary evidence, and an offer of documentary evidence, portions of which are improper, should point out those portions which are proper, offering only the latter. *Hidy v. Murray*, 101 Iowa, 65, 69 N. W. 1138; *Hamberg v. St. Paul F. & M. Ins. Co.* 68 Minn. 335, 71 N. W. 388; *McGrew v. Missouri P. R. Co.* 109 Mo. 582, 19 S. W. 53. See also *infra*, § 9.

³ *Russell v. Stoner*, 18 Ind. App. 543, 47 N. E. 645, 48 N. E. 650; *Conlan v. Grace*, 36 Minn. 276, 30 N. W. 880; *Best v. Hoeffner*, 39 Mo. App. 682; *Pryor v. Morgan*, 170 Pa. 568, 33 Atl. 98; *Ladd v. Missouri Coal & Min. Co.* 14 C. C. A. 246, 32 U. S. App. 93, 66 Fed. 880; *Jackson v. Kansas City Pkg. Co.* 42 Minn. 382, 44 N. W. 126; *Middleton v. Griffith*, 57 N. J. L. 442, 31 Atl. 405.

In harmony with this rule it is held that the offer must be complete in itself and must not omit facts without which the facts offered are irrelevant. *Chamberlin v. Vance*, 51 Cal. 75.

In *Wolford v. Farnham*, 47 Minn. 95, 49 N. W. 528, the court declared the rule to be that an offer of evidence must be so full that the court can see from it, in connection with the evidence already in, that something material to the issue will be disclosed by the evidence offered.

⁴ *Warrior Coal & C. Co. v. Mabel Min. Co.* 112 Ala. 624, 20 So. 918; *Stevens v. San Francisco & N. P. R. Co.* 100 Cal. 554, 35 Pac. 165.

The evidence must be admissible for the specific purpose for which it is offered. *Maxwell Land Grant Co. v. Dawson*, 7 N. M. 133, 34 Pac. 191.

A general offer that in certain proceedings the plaintiff swore to statements which were false, without any specification of any particular statement that was alleged to be false, is not sufficiently specific. *Cole v. High*, 173 Pa. 590, 34 Atl. 292.

In *Taylor v. Calvert*, 138 Ind. 67, 37 N. E. 531, it was held that the offer must be specific and that a general offer would not be sufficient; that an offer to prove the amount of rent received, the amount paid for improvements, and what the annual rental value after deducting the cost of improvements was, as it did not state specifically the amount of the rent or the cost or value of the improvements proposed to be proved, was too general.

In consonance with the rule it was held in *Murphy v. Jones*, 4 Sadler (Pa.) 52, 6 Atl. 726, that an offer to show payment should set forth the facts specifically as to the mode or manner in which the payment was made or under what particular state of facts the defendant is not indebted.

In *Davis v. Harper*, 17 Tex. Civ. App. 88, 42 S. W. 788, which was a suit to recover an office, an offer in evidence of the numbers of the tickets and poll lists for the identification of the voters was properly rejected, for, although illegal votes might have been cast as alleged, they should have been named in the offer and the evidence confined to them.

In *Alexander v. Thompson*, 42 Minn. 498, 44 N. W. 534, it was held that an offer in general terms to prove the allegation of the answer should properly have specified the particular facts proposed to be proved.

⁵ *Harter v. Eltzroth*, 111 Ind. 159, 12 N. E. 129.

⁶ *Masons' Union L. Ins. Asso. v. Brockman*, 20 Ind. App. 206, 50 N. E. 493; *Keens v. Robertson*, 46 Neb. 837, 65 N. W. 897.

the offer cannot supply omissions in the question. *Cutting v. Baker*, 43 Neb. 470, 61 N. W. 726.

⁷ *Mentel v. Hippely*, 165 Pa. 558, 30 Atl. 1021.

⁸ *Wallach v. Macfarland*, 31 App. D. C. 130.

⁹ *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405; *Southern P. Co. v. Schoer*, 57 L.R.A. 707, 52 C. C. A. 268, 114 Fed. 466.

3. Repeating the offer.

When an offer of evidence has been rejected, if subsequently the reasons for its rejection are removed,¹ or if it is desired to introduce the evidence for another purpose,² the offer should be repeated, but if its repetition could only result in the repetition or reversal of the ruling upon the first offer,³ it need not be renewed.

¹ *Jones v. St. Louis, I. M. & S. R. Co.* 53 Ark. 27, 13 S. W. 416; *Baker v. McKinney*, 87 Mo. App. 361; *Saucer v. New Hampshire Spinning Mills*, 72 N. H. 292, 56 Atl. 545; *Agresta v. Hart*, 34 Misc. 784, 60 N. Y. Supp. 1031.

² *Patterson v. Chicago, M. & St. P. R. Co.* 70 Iowa, 593, 33 N. W. 228.

³ Having once obtained a ruling and saved an exception counsel is not bound to press the question further. *Mackin v. Blythe*, 35 Ill. App. 216.

Thus, it was held in *Johnson v. Russell*, 144 Mass. 409, 11 N. E. 670, where evidence was offered for a purpose for which it was competent, and was excluded for reasons that applied equally to an offer for another purpose, that plaintiff was not bound to again tender the evidence.

When the court reserves its ruling upon the admissibility of evidence, a subsequent offer should be made or the attention of the court in some way called to the matter, and unless this is done the ruling may not be treated as an exclusion of the evidence. *Dudley v. Poland Paper Co.* 90 Me. 257, 38 Atl. 157.

4. Offer in hearing of jury.

If offered evidence be oral the offer is necessarily oral, and may be made notwithstanding the presence and hearing of the jury.¹

If it be documentary the judge may require that the document be submitted to him to determine its admissibility before

allowing it to be read in the presence of the jury, against objection.²

¹ Carroll County Comrs. v. O'Conner, 137 Ind. 622, 35 N. E. 1006; Sievers v. Peters Box & Lumber Co. 151 Ind. 642, 50 N. E. 877, 52 N. E. 399; Bagley v. Mason, 69 Vt. 175, 37 Atl. 287.

But reiterated offers in their hearing, after exclusion, should not be tolerated. Scripps v. Reilly, 38 Mich. 10, 24 Am. Rep. 575; Turner v. Muskegon Mach. & Foundry Co. 97 Mich. 166, 56 N. W. 356.

The court may require the offer to be reduced to writing, or made in such manner that it will not be heard by the jury. Omaha Coal, Coke, & Lime Co. v. Fay, 37 Neb. 68, 55 N. W. 211; Maxwell v. Habel, 92 Ill. App. 510.

It is within the discretion of the court to permit the jury to be withdrawn during the discussion of an offer of evidence. Henrietta Coal Co. v. Campbell, 211 Ill. 216, 71 N. E. 863; Leicher v. Keeney, 98 Mo. App. 394, 72 S. W. 145; Hedlun v. Holy Terror Min. Co. 16 S. D. 261, 92 N. W. 31.

It should be borne in mind, as is stated in § 1, supra, that there must be an offer of proof after objection to a question; and the presence of the jury does not affect counsel's right or duty to make that offer, although the court may require the offer, as stated in the text, to be made in such manner as not to reach the jury. Carroll County v. O'Conner, 137 Ind. 622, 35 N. E. 1006.

² Gould v. Weed, 12 Wend. 12, 24; Scripps v. Reilly, 38 Mich. 10, 24 Am. Rep. 575; Keedy v. Newcomer, 1 Md. 241.

The judge should not permit reading to him as an indirect way of letting the jury hear. Philpot v. Taylor, 75 Ill. 309, 312. Reading in the hearing of the jury was held not error in Brill v. Flagler, 23 Wend. 354.

A judgment will be reversed because of the persistent efforts of the counsel to place the contents of a letter before the jury after it has been excluded, unless it can be shown that the letter is legally admissible. Rudd v. Rounds, 64 Vt. 432, 25 Atl. 438.

5. Offer without putting question.

An offer of oral evidence may be refused if the witness is not present in court¹ and circumstances indicate that the offer is not made in good faith.² The court may not be required to act upon mere offers³ when the witnesses are not questioned.

¹ Lewis v. Newton, 93 Wis. 405, 67 N. W. 724; Robinson v. State, 1 Lea, 673; Eschbach v. Hurtt, 47 Md. 61, 66. See also Lisonbee v. Monroe Irrigation Co. 18 Utah, 343, 54 Pac. 1009, holding that offers are

properly rejected when counsel refused to produce the witness upon the court's requesting him to do so, that it might rule on the questions and answers.

If a party offers evidence the witness must either be present, and the party must call him, or offer to call him, or show that the evidence is offered in good faith, with the means of doing or trying to do what is desired. *Schilling v. Curran*, 30 Mont. 370, 76 Pac. 998.

In *Biddick v. Kobler*, 110 Cal. 191, 42 Pac. 578, where there was a general offer to prove without producing the witnesses, it was said that, unless an objection be made upon the ground that the offer is an improper method, it may be assumed that the method used was by consent of parties.

Although the appellate court will not, as a general rule, review exceptions taken to mere offers, nevertheless, if it appears that the offers were made in absolute good faith, for the purpose of furthering the business of the court, with its sanction and without objection by opposing counsel, the rule will be departed from. *Gerard v. Cowperthwait*, 2 Misc. 371, 21 N. Y. Supp. 1092.

² *Scotland County v. Hill*, 112 U. S. 183, 28 L. ed. 692, 5 Sup. Ct. Rep. 93.

³ *Darnell v. Sallee*, 7 Ind. App. 581, 34 N. E. 1020; *Ralston v. Moore*, 105 Ind. 243, 4 N. E. 673; *Smith v. Gorham*, 119 Ind. 436, 21 N. E. 1096; *Stevens v. Newman*, 68 Ill. App. 549; *Higham v. Vanosdol*, 101 Ind. 160; *Rose v. Doe*, 4 Cal. App. 680, 89 Pac. 135; *Erickson v. Schmill*, 62 Neb. 368, 87 N. W. 166.

6. Calling for disclosure.

a. Before swearing witness.—The court may, as a condition of allowing a witness to be sworn or examined, require counsel, if able to do so, to state the substance of what he proposes to prove by him.¹

If no request or disclosure be made, it is error to refuse to allow a witness to be sworn, if he is competent to testify to anything, although he may be incompetent as to other things.²

¹ *Roy v. Targee*, 7 Wend. 359.

But the court should always listen to reasons offered for not making such disclosure. *Roy v. Targee*, 7 Wend. 359.

² *Beal v. Finch*, 11 N. Y. 128, 135; *Brown v. Richardson*, 20 N. Y. 472.

It was expressly held in *Haussknecht v. Claypool*, 1 Black. 431, 17 L. ed. 172, that it is not essential to state that the witness is a material witness, though to do so is more in conformity with the usual practice. See 1 Black. 435, 17 L. ed. 173, where judgment was reversed for error in exclusion. *Contra*, *Stewart v. Kirk*, 69 Ill. 509.

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b. Before putting question.—If a question calls for evidence which may or may not be relevant or material, the adverse party may require that counsel state the substance of what he proposes to prove,¹ and if he refuse to do so the question may be excluded.

But this rule does not apply to strict cross-examination.²

And counsel should always be given an opportunity to state what he expects to prove by a particular question, when he desires to do so.³

¹ Tietjen v. Snead, 3 Ariz. 195, 24 Pac. 324; Baldwin v. Central Sav. Bank, 17 Colo. App. 7, 67 Pac. 179; Hawkinsville Bank & T. Co. v. Walker, 99 Ga. 242, 25 S. E. 205; Stewart v. Kirk, 69 Ill. 509; Bake v. Smiley, 84 Ind. 212; Kuhn v. Gustafson, 73 Iowa, 633, 35 N. W. 660; Palatine Ins. Co. v. Weiss, 109 Ky. 464, 59 S. W. 509; Jackson v. Hardin, 83 Mo. 175; First Baptist Church v. Brooklyn F. Ins. Co. 23 How. Pr. 448, 450, affirmed on merits in 28 N. Y. 153; Fairchild v. Case, 24 Wend. 381; Nightingale v. Eiseman, 121 N. Y. 288, 24 N. E. 475, affirming 50 Hun, 189, 2 N. Y. Supp. 779; Murry v. Hennessey, 48 Neb. 608, 67 N. W. 470; Halley v. Folsom, 1 N. D. 325, 48 N. W. 219; Morgan v. Browne, 71 Pa. 130; Carpenter v. Willey, 65 Vt. 168, 26 Atl. 488; Plano Mfg. Co. v. Frawley, 68 Wis. 577, 32 N. W. 768; Hoffman v. Joachim, 86 Wis. 188, 56 N. W. 636; United States v. Gibert, 2 Sumn. 19, Fed. Cas. No. 15,204.

² O'Donnell v. Segar, 25 Mich. 367, 372; Martin v. Elden, 32 Ohio St. 282; Batten v. State, 80 Ind. 394; Stanton County v. Canfield, 10 Neb. 389, 6 N. W. 466. Contra, United States v. Gibert, 2 Sumn. 19, Fed. Cas. No. 15,204 (Story, J.).

³ Maxwell v. Habee, 92 Ill. App. 510; Millington v. O'Dell, 35 Ind. App. 225, 73 N. E. 949; Ruschenberg v. Southern Electric R. Co. 161 Mo. 70, 61 S. W. 626; Imboden v. St. Louis Trust Co. 111 Mo. App. 220; 86 S. W. 263; Mullin v. Flanders, 73 Vt. 95, 50 Atl. 813; Hathaway v. Goslant, 77 Vt. 199, 59 Atl. 835.

7. Statement of purpose of evidence.

Where evidence offered is admissible under the general issue, the party offering it is not required to avow in advance the special purpose for which it is offered.¹ But where the evidence is not admissible generally, or is apparently irrelevant, the purpose for which it is offered should be disclosed.² And where evidence is offered for two specified purposes, for either of which it is inadmissible, it is not error to reject it.³

¹ Byers v. Horner, 47 Md. 23; Hall v. Patterson, 51 Pa. 289.

- ² *Farley v. Bay Shell Road Co.* 125 Ala. 184, 27 So. 770; *Howard v. Howard*, 134 Cal. 346, 66 Pac. 367; *Davis v. Gibson*, 70 Ill. App. 273; *Tuttle v. Wood*, 115 Iowa, 507, 88 N. W. 1056; *Haney-Campbell Co. v. Preston Creamery Asso.* 119 Iowa, 188, 93 N. W. 297; *Pasquier's Succession*, 12 La. Ann. 758; *Atherton v. Atkins*, 139 Mass. 61, 29 N. E. 223; *Chase v. Ainsworth*, 135 Mich. 119, 97 N. W. 404; *Young v. Otto*, 57 Minn. 307, 59 N. W. 199; *Summers v. Metropolitan L. Ins. Co.* 90 Mo. App. 691; *Hutchins v. Missouri P. R. Co.* 97 Mo. App. 548, 71 S. W. 473; *Enright v. Franklin Pub. Co.* 24 Misc. 180, 52 N. Y. Supp. 704; *Jaeckel v. David*, 34 Misc. 791, 69 N. Y. Supp. 998; *Hall v. Patterson*, 51 Pa. 289; *Burns v. Pennsylvania R. Co.* 213 Pa. 280, 62 Atl. 845; *Jeannette Bottle Works v. Schall*, 13 Pa. Super Ct. 96; *Wilson v. Noonan*, 35 Wis. 321.
- ³ *Hicks v. Lawson*, 39 Ala. 90.

8. Showing relevancy or materiality of evidence; promise to connect.

The party offering evidence must show its relevancy and materiality, if the evidence does not of itself show that it is relevant and material.¹

And he who offers evidence, the competency of which depends upon other evidence being given to establish it, must make it appear that it will be competent by stating what he expects to prove, and if he does not do so when objection is made, it is not error to exclude the evidence.²

- ¹ *McGarritty v. Byington*, 12 Cal. 426, 2 Mor. Min. Rep. 311; *Baum v. Roper*, 132 Cal. 42, 64 Pac. 128; *Baldwin v. Central Sav. Bank*, 17 Colo. App. 7, 67 Pac. 179; *Dunham v. Boyd*, 64 Conn. 397, 30 Atl. 62; *Greer v. Caldwell*, 14 Ga. 207, 58 Am. Dec. 553; *Sweeney v. Sweeney*, 121 Ga. 293, 48 N. E. 984; *Grover & B. Sewing Mach. Co. v. Newby*, 58 Ind. 570; *Marshall v. Marshall*, 71 Kan. 313, 80 Pac. 629; *Powers v. Boston & M. R. Co.* 175 Mass. 466, 56 N. E. 710; *Knatvold v. Wilkinson*, 83 Minn. 265, 86 N. W. 99; *Loker v. Southwestern Missouri Electric R. Co.* 94 Mo. App. 481, 68 S. W. 373; *Webster v. Sherman*, 33 Mont. 448, 84 Pac. 878; *Palatine Ins. Co. v. Sante Fe Mercantile Co.* 13 N. M. 241, 82 Pac. 363; *Erdman v. Upham*, 70 App. Div. 315, 75 N. Y. Supp. 241; *Norman v. Hopper*, 38 Wash. 415, 80 Pac. 551.

- ² *Abney v. Kingsland*, 10 Ala. 355, 44 Am. Dec. 491, and cases cited; *Boland v. Louisville & N. R. Co.* 106 Ala. 641, 18 So. 99; *Holman v. Boston Land & Secur. Co.* 8 Colo. App. 282, 45 Pac. 519; *Cheatham v. Wilbur*, 1 Dak. 335, 46 N. W. 580; *Wicks v. Smith*, 18 Kan. 508; *Perkins v. Poughkeepsie*, 83 Hun, 76, 31 N. Y. Supp. 368; *McAllister v. Barnes*, 35 Mo. App. 668; *Crate v. Decorah*, 61 Hun, 620, 39 N. Y. S.

R. 117, 15 N. Y. Supp. 607; *Carnes v. Platt*, 15 Abb. Pr. N. S. 337, 4 Jones & S. 361, affirmed in 59 N. Y. 405; *Van Buren v. Wells*, 19 Wend. 203; *Piper v. White*, 56 Pa. 90; *Hall v. Patterson*, 51 Pa. 289; *Bilberry v. Mobley*, 21 Ala. 277.

Evidence may be received on condition that defects shall be afterwards supplied, and for failure to supply such defects the evidence may be stricken out. *Ellis v. Thayer*, 183 Mass. 309, 67 N. E. 325; *Alexander v. Grover*, 190 Mass. 462, 77 N. E. 487.

But where evidence has been received provisionally on a promise to supply defects, the court cannot afterwards exclude it on its own motion. *Hix v. Gulley*, 124 Ga. 547, 52 S. E. 890.

9. Offer of document.

a. In general.—Under a general offer of a document and its reception in evidence without objection or qualification, the whole document is deemed in evidence for all purposes,¹ and including indorsements thereon, such as may be deemed connected with the contents.²

It is unnecessary that the whole of a document shall be introduced in evidence when it is desired to use portions of it, unless the parts are so interdependent that the whole document must necessarily be considered in the consideration of the part.³ But if a part of a document be read in evidence by one party, it is the privilege of the adverse party to read the remainder of the same document.⁴

¹ *Miles v. Loomis*, 75 N. Y. 288, 31 Am. Rep. 470, affirming 10 Hun, 372.

Hence the party who so introduced it cannot impeach any part of it. *Maclin v. New England Mut. L. Ins. Co.* 33 La. Ann. 801; *Hewett v. Buck*, 17 Me. 147, 35 Am. Dec. 243.

If it is desired to withhold a part of a document it is necessary to point out definitely the part offered, that is, the pages, paragraphs, sentences, or words. *Jones v. Grantham*, 80 Ga. 472, 5 S. E. 764.

² *Bell v. Keefe*, 12 La. Ann. 340.

³ *Travis v. Continental Ins. Co.* 32 Mo. App. 198; *Pacific Teleg. Co. v. Underwood*, 37 Nev. 315, 55 N. W. 1057; *Gossler v. Wood*, 120 N. C. 69, 27 S. E. 33; *Anderson v. Anderson*, 13 Tex. Civ. App. 527, 36 S. W. 816.

But see *Ames v. Manhattan L. Ins. Co.* 31 App. Div. 180, 52 N. Y. Supp. 759, where, in an action against an insurance company, a portion of the paper which was called the application had been torn from the residue, it was held that the mutilated paper was properly rejected; and *First Nat. Bank v. Taliaferro*, 72 Md. 164, 19 Atl. 364, where it

is said that an offer to prove only the printed part of a contract implies that there is some other part in writing, and is an offer to prove part of an entire contract which, if admissible at all, is only admissible in its entirety.

- ¹ *Imperial Hotel Co. v. H. B. Claflin Co.* 55 Ill. App. 337; *Re Chamberlain*, 64 Hun, 637, 19 N. Y. Supp. 1010; *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772; *Noble v. Fagnant*, 162 Mass. 275, 38 N. E. 507; *Glover v. Stevenson*, 126 Ind. 532, 26 N. E. 486; *Haddaway v. Post*, 35 Mo. App. 278; *Re Chamberlain*, 140 N. Y. 390, 35 N. E. 602.

Defendant should be permitted to read the whole of depositions of his witnesses, which were used by plaintiff in the cross-examination of those witnesses, for the purpose of calling their attention to statements made by them contained therein, although no part of the depositions was read to the jury by plaintiff's counsel. *Wilkerson v. Eilers*, 114 Mo. 245, 21 S. W. 514.

b. Of part of series or complex document.—Under an offer of a particular document forming an integral part of a complex document, produced entire, and its reception without objection or qualification,—such as an offer and reception of a notary's protest without mentioning a certificate of notice attached thereto, or an offer and reception of a pleading contained in a judgment roll, produced without mentioning the judgment, etc.,—the particular document offered is alone deemed in evidence for the party offering it,¹ subject, however, to the right of the adverse party to read the other connected papers (but so far only as they qualify the paper offered),² if their genuineness appears, or if it was assumed by the offer.

But it is unnecessary that the residue of a set of documents or of a complex document be read in evidence because it is desired to have a portion of the set or document admitted when the whole is not necessary to a correct understanding of the part.³

- ¹ *Marchand v. Coffee*, 23 La. Ann. 442. See *Laurent v. Lanning*, 32 Or. 11, 51 Pac. 80; where it was held that the offer of a mortgage carried the notary's certificate into evidence.

- ² *Abbott v. Pearson*, 130 Mass. 191.

If one party introduces letters constituting part of a correspondence between himself and the other party, the adverse party is entitled to introduce the remainder of the correspondence (*Morgan v. Farrel*, 58 Conn. 413, 20 Atl. 614; *Lindheim v. Days*, 11 Misc. 16, 31 N. Y. Supp. 870; *Lewis v. Newcombe*, 1 App. Div. 59, 37 N. Y. Supp. 8), although the correspondence is incompetent (*Werner v. Kasten*, — Tex. Civ.

App. —, 26 S. W. 322), even if the letter first introduced in evidence be subsequent to that sought to be introduced by the adverse party when the letter first introduced in evidence contains references to the one first written. *Darling v. Klock*, 33 App. Div. 270, 53 N. Y. Supp. 593.

For other illustrations of the rule stated in the text, see *Moniotte v. Lieux*, 41 La. Ann. 528, 6 So. 817; *Silverman v. Empire L. Ins. Co.* 24 Misc. 399, 53 N. Y. Supp. 407; *Wallace Bros. v. Douglas*, 114 N. C. 450, 19 S. E. 668.

But when the documents are not necessarily connected, as where proceedings set forth in different records are not part of the same transaction (*Threadgill v. Anson County*, 116 N. C. 616, 21 S. E. 425), the other parts of the series of documents, if otherwise immaterial, may not properly be admitted. *Ponder v. Cheeves*, 104 Ala. 307, 16 So. 145.

³ *Tustin Fruit Asso. v. Earl Fruit Co.* — Cal. —, 53 Pac. 693; *Dougherty v. Metropolitan L. Ins. Co.* 3 App. Div. 313, 38 N. Y. Supp. 258; *West Chester & W. Pl. Road Co. v. Chester County*, 182 Pa. 40, 37 Atl. 905; *Powers v. Standard Oil Co.* 53 S. C. 358, 31 S. E. 276; *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. 415; *Guinn v. Bowers*, 44 W. Va. 507, 29 S. E. 1027; *Priest v. Glenn*, 2 C. C. A. 305, 4 U. S. App. 478. 51 Fed. 400; *O'Hara v. Mobile & O. R. Co.* 22 C. C. A. 512, 40 U. S. App. 471, 76 Fed. 718.

If a party has introduced part of a correspondence by one of the defendants, he may, on cross-examination, properly identify the balance and offer it in evidence in connection with the cross-examination. *Thayer v. Hoffman*, 53 Kan. 723, 37 Pac. 125.

If another part is necessary to show the relation of the admitted part to other portions of the evidence, the offer should include it. *Gardner v. Meeker*, 169 Ill. 40, 48 N. E. 307.

In some of the states this matter is perhaps regulated by statute. See *Fisher v. Fidelity Mut. Life Asso.* 188 Pa. 1, 41 Atl. 467.

10. Precluding offer by admitting fact.

Upon a conclusive admission of fact being made by counsel, the court may in its discretion exclude an offer of further evidence of the fact admitted,¹ unless the offer goes beyond the admission.²

But this does not extend to shutting off strict cross-examination.³

¹ *Dorr v. Tremont Nat. Bank*, 128 Mass. 349; *Bannister v. Alderman*, 111 Mass. 261 (holding it no error to rule either way); *Ainsworth v. Hutchins*, 52 Vt. 554; *Butterworth v. Pecare*, 8 Bosw. 671; *Donnelly v. Burkett*, 75 Iowa. 613, 34 N. W. 330; *Boseli v. Doran*, 62 Conn. 311,

25 Atl. 242; *Blackburn v. St. Paul F. & M. Ins. Co.* 117 N. C. 531, 23 S. E. 456; *Whiteside v. Lowney*, 171 Mass. 431, 50 N. E. 931.

The reason is the court is not bound to spend time in taking evidence and ruling on a point which is not controverted. But the power to refuse should be sparingly used. It is not error to admit the evidence. *John Hancock Mut. L. Ins. Co. v. Moore*, 34 Mich. 41.

"It would be absurd to hold that any party, by his bald admissions on a trial, could shut out legal evidence." *Kimball & A. Mfg. Co. v. Vroman*, 35 Mich. 310, 24 Am. Rep. 558.

² As, for instance, where the offer is to show circumstances, manner, etc., as being relevant in aggravation. See also *Priest v. Groton*, 103 Mass. 540.

That a party is not bound to take a disclaimer of damages as reason for excluding evidence, see *Brown v. Perkins*, 1 Allen, 89, 96.

³ *Berger v. Clippert*, 53 Mich. 468, 19 N. W. 149.

11. Opening the door for the adversary.

a. By error, without objection.—Where irrelevant evidence has been received without objection it is not error to allow the adverse party to give evidence to meet it.¹ So, if one party introduced evidence upon a point immaterial as matter of law, but not objected to as immaterial, the other side may be allowed to rebut it.²

Yet, on the other hand, it is not error to refuse to receive equally irrelevant evidence to meet it,³ except where the evidence received gave a right to contradict for purposes of impeachment, or was calculated to make an impression on the jury which instructions from the court could not efface,⁴ and which the offered evidence tends to remove.

¹ *Blossom v. Barrett*, 37 N. Y. 434, 438, 97 Am. Dec. 747; *Havis v. Taylor*, 13 Ala. 324; *Hale v. Philbrick*, 47 Iowa, 217; *Mobile & B. R. Co. v. Ladd*, 92 Ala. 287, 9 So. 169; *Cleveland, C. C. & St. L. R. Co. v. Highsmith*, 59 Ill. App. 651; *Hobbs v. Tipton County Comrs.* 116 Ind. 376, 19 N. E. 186; *Swofford Bros. Dry-Goods Co. v. Zeigler*, 2 Kan. App. 296, 42 Pac. 592; *Arbuckle v. Smith*, 74 Mich. 568, 42 N. W. 124; *Ellis v. Simpkins*, 81 Mich. 1, 45 N. W. 646; *Wilson v. Gibson*, 63 Mo. App. 656; *Bethany Sav. Bank v. Cushman*, 66 Mo. App. 102; *Drucker v. Metropolitan Elev. R. Co.* 73 Hun, 102, 25 N. Y. Supp. 922; *Hankinson v. Charlotte, C. & A. R. Co.* 41 S. C. 1, 19 S. E. 206; *Sisler v. Shaffer*, 43 W. Va. 769, 28 S. E. 721; *Ward v. Blake Mfg. Co.* 5 C. C. A. 538, 12 U. S. App. 295, 56 Fed. 437.

But the practice disapproved and held not error to exclude such evidence. *Walkup v. Pratt*, 5 Harr. & J. 51.

The giving of an incompetent kind of evidence—such as oral to vary written—is a waiver of the right to object to the adversary's doing likewise. *Shaw v. Stone*, 1 Cush. 228, 243.

But in *Lake Roland Elev. R. Co. v. Weir*, 86 Md. 273, 37 Atl. 714, a distinction is made between cases where the first improper evidence was objected to and where it was not, and it is insisted that incompetent evidence may only be contradicted when its introduction was objected to. To the same effect see *Dolson v. De Ganahl*, 70 Tex. 620, 8 S. W. 321. The introduction of improper evidence does not authorize the like in contradiction of it. *Carr v. West End Street R. Co.* 163 Mas. 360, 40 N. E. 185; *Stinde v. Blesch*, 42 Mo. App. 578; *Phillips v. Marblehead*, 148 Mass. 326, 19 N. E. 547. But it is also said that the introduction of improper evidence on one side does not justify the same course by the adverse party, since it is not required to change the rules of evidence, that errors may be balanced. *Redman v. Peirsol*, 39 Mo. App. 173; *San Diego Land & Town Co. v. Neale*, 78 Cal. 63, 3 L.R.A. 83, 20 Pac. 372; *San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 11 L.R.A. 604, 25 Pac. 977; *Dodge v. Kiene*, 28 Neb. 216, 44 N. W. 191.

² *Waldron v. Romaine*, 22 N. Y. 368, 371; *Furbush v. Goodwin*, 25 N. H. 425; *Weiting v. Shearer*, 8 N. Y. Week. Dig. 392; *Findlay v. Pruitt*, 9 Port. (Ala.) 195; *Patton v. Philadelphia & New Orleans*, 1 La. Ann. 98, s. p., recognized in *Scattergood v. Wood*, 79 N. Y. 263, 35 Am. Rep. 515.

So, if a party, while testifying in his own behalf, volunteers an irrelevant statement, no question on the point being asked, it is not error to receive contrary evidence from the other party. *Brown v. Perkins*, 1 Allen, 89, 96.

"The defendant opened the door for the testimony and cannot complain that it was not closed soon enough to suit him." *Sherwood v. Titman*, 55 Pa. 77. Contra, *Mitchell v. Sellman*, 5 Md. 376.

This is not error, even though allowed as independent testimony, not merely by way of contradiction. *Sherwood v. Titman*, 55 Pa. 77. Contra, *McCartny v. Territory*, 1 Neb. 121.

³ *Farmers' & Mfrs. Bank v. Whinfield*, 24 Wend. 419; *Stringer v. Young*, 3 Pet. 320, 337, 7 L. ed. 693, 698; *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, 10 L. ed. 535; *Manning v. Burlington, C. R. & N. R. Co.* 64 Iowa. 240, 20 N. W. 169. Contra, *Thomson v. Brothers*, 5 La. 279.

A party has not the right to give immaterial evidence because his adversary has done so before him. *People v. Dowling*, 84 N. Y. 478, 486 (Per Folger, Ch. J.).

⁴ *Wallis v. Randall*, 81 N. Y. 164, 167, affirming 16 Hun, 33. And see *Stringer v. Young*, 3 Pet. 320, 337, 7 L. ed. 693, 698; *Scales v. Shackelford*, 64 Ga. 170.

b. By an offer or challenge.—An offer to allow the other party to prove that which might be objected to under the pleadings,¹ or a challenge to him to do so,² followed by a responsive offer of such proof, is a waiver of the right to object.

¹ Adams v. Farnsworth, 15 Gray, 423, 426.

² Rundell v. Butler, 10 Wend. 119.

c. By error, against objection.—Where improper evidence has been received against objection and exception, the refusal to receive contrary evidence on the same point is error which will not be disregarded by the appellate court, unless they can see that the improper evidence could not have influenced the jury.¹

¹ Ewing v. Bass, 149 Ind. 1, 48 N. E. 241; Vermont Farm Mach. Co. v. Batchelder, 68 Vt. 430, 35 Atl. 378; Spaulding v. Chicago, St. P. & K. C. R. Co. 98 Iowa, 205, 67 N. W. 227; Ward v. Washington Ins. Co. 6 Bosw. 229.

An unequal application of the rules of evidence which might have prejudiced the case, such as allowing opinion evidence offered by one party and excluding evidence of the same character on the same point offered by the other, is ground of reversal. *Holten v. Holten*, 5 N. Y. Week. Dig. 14.

12. Opening the door for one's self.

A party who puts in illegal evidence not objected to by the other party cannot complain that he is not allowed to follow it with other such evidence,¹ even to confirm² or explain it.³

¹ Lyons v. Teal, 28 La. Ann. 592.

² Trenton Mut. L. & F. Ins. Co. v. Johnson, 24 N. J. L. 576, 579.

³ Brand v. Longstreet, 4 N. J. L. 325.

13. Retracting.

If a party, after causing a witness to be sworn, or a deposition to be taken, refuses to examine the witness or read the deposition, the other party has the right to do so, but the evidence which the latter adduces by so doing will be his own, within the rule forbidding him to impeach it.¹

One who has put a question has the right to withdraw it before any answer is given.

¹ Sullivan v. Norris, 8 Bush, 519; Weil v. Silverstone, 6 Bush, 698; Musick

v. Ray, 3 Met. (Ky.) 427 (where a party refused to read his own cross-examination in a deposition, and the court, after allowing the adverse party to read it, allowed him also to contradict it; and this was held error).

14. The necessity for an objection.

It is a general rule that, in order to avail the admission of evidence by the trial court as error and to secure a reversal of its judgment upon appeal, the evidence must be objected to in the trial court.¹

The reason for this rule seems to be that the objection may be obviated if assigned at the trial² and many of the exceptions are instances of objections which could not be obviated.³ An exception is also made where the representative of an infant⁴ or insane party⁵ has failed to make proper objection. The court should nevertheless exclude the improper evidence, and an objection is not prerequisite to an assignment of its admission as error. And a party who consents to the introduction of improper testimony, or fails to object thereto, does not thereby waive his right afterwards to object to other similar evidence.⁶

¹ The rule applies to the admission of parol or other secondary evidence of the contents of written instruments (Cleveland, C. C. & St. L. R. Co. v. Strong, 56 Ill. App. 604; Riehl v. Evansville Foundry Asso. 104 Ind. 70, 3 N. E. 633; Vietti v. Nesbitt, 22 Nev. 390, 41 Pac. 151; Scott v. Chicago, M. & St. P. R. Co. 78 Iowa, 199, 42 N. W. 645; Paine v. Trask, 5 C. C. A. 497, 5 U. S. App. 283, 56 Fed. 233; Brown v. Oldham, 123 Mo. 621, 27 S. W. 409; Coleman v. Davis, 13 Colo. 98, 21 Pac. 1018; McLaughlin v. Wheeler, 1 S. D. 497, 47 N. W. 816; Schwertsenski v. Vineberg, 19 Can. S. C. 243), to the introduction of evidence which is not the best evidence (Western U. Teleg. Co. v. Poyell, 94 Va. 268, 26 S. E. 828; Western U. Teleg. Co. v. Cline, 8 Ind. App. 364, 35 N. E. 564), to the admission of a document in some particular imperfect (Billings v. Chicago, 167 Ill. 337, 47 N. E. 731; Wells, F. & Co. v. Davis, 105 N. Y. 670, 12 N. E. 42), as a deed, the certificate to the acknowledgment of which is defective (Western v. Flanagan, 129 Mo. 61, 25 S. W. 531), to the admission of a note without proving the signatures of the maker and indorser (Knoll v. Kiessling, 23 Or. 8, 35 Pac. 248), to the introduction of a deposition without showing a right under the statute to read it, on account of the absence of the witness (Bell v. Jamison, 102 Mo. 71, 14 S. W. 714), to the admission of parol evidence of that which the statute requires shall be written (Leeper v. Paschal, 70 Mo. App. 117; Yeoman v. Mueller, 33 Mo. App. 343; Brown v. Barnwell Mfg. Co. 46 S. C. 415, 24 S. E. 191), to the

admission of the testimony of an incompetent witness (*Doty v. Doty*, 159 Ill. 46, 42 N. E. 174; *Hickman v. Green* 123 Mo. 165, 29 L.R.A. 39, 22 S. W. 455, 27 S. W. 440; *Parrish v. McNeal*, 36 Neb. 727, 55 N. W. 222), to the means by which a witness refreshes his memory (*Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444), to the objection that the evidence is inadmissible under the pleadings, either as a variance therefrom (*Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869; *Swift & Co. v. Madden*, 165 Ill. 41, 45 N. E. 979; *Colorado Mortg. & Invest. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42; *Stockton Combined Harvester & Agri. Works v. Glens Falls Ins. Co.* 121 Cal. 167, 53 Pac. 565), or without the issues made thereby (*Boston & A. R. Co. v. O'Reilly*, 153 U. S. 334, 39 L. ed. 1006, 15 Sup. Ct. Rep. 830; *Evans & H. Fire Brick Co. v. Hadfield*, 93 Wis. 665, 68 N. W. 468; *David Bradley Mfg. Co. v. Eagle Mfg. Co.* 6 C. C. A. 661, 18 U. S. App. 349, 57 Fed. 980; *Blanchard v. Cooke*, 147 Mass. 215, 17 N. E. 313; *Brady v. Nally*, 151 N. Y. 258, 45 N. E. 547; *Doherty v. Holliday*, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907).

In some of the states there are statutes providing the method for taking advantage of a variance between the pleadings and proof. *Ridenhour v. Kansas City Cable R. Co.* 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; *Lalor v. Byrne*, 51 Mo. App. 578.

² *Taylor v. Adams*, 115 Ill. 570, 4 N. E. 837; *Hyde v. Heath*, 75 Ill. 381.

³ When the evidence is made incompetent by statute. *Presnell v. Garrison*, 122 N. C. 595, 29 S. E. 839; *Johnson v. Allen*, 100 N. C. 131, 5 S. E. 666; *Houghton v. Jones*, 1 Wall. 702, 17 L. ed. 503; *Mott v. Smith*, 16 Cal. 533. But see *Howard v. Metcalf*, — Tex. Civ. App. —, 26 S. W. 449.

⁴ *Johnston v. Johnston*, 138 Ill. 385, 27 N. E. 930; *Cartwright v. Wise*, 14 Ill. 417; *Barnard v. Barnard*, 119 Ill. 92, 8 N. E. 320.

⁵ *Huling v. Huling*, 32 Ill. App. 519.

⁶ *Smith v. Sovereign Camp*, W. W. 179 Mo. 119, 77 S. W. 862; *Metropolitan Nat. Bank v. Commercial State Bank*, 104 Iowa, 682, 74 N. W. 26; *McLane v. Paschal*, 74 Tex. 20, 11 S. W. 837.

15. The substance of objection.

An objection to admission of evidence must specify the particular evidence which it is desired to exclude¹ and a general objection² or one which does not specify the ground thereof nor point out the particular evidence which it is desired to have excluded³ will not entitle the party to the exclusion of any evidence.

A similar rule prevails when there is more than one party plaintiff or defendant, and a general objection by one of the co-parties to evidence admissible against his coplaintiff or defend-

is properly over-ruled, although the evidence was inadmissible as to him.⁴ A ground for objection which is not urged in the trial court may not be insisted upon in the appellate tribunal, nor will a general objection urged below⁵ entitle the objector to specify the ground for the purpose of convicting the trial court of error on appeal; neither may a new ground of objection be substituted upon the trial of the appeal for that which was urged in the lower court.⁶

An exception to the rule requiring the objection to point out the evidence objected to and state the ground of objection is made when the evidence is clearly inadmissible for any purpose, and the defect could not be obviated were the ground of objection specified.⁷

The reason for these rules requiring a party objecting to the admission of evidence clearly to define the boundaries and state the foundation of his objection seems to be that thereby the party offering the evidence will have such knowledge of its objectionable features as will enable him to remedy the defects, and that, also, in the same manner, the court will be enabled to see those defects without being put to the inconvenience of searching for them.⁸

¹ *Shumate v. Heman*, 181 U. S. 402, 45 L. ed. 922, 21 Sup. Ct. Rep. 645; *Ballow v. Collins*, 139 Ala. 543, 36 So. 712; *Kessler v. Ellis*, 27 Ky. L. Rep. 1042, 87 S. W. 798; *First Nat. Bank v. Schmitz*, 90 Minn. 45, 95 N. W. 577; *Mersereau v. Mersereau*, 49 App. Div. 647, 63 N. Y. Supp. 336; *Houston v. Stewart*, 40 Tex. Civ. App. 499, 90 S. W. 49; *Gage v. Eddy*, 186 Ill. 432, 57 N. E. 1030; *Cantwell v. Welch*, 187 Ill. 275, 58 N. E. 414; *Richardson v. Roberts*, 195 Ill. 27, 62 N. E. 840; *Wabash R. Co. v. Kamradt*, 109 Ill. App. 203; *Page v. Grant*, 127 Iowa, 249, 103 N. W. 124; *Priest v. Robinson*, 64 Kan. 416, 67 Pac. 850; *Mechanics' Sav. Bank v. Harding*, 65 Kan. 655, 70 Pac. 655; *Jewett v. Black*, 60 Neb. 173, 82 N. W. 375; *Accetta v. Zupa*, 54 App. Div. 33, 66 N. Y. Supp. 303; *Long Bell Lumber Co. v. Martin*, 11 Okla. 192, 66 Pac. 328; *Park v. Robinson*, 15 S. D. 551, 91 N. W. 344; *Emrich v. Gilbert Mfg. Co.* 138 Ala. 316, 35 So. 322; *Seaboard Air Line R. Co. v. Phillips*, 117 Ga. 98, 43 S. E. 494; *Potomas Bottling Works v. Barber*, 103 Md. 509, 63 Atl. 1068; *Jones v. Galbraith*, — Tenn. Ch. App. —. 59 S. W. 350; *Shippers' Compress & Warehouse Co. v. Davidson*, 35 Tex. Civ. App. 558, 80 S. W. 1032; *Morrisette v. Canadian P. R. Co.* 76 Vt. 267, 56 Atl. 1102; *Stuart v. Mitehum*, 135 Ala. 546, 33 So. 670; *Faylor v. Faylor*, 136 Cal. 92, 68 Pac. 482; *Rice v. Williams*, 18 Colo. App. 330, 71 Pac. 433; *Allen*

B. Wrisley Co. v. Burke, 203 Ill. 250, 67 N. E. 818; *Indiana, I. & I. R. Co. v. Otstot*, 212 Ill. 429; 72 N. E. 387; *Illinois Car & Equipment Co. v. Linstroth Wagon Co.* 50 C. C. A. 504, 112 Fed. 737; *Bird v. Utica Gold Min. Co.* 2 Cal. App. 674, 86 Pac. 509; *Mugge v. Jackson*, 50 Fla. 235, 39 So. 157; *Aledo v. Honeyman*, 208 Ill. 415, 70 N. E. 338; *Styles v. Decatur*, 131 Mich. 443, 91 N. W. 622; *Bragg v. Metropolitan Street R. Co.* 192 Mo. 331, 91 S. W. 527; *McQueen v. Bank of Edgemont*, 20 S. D. 378, 107 N. W. 208; *Pecos & N. T. R. Co. v. Evans-Snyder-Buel Co.* 100 Tex. 190, 97 S. W. 466; *San Antonia v. Potter*, 31 Tex. Civ. App. 263, 71 S. W. 764; *Shafer v. Eau Claire*, 105 Wis. 239, 81 N. W. 409; *Nassau Electric R. Co. v. Corliss*, 61 C. C. A. 257, 126 Fed. 355; *United Oil Co. v. Roseberry*, 30 Colo. 177, 69 Pac. 588; *Wilson v. Harnette*, 32 Colo. 172, 75 Pac. 395; *O'Neill v. Kansas City*, 178 Mo. 91, 77 S. W. 64; *Vagts v. Utman*, 125 Wis. 265, 104 N. W. 88.

If an objection by counsel is not specific, and is sustained, it is the duty of the court to state the grounds of the ruling, so that counsel may be able to frame questions suitable to the circumstances. *Colburn v. Chicago*, St. P. M. & O. R. Co. 109 Wis. 377, 85 N. W. 354.

²The stock objection of "incompetent, irrelevant, and immaterial" avails nothing if the evidence be admissible for any purpose. *Wilson v. Reeves*, 70 Mo. App. 30; *Three States Lumber Co. v. Rodgers*, 145 Mo. 445, 46 S. W. 1079; *Stringer v. Frost*, 116 Ind. 477, 2 L.R.A. 614, 19 N. E. 331; *Chicago & E. I. R. Co. v. Holland*, 122 Ill. 461, 13 N. E. 145; *Clark Civil Twp. v. Brookshire*, 114 Ind. 437, 16 N. E. 132; *Gould v. Young*, 143 Mich. 572, 107 N. W. 281; *Adair v. Mette*, 156 Mo. 496, 57 S. W. 551 (incompetency not specified); *Friedman v. Breslin*, 169 N. Y. 574, 61 N. E. 1129; *Colburn v. Chicago*, St. P. M. & O. R. Co. 109 Wis. 377, 85 N. W. 354. But see *First Nat. Bank v. Carson*, 30 Neb. 104, 46 N. W. 276, where the objection was held sufficient as to evidence which did not in any manner tend to throw light on the issue.

When part of the evidence is admissible and part is inadmissible, a general objection will entitle the objector to the exclusion of none of the evidence. *New York, T. & M. R. Co. v. Gallaher*, 79 Tex. 685, 15 S. W. 694; *Mock v. Muncie*, 9 Ind. App. 536, 37 N. E. 281; *McGuffey v. McClain*, 130 Ind. 327, 30 N. E. 296; *Milligan v. Sligh Furniture Co.* 111 Mich. 629, 70 N. W. 133; *Skow v. Locke*, 3 Neb. (Unof.) 176, 91 N. W. 204; *Travelers' Ins. Co. v. Hunter*, 30 Tex. Civ. App. 489, 70 S. W. 798; *Davidson S. S. Co. v. United States*, 205 U. S. 187, 51 L. ed. 764, 27 Sup. Ct. Rep. 480; *Louisville & N. R. Co. v. Stewart*, 128 Ala. 313, 29 So. 562; *Collin v. Farmers' Alliance Mut. F. Ins. Co.* 18 Colo. App. 170, 70 Pac. 698; *Chicago City R. Co. v. Matthieson*, 212 Ill. 292, 72 N. E. 443; *Hoselton v. Hoselton*, 166 Mo. 182, 65 S. W. 1005; *O'Neill v. Kansas City*, 178 Mo. 91, 77 S. W. 64; *Davey v. Janesville*, 111 Wis. 628, 87 N. W. 813.

And the rule applies to hypothetical questions. *Chicago & E. I. R. Co. v. Wallace*, 202 Ill. 129, 66 N. E. 1096.

But a general objection is sufficient if testimony is inadmissible for any purpose. *Chicago, R. I. & P. R. Co. v. Rathneau*, 225 Ill. 278, 80 N. E. 119.

³ *Merkle v. Bennington Twp.* 68 Mich. 133, 35 N. W. 846; *Johnson v. Okerstrom*, 70 Minn. 303, 73 N. W. 147; *Steele v. Pacific Coast R. Co.* 74 Cal. 323, 15 Pac. 851; *L'Hommedieu v. Cincinnati, W. & M. R. Co.* 120 Ind. 435, 22 N. E. 125; *Helena v. Albertose*, 8 Mont. 499, 20 Pac. 817; *Masonic Mut. Ben. Soc. v. Lackland*, 97 Mo. 137, 10 S. W. 895; *Maddox v. Teague*, 18 Mont. 512, 46 Pac. 535; *Smith v. Hanie*, 74 Ga. 324.

The objection must cover all of the reasons for excluding the evidence, since it is the rule that an objection which specifies particular grounds will be dealt with upon those grounds alone, and the objector will be held to have waived the grounds of objection which are not stated. *Evanston v. Gunn*, 99 U. S. 660, 25 L. ed. 306; *Alabama G. S. R. Co. v. Bailey*, 112 Ala. 167, 20 So. 313; *Kahn v. Lucchesi*, 65 Ark. 371, 46 S. W. 729; *Sullivan v. Richardson*, 33 Fla. 1, 14 So. 692; *Alexander v. Thompson*, 42 Minn. 498, 44 N. W. 534; *Bailey v. Chicago, M. & St. P. R. Co.* 3 S. D. 531, 19 L.R.A. 653, 54 N. W. 596.

⁴ *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955; *Appleton Mill Co. v. Warder*, 42 Minn. 117, 43 N. W. 791; *Fox v. Erbe*, 184 N. Y. 542, 76 N. E. 1095.

If one of two defendants offers evidence competent as between himself and the plaintiff, such evidence is not subject to objection by a codefendant. *Gardner v. Friederich*, 163 N. Y. 568, 57 N. E. 1110.

⁵ Under this rule when a general objection was taken at the trial the party objecting was not permitted upon appeal to insist that the evidence varied from the pleadings (*State ex rel. El Paso v. Pierce County Supers.* 72 Wis. 327, 37 N. W. 233; *Schott v. Youree*, 142 Ill. 233, 31 N. E. 591; *Keigher v. St. Paul*, 73 Minn. 21, 75 N. W. 732; *White v. Craft*, 91 Ala. 139, 8 So. 420; *Merrick v. Hill*, 77 Hun, 30, 28 N. Y. Supp. 237; *Burlington Ins. Co. v. Miller*, 8 C. C. A. 612, 19 U. S. App. 588, 60 Fed. 254; that parol evidence was admitted to vary the terms of a subsequent written contract (*John Hutchison Mfg. Co. v. Pinch*, 107 Mich. 15, 64 N. W. 729, 66 N. W. 340); that secondary evidence was admitted without a proper foundation having been laid therefor (*Kenosha Stove Co. v. Shedd*, 82 Iowa, 540, 48 N. W. 933); that evidence which was not the best evidence was permitted to be given (*Walser v. Wear*, 141 Mo. 443, 42 S. W. 928; *Eversdon v. Mayhew*, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382; *Rich v. Trustees of Schools*, 158 Ill. 242, 41 N. E. 924); that evidence involving a transaction with a decedent was given by his heir at law (*Howard v. Howard*, 52 Kan. 469, 34 Pac. 1114); or that a municipal ordinance admitted had not been published as required by the charter. *Klotz v. Winona & St. P.*

R. Co. 68 Minn. 341, 71 N. W. 257; *Chicago & E. I. R. Co. v. People*, 120 Ill. 667, 12 N. E. 207.

⁶ *Wiley v. Portsmouth*, 64 N. H. 214, 9 Atl. 220; *Bright v. Ecker*, 9 S. D. 449, 69 N. W. 824. But see *Pressnell v. Garrison*, 121 N. C. 366, 28 S. E. 409, where it is said that parol evidence offered to prove a fact which it is unlawful to prove by parol should not be allowed, although the objection was put on improper grounds.

⁷ *Espalla v. Richard*, 94 Ala. 159, 10 So. 137; *Lowenstein v. McCadden*, 92 Tenn. 614, 22 S. W. 426; *Connor v. Black*, 119 Mo. 126, 24 S. W. 184; *Turner v. Newburgh*, 109 N. Y. 301, 16 N. E. 344; *Waller v. Leonard*, 89 Tex. 507, 35 S. W. 1045; *Tozer v. New York C. & H. R. R. Co.* 105 N. Y. 659, 11 N. E. 846; *Snowden v. Pleasant Valley Coal Co.* 16 Utah, 366, 52 Pac. 599.

⁸ *Rush v. French*, 1 Ariz. 99, loc. cit. 123, 25 Pac. 816; *Sigafus v. Porter*, 28 C. C. A. 443, 51 U. S. App. 693, 84 Fed. 430; *McDonald v. Stark*, 176 Ill. 456, 52 N. E. 37; *Pitts Agri. Works v. Young*, 6 S. D. 557, 62 N. W. 432; *King v. Nichols & S. Co.* 53 Minn. 453, 55 N. W. 604; *Chicago, P. & St. L. R. Co. v. Nix*, 137 Ill. 141, 27 N. E. 81; *Tewalt v. Irwin*, 164 Ill. 592, 46 N. E. 13; *Drew v. Drum*, 44 Mo. App. 25; *Clark v. Conway*, 23 Mo. 438; *Earl v. Lefler*, 46 Hun, 9.

16. Time for objecting.

The proper time to object to the introduction of evidence is when it becomes apparent that error will be committed by receiving evidence which is not admissible, as when the evidence is offered ¹ or when a question is asked ² which is in itself improper or calls for an improper answer.

¹ *Crump v. Starke*, 23 Ark. 131; *Shain v. Sullivan*, 106 Cal. 208, 39 Pac. 605; *McKay v. Lane*, 5 Fla. 268; *Swift & Co. v. Madden*, 165 Ill. 41, 45 N. E. 979; *Crabs v. Mickle*, 5 Ind. 145; *Thomson v. Wilson*, 26 Iowa. 120; *Johnson v. Mathews*, 5 Kan. 118; *Perrott v. Shearer*, 17 Mich. 48; *Aultman v. Kennedy*, 33 Minn. 339, 23 N. W. 528; *Skinner v. Collier*, 4 How. (Miss.) 396; *Sharon v. Minnock*, 6 Nev. 377; *Donner v. Metropolitan Street R. Co.* 54 App. Div. 315, 66 N. Y. Supp. 719; *Ryan v. Providence Washington Ins. Co.* 79 App. Div. 316, 79 N. Y. Supp. 460; *Gwynn v. Citizens' Teleph. Co.* 69 S. C. 434, 67 L.R.A. 111, 104 Am. St. Rep. 819, 48 S. E. 460; *Culbertson v. Salinger*, — Iowa — 117 N. W. 6; *Carey Printing Co. v. Toilettes Fashion Co.* 135 App. Div. 441, 120 N. Y. Supp. 436.

An objection that evidence is insufficient cannot be raised for the first time on appeal, if it is apparent that the defect might have been supplied if attention had been called to it. *Wm. Messer Co. v. Rothstein*, 129 App. Div. 215, 113 N. Y. Supp. 772.

So an objection that evidence is not within the pleadings cannot be taken for the first time on appeal. *Cole v. Bickelhaupt*, 64 App. Div. 6, 71 N. Y. Supp. 636.

It has been held, however, that incompetent testimony may be objected to at any time (*Day v. Crawford*, 13 Ga. 508), that objection to the competency of a witness is not necessarily waived by failure to make it before the examination in chief (*Hill v. Postley*, 90 Va. 200, 17 S. E. 946), and that the question of variance between the pleadings and proof may be raised at any time during the trial if there be an opportunity to avoid the variance by amending the pleadings. *McCormick Harvesting Mach. Co. v. Sendzikowski*, 72 Ill. App. 402.

And while objections should be made when evidence is offered, a subsequent motion to exclude on the ground of inadmissibility afterwards discovered may be entertained. *Holland v. Riggs*, 53 Tex. Civ. App. 367, 116 S. W. 167.

Apropos of the same question it has been said that evidence may not be objected to as irrelevant after the argument to the jury has been closed (*Farmers' & T. Nat. Bank v. Greene*, 20 C. C. A. 500, 43 U. S. App. 446, 74 Fed. 439); and that an objection is too late when made after counsel has begun his argument (*Terry v. Williams*, 148 Ala. 468, 41 So. 804), or after the submission of the case to the jury. (*Barton v. Gray*, 57 Mich. 622, 24 N. W. 638; *Arons v. Smit*, 173 Pa. 630, 34 Atl. 234), or on cross-examination to evidence received on direct examination (*Garr v. Cranney*, 25 Utah, 193, 70 Pac. 853).

² *Duer v. Allen*, 96 Iowa, 36, 64 N. W. 682; *Link v. Sheldon*, 136 N. Y. 1, 32 N. E. 696; *Blake v. Broughton*, 107 N. C. 220, 12 S. E. 127; *Storms v. Lemon*, 7 Ind. App. 435, 34 N. E. 644; *Newlon v. Tyner*, 128 Ind. 466, 27 N. E. 168, 28 N. E. 59; *Smith v. Chicago, M. & St. P. R. Co.* — S. D. —, 128 N. W. 815; *Baltimore & O. R. Co. v. State*, 107 Md. 642, 69 Atl. 439.

The objection must be to the question, and not to a responsive answer. *Louisville & N. R. Co. v. Seale*, 160 Ala. 584, 49 So. 323.

The proper remedy, if remedy there be, is by motion to strike out the answer. It would seem, however, that if the question is not objectionable and if the answer is not responsive to it, the failure to object to the question will not preclude an objection to the answer. *Malm v. Thelin*, 47 Neb. 686, 66 N. W. 650.

17. Right to call for ground of objection.

A party whose evidence is objected to may require the grounds of objection to be specified in detail sufficiently to enable him to remedy it, if remediable.¹

¹ *Milliken v. Barr*, 7 Pa. 23; *Harris v. Panama R. Co.* 5 Bosw. 312.

Where, as in Pennsylvania, a general objection is sufficient unless particularity is called for (*Penn Mut. Aid Soc. v. Corley*, 39 Phila.

Leg. Int. 139, 11 Ins. L. J. 493), the policy of counsel is to call for the ground. Otherwise often in those jurisdictions where a general objection does not avail, in error or on appeal if the ground of the objection is such that it could have been obviated had it been disclosed.

The court may exclude evidence upon a general objection which does not state the grounds, if there be sufficient ground for the objection and the counsel seeking to introduce the evidence does not request that the grounds be specified. *Wilson v. Steers*, 18 Misc. 364, 41 N. Y. Supp. 550.

18. Cross-examining as to competency.

When objection to the competency of evidence arises upon the examination of a witness,¹ the objector has a right to interpose with cross-examination upon the facts material to the question of competency.²

¹ As to the preliminary cross-examination of an expert witness before permitting him to testify, see ante, chapter VIII. § 1.

² Where objection is made to the admissibility in evidence of a document on the ground that it is a privileged communication, the court may properly allow the witness offering it to be cross-examined to show its privileged character before permitting it to be read. *Trussell v. Scarlett*, 18 Fed. 214, and note.

19. Counter proof as to competency.

On an objection to the competency, either of testimony or a document, the court may allow the objector to interpose with other evidence upon the facts material to it;¹ or, if the question be identical with one in issue, and a prima facie case of competency is made out by the party offering the evidence, the court may (after allowing cross-examination, if the proposed evidence be testimony or a document introduced by testimony) receive the evidence, subject to the right of the adverse party to move to strike it out and have the jury instructed to disregard it, if he shall in due course rebut the apparent competency.

¹ *Maurice v. Worden*, 54 Md. 233, 39 Am. Rep. 384 (so held, notwithstanding an express rule of court giving plaintiff the opening); *Trussell v. Scarlett*, 18 Fed. 214; *Com. v. Howe*, 9 Gray, 110 (holding that when a judge hears evidence on a question preliminary he should hear all, even though it be a question which more properly should go to the jury). Contra, *Verzan v. McGregor*, 23 Cal. 339, holding it error to receive counterproof on the competency of a document before allowing

it to be read to the jury. To the same effect, though conceding the tendency to confuse the jury by not allowing it, is *Crenshaw v. Jackson*, 6 Ga. 509, 50 Am. Dec. 361.

The true rule is, that it is in the sound discretion of the court to pursue either course, as stated in the text.

20. Arguing as to admissibility.

When a question of the admissibility of evidence is duly raised, the party has a right to be heard in argument, but a refusal of the right of argument is not error if the ruling, though without argument, be correct.¹ The court may, in its discretion, hear the argument in the presence² or in the absence of the jury.

¹ *Olive v. State*, 11 Neb. 1, 7 N. W. 451.

² *State v. Wood*, 53 N. H. 484; *Slaughter v. Heath*, 127 Ga. 747, 27 L.R.A. (N.S.) 1, 57 S. E. 69.

Counsel while arguing the question of the competency of a document to the court may read therefrom when necessary for the purpose of his argument. *Rogers v. Winch*, 76 Iowa, 546, 41 N. W. 214.

21. Repeating the objection.

It is not necessary to repeat an objection to evidence sought to be introduced if such objection can only call for a repetition of the court's ruling on the first objection,¹ but if there be a change in the circumstances of the trial so that a situation will be presented to the court upon a repetition of the objection different from that existent when the first objection was made, the objection should be renewed, for otherwise the admission of the evidence will not be reviewed in the appellate court.²

When there is an objection to evidence and the court postpones the ruling it is the duty of the counsel interposing the objection to call the matter to the attention of the court at some subsequent time and demand a ruling upon the objection.³

¹ *Dilleber v. Home L. Ins. Co.* 69 N. Y. 256, 25 Am. Rep. 182; *Church v. Howard*, 79 N. Y. 415; *Lyons v. New York Elev. R. Co.* 26 App. Div. 57, 49 N. Y. Supp. 610; *Anglo-American Pkg. & Provision Co. v. Baier*, 20 Ill. App. 376; *Griswold v. Edson*, 32 Minn. 436, 21 N. W. 475; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *Louisville & N. R. Co. v. Gower*, 85 Tenn. 465, 3 S. W. 824; *Magee v. North Pacific Coast R. Co.* 78 Cal. 430, 21 Pac. 114; *Oppenheimer v. Barr*, 71 Iowa. 525, 32 N. W. 499; *Anderson v. White*, 18 Wash. 658, 52 Pac. 231;

Bailey v. Kansas City, 189 Mo. 503, 87 S. W. 1182; Scott v. Dillon, 58 Misc. 522, 109 N. Y. Supp. 877.

But see Frost v. Goddard, 25 Me. 414, 418, holding that counsel should call the attention of the court to the evidence when it is attempted to introduce it after a ruling excluding it, and Wagner v. Jones, 77 N. Y. 590, where it is held that substantially the same question asked a second time after objection and exception should be objected to, and a failure to renew the objection waives it.

In harmony with this, although the objection be repeated, it is unnecessary to specify the grounds thereof when these were given at the time the former objection was made. Carlson v. Winterson, 147 N. Y. 652, 42 N. E. 347; Gray v. Brooklyn Union Pub. Co. 35 App. Div. 286, 55 N. Y. Supp. 35.

An objection to the first item of a series belonging to the same class is sufficient to cover all. Volekommer v. Cody, 85 App. Div. 57, 82 N. Y. Supp. 969.

Counsel may agree in open court that objections stated to a certain class of testimony may apply to all such testimony and it then becomes unnecessary to repeat the objections, as the appellate court will consider that those objections were timely made to all that class of testimony. Stevenson v. Woltman, 81 Mich. 200, 45 N. W. 825.

² Bailey v. Ogden, 75 Ga. 874.

An objection to testimony which is apparently admissible when the objection is made, to be available, should be repeated after its inadmissibility has been disclosed by cross-examination. Heusinkveld v. St. Paul F. & M. Ins. Co. 106 Iowa, 229, 76 N. W. 696. And when secondary evidence, although objected to and not introduced at one stage of the trial, is admitted subsequent to a cross-examination which tends to remove the ground for objection, that objection should be repeated, as, if this is not done, the objection first made will be disregarded upon appeal. Wheeler v. Van Sickle, 37 Neb. 651, 56 N. W. 196.

Likewise, when upon a question being asked, "Were any proceedings taken before those arbitrators?" the plaintiff objected to the question as incompetent, irrelevant, and immaterial, the objection will not reach forward and embrace the record which was finally offered, of the proceedings before those arbitrators, and if it is desired to assign error in the admission of the record it must be objected to. Kern v. Cummings, 10 Colo. App. 365, 50 Pac. 1051.

³ Bitzer v. Bobo, 39 Minn. 18, 38 N. W. 609; Norfolk & W. R. Co. v. Anderson, 90 Va. 1, 17 S. E. 57; St. Louis & S. F. R. Co. v. Brown, 62 Ark. 254, 35 S. W. 225.

22. Waiving objections.

After evidence has been admitted over the objection of a party it is necessary that he maintain his hostile position toward it,

for otherwise he will waive his objection. If he make the evidence admitted in the face of his objection his own by introducing the same evidence, either on cross-examination¹ or as part of his own case,² he will be deemed to have waived his objection to the admission of the evidence. Nevertheless, these rules do not prevent his cross-examining the witness upon the evidence admitted over his objection³ or preclude the introduction of similar evidence on his own part to meet the case made by the evidence given by his adversary, to which he objected.⁴

¹ *Schroeder v. Michel*, 98 Mo. 43, 11 S. W. 314; *Finnegan v. Waterhouse*, — R. I. —, 67 Atl. 427. See also note 1, § 21, *supra*.

The same rule prevails when there is an objection to the competency of a witness and the party objecting waives his objection by cross-examining the witness in such a manner as to make that witness his own. *Miller v. Miller*, 92 Va. 510, 23 S. E. 891.

² *Missouri P. R. Co. v. Bentley*, 78 Kan. 221, 93 Pac. 150, 96 Pac. 800; *Jenkins v. Salmen Brick & Lumber Co.* 120 La. 549, 45 So. 435; *Virginia & T. Coal & I. Co. v. Fields*, 94 Va. 102, 26 S. E. 426; *New York L. Ins. Co. v. Taliaferro*, 95 Va. 522, 28 S. E. 879; *Southern R. Co. v. Hansbrough*, 107 Va. 733, 60 S. E. 58; *Tacoma Light & Water Co. v. Huson*, 13 Wash. 124, 42 Pac. 536; *Wees v. Page*, 47 Wash. 213, 91 Pac. 766.

³ *Scarborough v. Blackman*, 108 Ala. 656, 18 So. 735; *Miles v. Chicago*, R. I. & P. R. Co. 76 Mo. App. 484.

⁴ *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262; *Winters v. Manhattan R. Co.* 15 Misc. 8, 36 N. Y. Supp. 772; *Douglas v. New York Elev. R. Co.* 14 App. Div. 471, 43 N. Y. Supp. 847; *Lyons v. New York Elev. R. Co.* 26 App. Div. 57, 49 N. Y. Supp. 610.

By submitting to the discretion of a witness the question whether testimony sought to be introduced is a privileged communication the party waives the right of objecting to the witness's testimony on the ground that it is a privileged communication. *Scates v. Henderson*, 44 S. C. 548, 22 S. E. 724.

XI.—RULING ON OFFERS AND OBJECTIONS.

1. In general; questions, how tried.
2. Conditional admission.
3. Objections.
 - a. Authorities in support of strict rules.
 - b. Nonprejudicial error.

1. In general; questions, how tried.

[A statement of objection not indicating its ground is not sufficient to require exclusion, unless the objection be of such a nature that it could not be obviated, or it appear that the party making the offer could not have avoided the ground of objection had it been specifically stated.

But it is not error to sustain such a general objection if any sufficient ground for it exists, provided that no request be made that the ground be specified.]

Whether evidence is admissible or not is a question of law for the court; ¹ and questions of fact incidental to its determination are also for the court to determine for that purpose ² even where they are identical with questions at issue for the jury to pass on. ³

If the incidental question be in doubt when the evidence is offered, the judge may decide it on the evidence as it then stands; ⁴ or, when it is identical with one in issue, may admit the evidence if it be such that the jury might rationally infer the fact, and may leave to them the question what influence it should have, with proper instructions as to the doubt respecting its competency. ⁵

¹ *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25, 7 L. ed. 335; *Carter v. Bennett*, 4 Fla. 283; *American Ins. Co. v. Smith*, 19 Mo. App. 627; *Messner v. Elliott*, 184 Pa. 41, 39 Atl. 46; *DeFrance v. DeFrance*, 34 Pa. 335; *Martin v. Jennings*, 52 S. C. 371, 29 S. E. 807.

² As, competency of the witness to testify. *Nelson v. First Nat. Bank*, 16 C. C. A. 425, 32 U. S. App. 554, 69 Fed. 798; *Clements v. McGinn* (Cal.) 33 Pac. 920.

- Or whether a witness has an interest that disqualifies him. *Reynolds v. Lounsbury*, 6 Hill, 534; *Currier v. Bank of Louisville*, 5 Coldw. 460; *Cook v. Mix*, 11 Conn. 432; *Labor v. Staniels*, 2 Cal. 240 (holding it error for the judge to leave the question to the jury).
- Or whether a witness was competent as an expert. *Chateaugay Ore & Iron Co. v. Blake*, 144 U. S. 476, 36 L. ed. 510, 12 Sup. Ct. Rep. 731; *Howland v. Oakland Consol. Street R. Co.* 110 Cal. 513, 42 Pac. 983; *Germania L. Ins. Co. v. Lewin*, 24 Colo. 43, 51 Pac. 488; *Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564; *Marston v. Dingley*, 88 Me. 546, 34 Atl. 414; *Dashiell v. Griffith*, 84 Md. 363, 35 Atl. 1094; *Perkins v. Stickney*, 132 Mass. 217; *Papooshek v. Winona & St. P. R. Co.* 44 Minn. 195, 46 N. W. 329; *Fullerton v. Fordyce*, 144 Mo. 519, 44 S. W. 1053; *Stevens v. Chase*, 61 N. H. 340; *New Jersey Zinc & I. Co. v. Lehigh Zinc & I. Co.* 59 N. J. L. 189, 35 Atl. 915; *Lynch v. Grayson*, 5 N. M. 487, 25 Pac. 992; *Jones v. Tucker*, 41 N. H. 546; *Woodworth v. Brooklyn Elev. R. Co.* 22 App. Div. 501, 48 N. Y. Supp. 80; *Slocovich v. Orient Mut. Ins. Co.* 108 N. Y. 56, 14 N. E. 802; *Pickett v. Wilmington & W. R. Co.* 117 N. C. 616, 30 L.R.A. 257, 23 S. E. 264; *First Nat. Bank v. Wirebach*, 12 W. N. C. 150; *Ryder v. Jacobs*, 182 Pa. 624, 38 Atl. 471; *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. 445; *Gulf, C. & S. F. R. Co. v. Norfleet*, 78 Tex. 321, 14 S. W. 703; *Wright v. Southern P. Co.* 15 Utah, 421, 49 Pac. 309; *Maughlan v. Burns*, 64 Vt. 316, 23 Atl. 583; *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509. And *Robinson v. Ferry*, 11 Conn. 460, held it error for the judge to leave the question to the jury. Or as a nonexpert. *Carpenter v. Bailey*, 94 Cal. 406, 29 Pac. 1101; *Re Wax*, 106 Cal. 343, 39 Pac. 624; *Wheelock v. Godfrey*, 100 Cal. 578, 35 Pac. 317; *Grand Lodge I. O. M. A. v. Wieting*, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59; *Denning v. Butcher*, 91 Iowa, 425, 59 N. W. 69.
- Or whether one whose admission or declaration was sought to be proved was a partner of him against whom it was offered. *Harris v. Wilson*, 7 Wend. 57.
- Or whether there was sufficient proof of agency to admit the supposed agent's acts and declarations against the principal. *Cliquot's Champagne*, 3 Wall. 114, 18 L. ed. 116.
- Or whether there was a writing such as to preclude oral evidence. *Ratliff v. Huntly*, 27 N. C. (5 Ired. L.) 545.
- Or whether a photograph, map, or plat offered for the use of witnesses in explaining their testimony is proved to be a true representation of the subject. *Goldsboro v. Central R. Co.* 60 N. J. L. 49, 37 Atl. 433; *Blair v. Pelham*, 118 Mass. 420; *Ortiz v. State*, 30 Fla. 256, 11 So. 611; *Florida Southern R. Co. v. Parsons*, 33 Fla. 631, 15 So. 338 (holding it reversible error to submit the question to the jury). See also note to *Dedrichs v. Lake City R. Co.* 35 L.R.A. 802, 805.

- Or whether a communication is or is not confidential. *Hughes v. Boone*, 102 N. C. 137, 9 S. E. 286; *Childs v. Merrill*, 66 Vt. 302, 29 Atl. 532.
- Or whether there is sufficient evidence of the loss or destruction of an instrument to admit secondary proof of its contents. *Bain v. Walsh*, 85 Me. 108, 26 Atl. 1001; *Smith v. Brown*, 151 Mass. 338, 24 N. E. 31; *Rupert v. Penner*, 35 Neb. 587, 17 L.R.A. 824, 53 N. W. 598; *Scoggins v. Turner*, 98 N. C. 135, 3 S. E. 719; *Springs v. Schenck*, 106 N. C. 153, 11 S. E. 646; *Gorgas v. Hertz*, 150 Pa. 538, 24 Atl. 756; *Norris v. Clinkscales*, 47 S. C. 488, 25 S. E. 797.
- Or whether there is sufficient proof of the correctness of an alleged copy of a will, and of the probate and loss of the original, to admit the copy. *Counts v. Wilson*, 45 S. C. 571, 23 S. E. 942.
- Or whether there is sufficient proof of the correctness, etc., of books of account to admit them in evidence. *Webster v. San Pedro Lumber Co.* 101 Cal. 326, 35 Pac. 871; *Riley v. Boehm*, 167 Mass. 183, 45 N. E. 84.
- Or the authenticity of a document offered in evidence as an official record. *State ex rel. Stuart v. Maloney*, 113 Mo. 367, 20 S. W. 1064.
- Or the sufficiency of the probate of a mortgage before it is admitted in evidence. *McMillan v. Baxley*, 112 N. C. 578, 16 S. E. 845.
- Or whether or not a delinquent tax sale notice was in accordance with the law. But erroneously submitting the question to the jury will not demand reversal if they decide the question rightly. *Comfort v. Ballingal*, 134 Mo. 281, 35 S. W. 609.
- Or whether a witness outside the state is "inaccessible" so as to admit his testimony taken at a former trial. *Atlanta & C. Air-Line R. Co. v. Gravitt*, 93 Ga. 369, 26 L.R.A. 553, 20 S. E. 550.
- Or whether or not a claim against the United States has been presented and disallowed by the proper accounting officer so as to be admissible upon the trial. *United States v. Patrick*, 20 C. C. A. 11, 36 U. S. App. 645, 73 Fed. 800.
- The rule that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed, applies to the question of preliminary proof to lay a foundation for further evidence or to connect declarations with the party sought to be charged. *Pleasants v. Fant*, 22 Wall. 116, 22 L. ed. 780.
- A constitutional provision making the jurors the judges of the law as well as the facts in "all prosecutions for libel," cannot deprive the trial judge of power to decide upon the admissibility of proffered evidence. *Thibault v. Sessions*, 101 Mich. 279, 59 N. W. 624.
- And a statute making it the duty of the judge, as a preliminary question, to pass on the genuineness of writings to be used as a standard of comparison, is no invasion of the province of the jury; but is merely a

legislative adaptation to the subject-matter of the settled common-law rule that, generally, it is the province of the court to say what is evidence, and the province of the jury to decide on its efficacy. *Powers v. McKenzie*, 90 Tenn. 167, 16 S. W. 559.

³ *Scherpf v. Szadeczky*, 1 Abb. Pr. 366, 4 E. D. Smith, 110; *Prall v. Hinchman*, 6 Duer, 351; *Reynolds v. Lounsbury*, 6 Hill, 534; *Scovell v. Kingsley*, 7 Conn. 284.

⁴ *Scherpf v. Szadeczky*, 1 Abb. Pr. 366, 4 E. D. Smith, 110; *Taylor v. Taylor*, 2 Watts, 357.

And in some states it is the exclusive province of the judge to so decide. *Gorton v. Hadsell*, 9 Cush. 508; *Harris v. Daugherty*, 74 Tex. 1, 11 S. W. 921; *Cairns v. Mooney*, 62 Vt. 172, 19 Atl. 225. The reason being, according to *Cairns v. Mooney*, that the admission of illegal evidence has an effect on the jury which is not cured by a direction from the court to disregard it.

But some of the courts hold that in doubtful cases it is not improper to refer the existence of the facts upon which the competency depends to the jury, and in some instances it is intimated that it should be done. *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502; *Johnson v. Kendall*, 20 N. H. 304; *Hart v. Heilner*, 3 Rawle, 407; *Haynes v. Hunsicker*, 26 Pa. 58.

⁵ See *Swearingen v. Leach*, 7 B. Mon. 285 (agency; a well-reasoned case). "A contrary practice would in many instances, as in this, take the whole case from the jury and subject it to the decision of the judge upon the weight of the evidence, thus destroying the established distinction between their respective functions." *Ibid.* To exclude the evidence, where the preliminary fact was such that a jury might rationally infer it, was held error. *Ibid.*

To the same effect, *Funk v. Kincaid*, 5 Md. 404.

As whether a memorandum made after signing a contract was part of it. *Verzan v. McGregor*, 23 Cal. 339.

Or whether a document was used fraudulently. *Winslow v. Bailey*, 16 Me. 319.

Or whether a communication was not made by way of compromise, and therefore inadmissible. *Bartlett v. Hoyt*, 33 N. H. 151; *Hall v. Brown*, 58 N. H. 93. But *Davis v. Charles River Branch R. Co.* 11 Cush. 506, holds it error to leave this question to the jury.

Where the evidence on which the admissibility of the fact depended had already gone to the jury, held, error to refuse to submit the other to them also. *Day v. Sharp*, 4 Whart. 339, 34 Am. Dec. 509.

In *Emerson v. Providence Hat Mfg. Co.* 12 Mass. 237, 7 Am. Dec. 66, it was held that the question of agent's authority to sign, if arising on a writing, was for the court; if oral, for the jury; but this was because the action was on the contract, and the execution of it was the very question in issue.

The case of *Porter v. Wilson*, 13 Pa. 641, well explains the distinction between such a case and the cases where the fact of authority is only preliminary to evidence on a collateral issue.

2. Conditional admission.

It is irregular to allow evidence objected to, to go to the jury, reserving the question of its competency for further consideration,¹ except when consented to by both parties,² or when allowed in the discretion of the court upon the assurance of counsel that he will give evidence to connect.³

¹ *McCurry v. Hooper*, 12 Ala. 823, 46 Am. Dec. 280; *Martin v. Lloyd*, 94 Cal. 195, 29 Pac. 491; *National Bank v. Anderson*, 32 S. C. 538, 11 S. E. 379. But *Everett v. Newton*, 118 N. C. 919, 23 S. E. 961, holds the relevancy and legal effect of the testimony may be reserved for decision at a later stage of the trial.

The reason is that the practice might in some cases seriously embarrass a party who, not knowing what the final ruling would be, could not determine what further evidence he should introduce. *Martin v. Lloyd*, 94 Cal. 195, 29 Pac. 491.

Ordinarily such rulings furnish ground for reversal, unless the questions reserved are immaterial or of such character that, if decided against the party raising them, the decision would constitute no sufficient ground of error. *Wright v. Reusens*, 133 N. Y. 298, 31 N. E. 215; citing *Sharpe v. Freeman*, 45 N. Y. 804; *Lathrop v. Bramhall*, 64 N. Y. 365.

But failure to subsequently rule on a question reserved without objection constitutes no error where there was no subsequent ruling asked as required in the decision of the court admitting the evidence. *Bitzer v. Bobo*, 39 Minn. 18, 38 N. W. 609. Especially where the party who introduced the evidence is the party complaining. *Meserve v. Pomona Land & Water Co.* (Cal.) 34 Pac. 508, 509.

In New Jersey, ruling on the competency of testimony when offered and before actually delivered, or declining to rule until it is actually given, is discretionary with the trial judge. *Fath v. Thompson*, 58 N. J. L. 180, 33 Atl. 391.

² *Hopkins v. Clark*, 90 Hun, 4, 35 N. Y. Supp. 360; *Fuller v. Metropolitan L. Ins. Co.* 68 Conn. 55, 35 Atl. 766.

But express consent need not be shown, for if it is proposed that the evidence be taken conditionally, subject to future decision as to its admissibility on proper motion, and no objection is made, consent will be implied. *McKnight v. Dunlap*, 5 N. Y. 537.

³ *Shepard v. Goben*, 142 Ind. 318, 39 N. E. 506. And see generally on this point, chapter x. § 8.

3. Objections.

a. Authorities in support of strict rules.—Whether a trial be long or short, or the exceptions few or many, every party has the right to demand that he shall not be prejudiced by improper evidence.¹ The admission of illegal evidence which bears in the least degree on the result is fatal.² The graver the charge, the more strictly the rules of evidence should be applied.³ It is always better and safer for the court to err in the direction of overstrictness in requiring from counsel adherence to rules.⁴

But this does not mean that material evidence should be excluded; for whatever may be the rule as to the admission of improper evidence, the exclusion of proper evidence which is evidently material and important, and would probably change the result, is equally fatal.⁵

¹ *New York Guaranty & Indemnity Co. v. Gleason*, 7 Abb. N. C. 334, 78 N. Y. 503; *Worrall v. Parmelee*, 1 N. Y. 519, 521.

Jury trials should be strictly confined to the issues made, and to the legitimate facts bearing upon them, and the practice of dragging in extraneous matters to influence the jury cannot be too strongly condemned. Upon a closely contested question of fact, slight influences may turn the scale, and every rule of propriety and justice demand that nothing outside of the legitimate facts should be introduced to affect the minds of those who are to decide the question. *O'Hagan v. Dillon*, 76 N. Y. 170.

² *Mexia v. Oliver*, 148 U. S. 664, 37 L. ed. 602, 13 Sup. Ct. Rep. 754; *Cain Lumber Co. v. Standard Dry Kiln Co.* 108 Ala. 346, 18 So. 882; *For-dyce v. McCants*, 51 Ark. 509, 4 L.R.A. 296, 11 S. W. 694; *Gibbs v. Gibbs*, 6 Colo. App. 368, 40 Pac. 781; *Rowland v. Philadelphia, W. & B. R. Co.* 63 Conn. 415, 28 Atl. 102; *Simmons v. Spratt*, 26 Fla. 449, 9 L.R.A. 343, 8 So. 123; *Harris v. Amoskeag Lumber Co.* 97 Ga. 465, 25 S. E. 519; *Holt v. Spokane & P. R. Co.* 3 Idaho, 703, 35 Pac. 39; *Gurney v. Brown*, 27 Ill. App. 640; *Waymire v. Waymire*, 141 Ind. 164, 40 N. E. 523; *Strobel v. Moser*, 70 Iowa, 126, 29 N. W. 821; *Missouri P. R. Co. v. Johnson*, 55 Kan. 344, 40 Pac. 641; *Ludlow v. Steffen*, 19 Ky. L. Rep. 1671, 44 S. W. 119; *Reeve v. Dennett*, 141 Mass. 207, 6 N. E. 378; *Dillon v. Howc*, 98 Mich. 168, 57 N. W. 102; *Cremer v. Miller*, 56 Minn. 52, 57 N. W. 318; *Desmond v. Levy (Miss.)* 12 So. 481; *Kearney Bank v. Froman*, 129 Mo. 427, 31 S. W. 769; *Thompson v. Wertz*, 41 Neb. 31, 59 N. W. 518; *Root v. Borst*, 142 N. Y. 62, 36 N. E. 814; *Baird v. Gillett*, 47 N. Y. 186, 188; *McMillen v. Aitchison*, 3 N. D. 183, 54 N. W. 1030; *Galion v. Lauer*, 55 Ohio St. 392, 45 N. E. 1044; *Boise v. Atchison, T. & S. F. R. Co.* 6 Okla. 243, 51 Pac. 662; *Tourgee v. Rose*, 19 R. I. 432, 37 Atl. 9; *Missouri, K. &*

T. R. Co. v. Hannig, 91 Tex. 347, 43 S. W. 508; *Richardson v. Carbon Hill Coal Co.* 10 Wash. 648, 39 Pac. 95; *Webb v. Big Kanawha & O. R. Packet Co.* 43 W. Va. 800, 29 S. E. 519; *Bartlett v. Beardmore*, 74 Wis. 485, 43 N. W. 492.

And so even in cases of doubt whether the improper evidence really affected the result. *Schwander v. Birge*, 46 Hun, 66; *Totten v. Read*, 32 N. Y. S. R. 46, 10 N. Y. Supp. 318.

And the fact that illegal evidence was admitted on a former trial without objection will not render it competent on the second trial, upon objection being made thereto. *Hunter v. Lanius*, 82 Tex. 677, 18 S. W. 201.

For the laxer rule in equity cases, see N. Y. Code Civ. Proc. § 1003.

³ *Blackburn v. Beall*, 21 Md. 208.

⁴ *Green v. Green*, 26 Mich. 437.

⁵ *McKinnon v. Lessley*, 89 Ala. 625, 8 So. 9; *Kleyenstuber v. Robinson* (Ariz.) 52 Pac. 1117; *Re Carpenter*, 79 Cal. 382, 21 Pac. 835; *Cravens v. Bennett*, 17 Colo. 419, 30 Pac. 61; *Schumann v. Torbett*, 86 Ga. 25, 12 S. E. 185; *First Nat. Bank v. Ryan*, 38 Ill. App. 268; *Terre Haute & I. R. Co. v. Jarvis*, 9 Ind. App. 438, 36 N. E. 774; *McNamara v. New Melleray*, 88 Iowa, 502, 55 N. W. 322; *Calvert County Comrs. v. Gantt*, 78 Md. 286, 28 Atl. 101, 29 Atl. 610; *Miller v. Hanley*, 94 Mich. 253, 53 N. W. 962; *Atwood v. Marshall*, 52 Neb. 173, 71 N. W. 1064; *Mutual L. Ins. Co. v. Suiter*, 131 N. Y. 557, 29 N. E. 822; *Trinity County Lumber Co. v. Denham*, 88 Tex. 203, 30 S. W. 856; *Mutual L. Ins. Co. v. Oliver*, 95 Va. 445, 28 S. E. 594; *Essency v. Essency*, 10 Wash. 375, 38 Pac. 1130; *Krell Piano Co. v. Kent*, 39 W. Va. 294, 19 S. E. 409.

b. Nonprejudicial error.—On the other hand, neither the admission of illegal evidence, nor the exclusion of proper evidence, is fatal error, if the exclusion of the evidence admitted,¹ or the admission of that excluded,² could not in any way affect the result favorably to the party complaining; or if the evidence admitted,³ or excluded,⁴ pertains to a fact otherwise conclusively established; or to a fact not disputed.⁵

Nor can the trial court be convicted of error in admitting improper evidence, where the evidence was subsequently withdrawn from the jury,⁶ or there was subsequently introduced evidence curing the error;⁷ or in excluding proper evidence where the evidence was in fact improper,⁸ or was subsequently admitted.⁹

And a party who puts in illegal evidence not objected to cannot complain that this adversary is permitted to introduce other

such, or practically the same, evidence;¹⁰ or that he is himself precluded from following it with other such evidence.¹¹

¹ *Hill v. Birmingham Union R. Co.* 100 Ala. 447, 14 So. 201; *Powers v. Armstrong*, 62 Ark. 267, 35 S. W. 228; *Davies v. Oceanic S. S. Co.* 89 Cal. 280, 26 Pac. 827; *Fitzgerald v. Burke*, 14 Colo. 559, 23 Pac. 993; *Key v. Abbott*, 99 Ga. 270, 25 S. E. 631; *Schultz v. Babcock*, 166 Ill. 398, 46 N. E. 892; *Holland v. Spell*, 144 Ind. 561, 42 N. E. 1014; *Empire Mill Co. v. Lovell*, 77 Iowa, 100, 41 N. W. 583; *Atchison, T. & S. F. R. Co. v. Shaw*, 56 Kan. 519, 43 Pac. 1129; *Wood v. Finson*, 91 Me. 280, 39 Atl. 1007; *Norwich & W. R. Co. v. Worcester*, 147 Mass. 518, 18 N. E. 409; *McKennon v. Gates*, 102 Mich. 618, 61 N. W. 74; *Rothschild v. Burritt*, 47 Minn. 28, 49 N. W. 393; *Blackwell v. Graham*, 74 Miss. 595, 21 So. 242; *Chicago, R. I. & P. R. Co. v. George*, 145 Mo. 38, 47 S. W. 11; *Terry v. Beatrice Starch Co.* 43 Neb. 866, 62 N. W. 255; *New Mexican R. Co. v. Hendricks*, 6 N. M. 611, 30 Pac. 901; *Houser v. Beam*, 111 N. C. 501, 16 S. E. 335; *Gram v. Northern P. R. Co.* 1 N. D. 252, 46 N. W. 972; *Portland v. King (Or.)* 26 Pac. 376; *Hoar v. Leaman (Pa.)* 15 Atl. 716; *Graham v. McReynolds*, 90 Tenn. 673, 18 S. W. 272; *Boone v. Miller*, 73 Tex. 557, 11 S. W. 551; *Morotock Ins. Co. v. Fostoria Novelty Co.* 94 Va. 361, 26 S. E. 850; *Peck v. Stanfield*, 12 Wash. 101, 40 Pac. 635; *Flowers v. Fletcher*, 40 W. Va. 103, 20 S. E. 870; *Wesling v. Kroll*, 78 Wis. 636, 47 N. W. 943.

² *Cowen v. Eartherly Hardware Co.* 95 Ala. 324, 11 So. 195; *Yaeger v. Southern California R. Co. (Cal.)* 51 Pac. 190; *Haley v. Elliott*, 20 Colo. 379, 38 Pac. 771; *Gulliver v. Fowler*, 64 Conn. 556, 30 Atl. 852; *Johnston v. State*, 29 Fla. 558, 10 So. 686; *Littlefield v. Drawdy*, 84 Ga. 644, 11 S. E. 504; *Gardner v. Meeker*, 169 Ill. 40, 48 N. E. 307; *Conner v. Citizens' Street R. Co.* 146 Ind. 430, 45 N. E. 662; *Gammon v. Ganfield*, 42 Minn. 368, 44 N. W. 125; *Teats v. Flanders*, 118 Mo. 660, 24 S. W. 126; *Louisville, N. O. & T. R. Co. v. Crayton*, 69 Miss. 152, 12 So. 271; *Blodgett v. McMurtry*, 54 Neb. 69, 74 N. W. 392; *Fourth Nat. Bank v. Spinney*, 47 Hun, 293; *Worth v. Simmons*, 121 N. C. 357, 28 S. E. 528; *Gearing v. Carroll*, 151 Pa. 79, 24 Atl. 1045; *Blohme v. Lynch*, 26 S. C. 300, 2 S. E. 136; *Seyring v. Eschweiler*, 85 Wis. 117, 55 N. W. 164; *Link v. Union P. R. Co.* 3 Wyo. 680, 29 Pac. 741.

³ *Milliken v. Maund*, 110 Ala. 332, 20 So. 310; *Campbell v. Carnahan (Ark.)* 13 S. W. 1098; *Giraudi v. Electric Improv. Co.* 107 Cal. 120, 28 L.R.A. 596, 40 Pac. 108; *Curr v. Hundley*, 3 Colo. App. 54, 31 Pac. 939; *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 157, 17 L.R.A. 33, 65, 9 So. 661; *Powell v. Brunner*, 86 Ga. 531, 12 S. E. 744; *Kankakee & S. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621; *Gulf, C. & S. F. R. Co. v. Jones*, 1 Ind. Terr. 354, 37 S. W. 208; *Elwood v. McDill*, 105 Iowa, 437, 75 N. W. 340; *Faulkner v. Davis*, 18 Ky. L. Rep. 1004, 38 S. W. 1049; *Kraatz v. Brush*

Electric Light Co. 82 Mich. 457, 46 N. W. 787; Beard v. First Nat. Bank, 41 Minn. 153, 43 N. W. 7, 8; St. Louis Nat. Bank v. Flanagan, 129 Mo. 178, 31 S. W. 773; Morrill v. Hershfield, 19 Mont. 245, 47 Pac. 997; New York, T. & M. R. Co. v. Gallaher, 79 Tex. 685, 15 S. W. 694; Elster v. Seattle, 18 Wash. 304, 51 Pac. 391; Sawyer v. Choate, 92 Wis. 533, 66 N. W. 689.

Otherwise, however, if the other evidence to support the fact be merely circumstantial. Ohio & M. R. Co. v. Levy, 134 Ind. 343, 32 N. E. 815, 34 N. E. 20. And the fact in question is one of the vital issues in the case. Schneider v. Second Ave. R. Co. 133 N. Y. 583, 30 N. E. 752.

⁴ Forst v. Leonard, 116 Ala. 82, 22 So. 481; Jones v. Malvern Lumber Co. 58 Ark. 125, 23 S. W. 679; Conboy v. Dickinson, 92 Cal. 600, 28 Pac. 809; St. Kevin Min. Co. v. Isaacs, 18 Colo. 400, 32 Pac. 822; Rome R. Co. v. Thompson, 101 Ga. 26, 28 S. E. 429; Crone v. Crone, 170 Ill. 494, 49 N. E. 217, affirming 70 Ill. App. 294; Oberholtzer v. Hazen, 92 Iowa, 602, 61 N. W. 365; South Scituate v. Scituate, 155 Mass. 428, 29 N. E. 639; Miller v. Jurczyk, 109 Mich. 637, 67 N. W. 898; Mulherin v. Simpson, 124 Mo. 610, 28 S. W. 86; Atwood v. Marshall, 52 Neb. 173, 71 N. W. 1064; Guilfoyle v. Pierce, 4 App. Div. 612, 38 N. Y. Supp. 697; Houston, E. & W. T. R. Co. v. Campbell, 91 Tex. 551, 43 L.R.A. 225, 45 S. W. 2.

⁵ Admission harmless when fact undisputed. West Coast Lumber Co. v. Newkirk, 80 Cal. 275, 22 Pac. 231; Eslich v. Mason City & Ft. D. R. Co. 75 Iowa, 443, 39 N. W. 700; Missouri, K. & T. R. Co. v. Lyan, 57 Kan. 635, 47 Pac. 526; Hinckley v. Somerset, 145 Mass. 326, 14 N. E. 166; Henderson v. Bartlett, 32 App. Div. 435, 53 N. Y. Supp. 149; Tucker v. Wilkins, 105 N. C. 272, 11 S. E. 575; Girardeau v. Southern Exp. Co. 48 S. C. 421, 26 S. E. 711; Wells v. Denver & R. G. W. R. Co. 7 Utah, 482, 27 Pac. 688.

Exclusion harmless when fact undisputed. Pittsburgh & W. R. Co. v. Thompson, 54 U. S. App. 222, 82 Fed. Rep. 720, 27 C. C. A. 333; Collier v. Coggins, 103 Ala. 281, 15 So. 578; Clark v. Olsen (Cal.) 33 Pac. 274; Willard v. Mellor, 19 Colo. 534, 36 Pac. 148; Boseli v. Doran, 62 Conn. 311, 25 Atl. 242; Champaign v. Maguire, 56 Ill. App. 618; Bromley v. Goodwin, 95 Ill. 118; Wichita & C. R. Co. v. Gibbs, 47 Kan. 274, 27 Pac. 991; Peoples v. Evening News Asso. 51 Mich. 11; Loudy v. Clarke, 45 Minn. 477, 48 N. W. 25; Shotwell v. Gordon, 121 Mo. 482, 26 S. W. 341; Cullen v. Gallagher, 15 Misc. 146, 36 N. Y. Supp. 468; Blackburn v. St. Paul F. & M. Ins. Co. 117 N. C. 531, 23 S. E. 456; McBride v. Banguss, 65 Tex. 174; Glick v. Weatherwax, 14 Wash. 560, 45 Pac. 156.

⁶ Long v. Booe, 106 Ala. 570, 17 So. 716; Chicago & G. T. R. Co. v. Gaeinowski, 155 Ill. 189, 40 N. E. 601; Rea v. Scully, 76 Iowa, 343, 41 N. W. 36; Dunn v. Jaffray, 36 Kan. 408, 13 Pac. 781; McGinnis v. Loring, 126 Mo. 404, 28 S. W. 750.

But the court should exclude it before counsel's address to the jury. Pittsburgh, B. & B. R. Co. v. McCloskey, 110 Pa. 436, 1 Atl. 555.

⁷ *Vaca Valley & C. L. R. Co. v. Mansfield*, 84 Cal. 560, 24 Pac. 145; *Sun Fire Office v. Wich*, 6 Colo. App. 103, 39 Pac. 587; *Stewart v. DeLoach*, 86 Ga. 729, 12 S. E. 1067; *Williamson v. Ohnemus*, 67 Ill. App. 341; *Baughan v. Brown*, 122 Ind. 115, 23 N. E. 695; *Amos v. Buck*, 75 Iowa, 651, 37 N. W. 118; *Kinsley v. Morse*, 40 Kan. 577, 20 Pac. 217; *Roux v. Blodgett & D. Lumber Co.* 94 Mich. 607, 54 N. W. 492; *People's Bank v. Howes*, 64 Minn. 457, 67 N. W. 355; *Davidson v. Bordeaux*, 15 Mont. 245, 38 Pac. 1075; *Meyer v. Shamp*, 51 Neb. 424, 71 N. W. 57; *Avery v. Starbuck*, 3 Silv. N. Y. 507, 27 N. E. 1080; *Maxwell v. Bolles*, 28 Or. 1, 41 Pac. 661; *Beardslee v. Columbia Twp.* 188 Pa. 496, 41 Atl. 617; *Glover v. Thomas*, 75 Tex. 506, 12 S. W. 684; *Fuller v. Worth*, 91 Wis. 406, 64 N. W. 995; *Kuhn v. McKay*, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 205.

And the reception of evidence which is proper if supplemented by other evidence is not available error, although the supplemental evidence is not introduced, in the absence of a motion to strike out. *United States Vinegar Co. v. Schlegel*, 143 N. Y. 537, 38 N. E. 729.

⁸ *Elwood v. McGill*, 105 Iowa, 437, 75 N. W. 340; *Conant v. Johnston*. 165 Mass. 450, 43 N. E. 192.

Even though the evidence was improper in part only. *Atchison, T. & S. F. R. Co. v. Myers*, 11 C. C. A. 439, 24 U. S. App. 295, 63 Fed. 793.

Or might have been admissible for another purpose than that for which it was offered. *Martin v. Jennings*, 52 S. C. 371, 29 S. E. 807.

Or the reasons given for its exclusion were erroneous. *Eppstein v. Wolfe*, — Tex. Civ. App. —, 35 S. W. 52; *Davey v. Southern P. Co.* 116 Cal. 325, 48 Pac. 117.

⁹ *Ross v. Wellman*, 102 Cal. 1, 36 Pac. 402; *Noble v. Worthy*, 1 Ind. Terr. 453, 45 S. W. 137; *Langhammer v. Manchester*, 99 Iowa, 295, 68 N. W. 688; *Providence & W. R. Co. v. Worcester*, 155 Mass. 35, 29 N. E. 56; *Ellis v. Whitehead*, 95 Mich. 105, 54 N. W. 752; *Jensen v. Bowles*, 8 S. D. 575, 67 N. W. 627.

And one whose offer is rejected, but who declines to avail himself of a subsequent offer of the court to admit the evidence, cannot complain. *Bozarth v. McGillicuddy*, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042; *Alabama & V. R. Co. v. Lowe*, 73 Miss. 203, 19 So. 96.

¹⁰ *Chicago, K. & W. R. Co. v. Brunson*, 43 Kan. 371, 23 Pac. 495. *Contra*, *Russ v. Wabash Western R. Co.* 112 Mo. 45, 18 L.R.A. 823, 20 S. W. 472; *Phifer v. Carolina C. R. Co.* 122 N. C. 940, 29 S. E. 578.

Refusing defendant admission to cross-examine with reference to matters on which plaintiff has been allowed to introduce evidence, though they are immaterial, and then instructing that such matters are competent and material evidence, was held fatal error, in *Mahoney v. Butte Hardware Co.* 19 Mont. 377, 48 Pac. 545.

¹¹ *Lyons v. Teal*, 28 La. Ann. 592.

And see, generally, for cases to support this and the preceding note, ante, chapter x. § 11.

XII.—EXCEPTIONS.

1. Necessity of exceptions.¹

a. In general.

b. Rulings not concerning conduct of trial.

c. Rulings made during progress of trial.

(1) In general.

(2) Conduct of trial judge.

(3) Conduct of counsel.

(4) Juries and jurors.

(5) Evidence and witnesses.

(6) View by jury.

(7) Instructions and charges.

(8) Verdict.

(9) Dismissal, nonsuit, directing verdict, etc.

2. By whom exceptions to be taken.

3. When to be taken.

4. Sufficiency.

a. Form of exception.

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d. Particularity and definiteness.

(1) In general.

(2) Exceptions in gross.

(3) Evidence.

(4) Instructions and charges.

(5) Refusal or failure to instruct.

(6) Specifying error.

1. Necessity of exceptions.

a. *In general.*—It is a general rule, with certain exceptions,¹ that an exception to any ruling of the trial court, on an objection duly taken,² is indispensable to a review of that ruling on appeal or error;³ otherwise the error committed by the trial court is deemed to be waived.⁴ But no exception need be taken to a question incidentally and necessarily involved in the consideration of other exceptions duly taken.⁵

¹In some states an exception is held unnecessary to a ruling or decision upon matters which are apparent upon the face of, and constitute, the record proper. *Galloway v. McLean*, 2 Dak. 372, 9 N. W. 98; *Mumma*

v. Staudte, 24 Mo. App. 473; O'Donohue v. Hendrix, 13 Neb. 255, 13 N. W. 215; Upper Appomattox County v. Buffalo, 121 N. C. 37, 27 S. E. 999. So by rule of court in Texas. See White v. San Antonio Waterworks Co. 9 Tex. Civ. App. 465, 29 S. W. 252. As, for instance, that the judgment is not supported by the pleadings. McKinstry v. Carter, 48 Kan. 428, 29 Pac. 297; Oakland Home Ins. Co. v. Allen, 1 Kan. App. 108, 40 Pac. 928. That certain costs were improperly taxed against defendant. St. Louis, K. C. & C. R. Co. v. Lewright, 113 Mo. 660, 21 S. W. 210. That the petition states no cause of action. Lilly v. Menke, 126 Mo. 190, 28 S. W. 643, 994. That the trial court had not jurisdiction of the action. Roberts v. More, 5 Colo. App. 511, 39 Pac. 346; Godwin v. Monds, 101 N. C. 354, 7 S. E. 793. That the question of alimony in a divorce suit was tried before the suit for the divorce. Re Johnston, 54 Kan. 729, 39 Pac. 735.

In Maryland it is not obligatory to take a bill of exceptions in a summary proceeding, such as a motion to strike out a judgment, to quash attachments, etc. Coulbourn v. Fleming, 78 Md. 210, 27 Atl. 1041, and cases cited.

And a rule of practice of a state court allowing exceptions to be first made on appeal, though not properly saved in the court below, is not made applicable in a Federal court by the act of Congress of 1872, conforming the practice in the Federal courts as near as may be to that of the state courts. Consumers' Cotton Oil Co. v. Ashburn, 26 C. C. A. 436, 52 U. S. App. 258, 81 Fed. 331.

In Nebraska no exception is necessary in order to have a review of the judgment of the district court, dismissing an appeal from a justice of the peace. Claflin v. American Nat. Bank, 46 Neb. 884, 65 N. W. 1056. Contra, in Illinois, Allan v. Foreman Bros. 69 Ill. App. 56.

And in New York the appellate division of the supreme court has power to reverse for errors committed upon the trial, even though they are not raised by exceptions; such as rulings on matters of evidence and instructions. Gillett v. Kinderhook, 77 Hun, 604, 28 N. Y. Supp. 1044; Re Brundage, 31 App. Div. 348, 52 N. Y. Supp. 362. The reason is, that the court examines the facts as well as the law, and if the errors committed involve the right of the party to recover it may, in its discretion, grant a new trial. But it must appear that grave injustice has been done and that the reversal is necessary for the purpose of correcting the injustice. Kowalewska v. New York, L. E. & W. R. Co. 72 Hun, 611, 25 N. Y. Supp. 184 (charge of court); McMurray v. Gage, 19 App. Div. 505, 46 N. Y. Supp. 608 (ruling on evidence); Howell v. Manwaring, 3 N. Y. S. R. 454; Goodenough v. Fuller, 5 N. Y. S. R. 896. But it should not be done if the error could have been cured on a proper objection made. Currier v. Henderson, 85 Hun, 300, 32 N. Y. Supp. 953, where complaint made was that the charge lacked definiteness. But a valid exception must be taken at the trial in the New York city court to present any question on appeal from a judgment of affirmance of the general term of that

court to the appellate term. *Machauer v. Fogel*, 21 Misc. 637, 47 N. Y. Supp. 1056. So, too, on appeal from the city court to the common pleas. *Mackie v. Egan*, 6 Misc. 95, 26 N. Y. Supp. 13.

These and other exceptions to the rule generally are due to particular statutes and rules of court, and will be discussed as they occur, with reference to the particular ruling under consideration. For cases, see succeeding notes to this and the following sections.

² As to the necessity generally of an objection being duly taken and preceding the exception, see *Laber v. Cooper*, 7 Wall. 565, 19 L. ed. 151; *Spear v. Lomax*, 42 Ala. 576; *Benepe v. Wash*, 38 Kan. 407, 16 Pac. 950; *Burks v. Chapman*, 11 Ky. L. Rep. 260; *New Orleans v. Congregation Dispersed of Judah*, 15 La. Ann. 389; *Spencer v. St. Paul & S. C. R. Co.* 22 Minn. 29; *McRaven v. McGuire*, 9 Smedes & M. 34; *Hullar v. Wynne*, 16 Misc. 580, 38 N. Y. Supp. 700; *Burris v. Whitner*, 3 S. C. 512; *Sculley v. Book*, 3 Wash. 182, 28 Pac. 556; *Dimmey v. Wheeling & E. G. R. Co.* 27 W. Va. 32, 35 Am. Rep. 292. See also ante, chapter x., *Offers of Evidence and Objections*, § 11.

In Kentucky, by statute, a party cannot except to a decision made at the instance of his adversary, unless he shall have first objected to the motion, offer, or request for such decision. *Loving v. Warren County*, 14 Bush, 316. But he may except without a previous objection to a decision adverse to him, if made at his own instance.

³ *Lester v. Georgia*, C. & N. R. Co. 90 Ga. 802, 17 S. E. 113; *Midland R. Co. v. Dickason*, 130 Ind. 164, 29 N. E. 775; *Spelman v. Gill*, 75 Iowa, 717, 38 N. W. 168; *Turner v. State ex rel. Stephenson*, 45 Kan. 554, 26 Pac. 35; *New v. Taylor*, 82 Md. 40, 33 Atl. 435; *New York L. Ins. Co. v. Macomber*, 169 Mass. 580, 48 N. E. 776; *Banks v. Cramer*, 109 Mich. 168, 66 N. W. 946; *Lawrence v. Bucklen*, 45 Minn. 195, 47 N. W. 655; *Sawyers v. Drake*, 34 Mo. App. 472; *Roode v. Dunbar*, 9 Neb. 95, 2 N. W. 345; *Reese v. Kinkad*, 20 Nev. 65, 14 Pac. 871; *Duryea v. Vosburgh*, 121 N. Y. 57, 24 N. E. 308; *Wicks v. Thompson*, 129 N. Y. 634, 29 N. E. 301; *Wills v. Fisher*, 112 N. C. 529, 17 S. E. 73; *Kearney v. Snodgrass*, 12 Or. 311, 7 Pac. 309; *Potter v. Langstrath*, 151 Pa. 216, 25 Atl. 76; *Crawford v. McGinty*, — Tex. —, 11 S. W. 1066; *Miles v. Albany*, 59 Vt. 79, 7 Atl. 601; *Brown v. Forest*, 1 Wash. Terr. 201.

In *Behrens v. McCance*, 106 Ind. 330, 6 N. E. 912, the court said: "It is definitely settled by a long line of decisions that where there is an appearance to the action, an exception to the ruling of a *nisi prius* court is absolutely necessary to present any question to this court by appeal, except in two contingencies: (1) where the court has no jurisdiction of the subject-matter of the action; (2) where the complaint does not state facts sufficient to constitute a cause of action."

And, according to *Crawford v. McGinty*, — Tex. —, 11 S. W. 1066, in the absence of exceptions or the statement of facts, unless failure to

except be waived or not insisted on, the only inquiry is whether the pleadings justify the judgment.

Nor can the form in which a question of law was reserved be questioned, unless an exception was duly taken. *Blake v. Metzgar*, 150 Pa. 291, 24 Atl. 755.

⁴ *Collier v. Jenks*, 19 R. I. 493, 34 Atl. 998.

⁵ *Parker v. Waycross & F. R. Co.* 81 Ga. 387, 8 S. E. 871; *Jordan v. Kavanaugh*, 63 Iowa, 152, 18 N. W. 151; *Browne v. Raleigh & G. R. Co.* 108 N. C. 34, 12 S. E. 958.

b. Rulings not concerning conduct of trial.—Within the rule just stated, an exception is generally necessary to a decision or ruling on an objection which does not necessarily or immediately concern the conduct of the trial.¹ Included in these are such decisions or rulings as the rejection of a plea,² the decision on a demurrer,³ on a motion to dismiss,⁴ or for judgment on the pleadings,⁵ or to require an election,⁶ or to amend,⁷ or to strike out.⁸

So, too, an exception is necessary to an order denying a postponement,⁹ denying the right of trial by jury,¹⁰ and to a decision on application for a change of venue.¹¹

¹ *Moore v. Newell*, 94 N. C. 265.

As refusal of a discovery sought. *Peterson v. Gresham*, 25 Ark. 380. Or dismissal as to one of two joint defendants in an action of tort. *Pioneer Fireproof Constr. Co. v. Hansen*, 176 Ill. 100, 52 N. E. 17. Or an order substituting a party plaintiff. *Maul v. Drexel*, 55 Neb. 446, 76 N. W. 163. Or granting a motion for a speedy trial, and trying the case out of its regular order. *Caveny v. Weiller*, 90 Ill. 158. Or denying a motion to quash a writ of mandamus. *Lamkin v. Sterling*. 1 Idaho, 120.

As to the necessity of an exception to decisions or rules on questions relative to the taxation of costs, see *Muir v. Meredith*, 82 Cal. 19, 22 Pac. 1080; *Darst v. Collier*, 86 Ill. 96; *Sisson v. Pearson*, 44 Ill. App. 81; *State ex rel. Littleton v. Brewer*, 70 Iowa, 384, 30 N. W. 646; *Barry v. McGrade*, 14 Minn. 286, Gil. 214; *Roberts v. Drehmer*, 41 Neb. 306, 59 N. W. 911; *Allbright v. Corley*, 54 Tex. 372; *Cord v. Southwell*, 15 Wis. 211.

But in some states, by statute, formal exceptions are not necessary to interlocutory orders finally determining the rights of the parties, appealable orders, decisions on demurrers, orders made on *ex parte* applications, and orders made in the absence of the party; as in California, Code Civ. Proc. § 647; *Davis v. Honey Lake Water Co.* 98 Cal. 415, 33 Pac. 270 (order striking out demurrer).

Such a statute was no doubt enacted for the benefit of parties who, through inadvertence or other cause, should fail to take an exception to orders or decisions therein mentioned, when they were present, and also for those parties who should be absent when the order or decision was made or rendered. But it does not relieve the party against whom the order or decision is made or rendered of the necessity of presenting and having settled a bill showing that he is entitled to the benefit of the presumed statutory exception. *Bostwick v. Knight*, 5 Dak. 305, 40 N. W. 344; *Lamet v. Miller*, — Cal. —, 11 Pac. 744; *Purdum v. Taylor*, 2 Idaho, 153, 9 Pac. 607; *Guthrie v. Phelen*, 2 Idaho, 89, 6 Pac. 107.

And a presumption of the party's absence is not raised by the fact that the court before ruling took the matter under advisement. *Lamet v. Miller*, — Cal. —, 11 Pac. 744.

And a decision on an objection to the introduction of evidence, on the ground that the complaint states no cause of action, is not a decision of a demurrer, within the meaning of such a statute. *Ross v. Wait*, 2 S. D. 638, 51 N. W. 866. Nor is a ruling on evidence an order within the terms of such a statute. *McGuire v. Drew*, 83 Cal. 225, 23 Pac. 312.

² *Young v. Donegan*, — Cal. —, 29 Pac. 412; *Huntington v. Chambers*, 15 Ill. App. 426; *Cook v. Steuben County Bank*, 1 G. Greene, 447; *Equitable Mortg. Co. v. Thorn*, — Tex. Civ. App. —, 26 S. W. 276; *White v. Toncray*, 9 Leigh, 347; *Bowyer v. Hewitt*, 2 Gratt. 193; *Hart v. Baltimore & O. R. Co.* 6 W. Va. 336.

³ *Galloway v. Carlisle*, 15 Colo. 244, 25 Pac. 316; *Turner v. State ex rel. Stephenson*, 45 Kan. 554, 26 Pac. 35; *Lott v. Kansas City, Ft. S. & G. R. Co.* 42 Kan. 293, 21 Pac. 1070; *State ex rel. Rowe v. Weaver*, 123 Ind. 512, 24 N. E. 330; *Beaven v. Phillips*, 83 Ky. 89; *Burdick v. Kenyon*, 20 R. I. 498, 40 Atl. 99. So, also, as to refusal of leave to plead over, after demurrer sustained. *Powell v. Asten*, 36 Ala. 140.

Contra, *Marshall v. Cleveland, C. C. & St. L. R. Co.* 89 Ill. App. 531; *Lee v. Rutledge*, 51 Md. 311; *McKenzie v. Donnell*, 151 Mo. 431, 52 S. W. 214. Where the ground of demurrer is that the complaint or petition fails to state a cause of action. *Hall v. Linn*, 8 Colo. 264, 5 Pac. 641; *Behrens v. McCance*, 106 Ind. 330, 6 N. E. 912; *St. Paul v. Kuby*, 3 Minn. 154, Gil. 125; *Territory ex rel. Blake v. Virginia Road Co.* 2 Mont. 96. And by statute in some states. *Efurd v. Loeb*, 82 Ala. 429, 3 So. 3; *Jones v. Townsend*, 21 Fla. 438, 58 Am. Rep. 676; *Barnes v. Scott*, 29 Fla. 285, 11 So. 48; *Ross v. Wait*, 2 S. D. 638, 51 N. W. 866. And by rule of court in Texas. *White v. San Antonio Waterworks Co.* 9 Tex. Civ. App. 465, 29 S. W. 252. See also note 1, supra. And *Long v. Billings*, 7 Wash. 267, 34 Pac. 936, holds that an exception is not necessary to a judgment dismissing the action after demurrer sustained. Or to judgment against defendant on sustaining a demurrer to his answer. *Coffman v. Wilson*, 2 Met. (Ky.) 542.

- ⁴ As, for plaintiff's failure to give security for costs. *Hyde v. Adams*, 80 Ala. 111. For the rule as to necessity of exceptions to rulings on motions to dismiss at trial, see *infra*, § 9.
- ⁵ *Robbins v. Butler*, 13 Colo. 496, 22 Pac. 803; *Security Sav. & L. Asso. v. Anderson*, 172 Pa. 305, 34 Atl. 44.
- Contra*, *Lamet v. Miller*, — Cal. —, 11 Pac. 744; *Purdum v. Taylor*, 2 Idaho, 153, 9 Pac. 607; *Power v. Gum*, 6 Mont. 5, 9 Pac. 575.
- ⁶ *Finley v. Brown*, 22 Iowa, 538; *Hammett v. Trueworthy*, 51 Mo. App. 281. *Contra*, *Barnes v. Scott*, 29 Fla. 285, 11 So. 48.
- ⁷ *McNutt v. King*, 59 Ala. 597; *King v. Rea*, 13 Colo. 69, 21 Pac. 1084; *Pettis v. Campbell*, 47 Ga. 596; *McFarland v. Claypool*, 128 Ill. 398, 21 N. E. 587; *Knowles v. Rexroth*, 67 Ind. 59; *Alcorn v. Morgan*, 77 Ind. 184; *Jouitt v. Lewis*, 4 Litt. (Ky.) 160; *Sutherland v. Kittridge*, 19 Me. 424; *Holliday v. Mansker*, 44 Mo. App. 465; *Wallace v. Baisley*, 22 Or. 572, 30 Pac. 432; *Gibson v. Beveridge*, 90 Va. 696, 19 S. E. 785. *Contra*, *Cumber v. Schoenfeld*, 16 Daly, 454, 12 N. Y. Supp. 282.
- And *Lamb v. Beaumont Temperance Hall Co.* 2 Tex. Civ. App. 289, holds that it is necessary to except to the action of the court, allowing a supplemental petition to be filed, setting up facts which should have been brought in by amendment.
- But according to *Giddings v. 76 Land & Water Co.* 109 Cal. 116, 41 Pac. 788, an order denying a motion for leave to file a supplemental complaint need not be excepted to.
- ⁸ *Mahoney v. O'Leary*, 34 Ala. 97; *Blackford v. Killan*, 42 Ala. 487; *McCormick Harvesting Mach. Co. v. Russell*, 86 Iowa, 556, 53 N. W. 310; *State use of Sly v. Steinman*, 18 Mo. 201; *Martin v. Jones*, 72 Mo. 23; *Gorwyn v. Anabel*, 48 Mo. App. 297; *Kratz v. Dawson*, 3 Wash. Terr. 100, 13 Pac. 663.
- In California it is necessary to except to an order denying a motion to strike out the pleading. *Ganceart v. Henry*, 98 Cal. 281, 33 Pac. 92. But not to an order granting such a motion. *Davis v. Honey Lake Water Co.* 98 Cal. 415, 33 Pac. 270.
- ⁹ *Davis v. Patrick*, 6 C. C. A. 632, 12 U. S. App. 629, 57 Fed. 909; *Coad v. Home Cattle Co.* 32 Neb. 761, 49 N. W. 757. For other cases see ante, chapter II., Applications to Postpone, § 27.
- ¹⁰ *Klotz v. Perteet*, 101 Mo. 213, 13 S. W. 955. *Contra*, *Meech v. Brown*, 4 Abb. Pr. 19, 1 Hilt. 257.
- ¹¹ *Scott v. Neises*, 61 Iowa, 62, 15 N. W. 663; *Goodnow v. Plumb*, 67 Iowa, 661, 25 N. W. 870; *Klotz v. Perteet*, 101 Mo. 213, 13 S. W. 955; *Evans v. Trenton*, 112 Mo. 390, 20 S. W. 614; *Muller v. Bayly*, 21 Gratt. 521; *Church v. Milwaukee*, 31 Wis. 512.

c. Rulings made during progress of trial. (1) *In general.*—It is a rule with but few exceptions, that to secure a review on appeal or error, of alleged erroneous rulings or decisions made

or rendered during the progress of the trial, a timely exception thereto must have been saved.¹

¹ *Otterbach v. Patch*, 5 App. D. C. 69; *Utter v. Jaffray*, 114 Ill. 470, 2 N. E. 494; *Messery v. Hull*, 60 Mo. App. 132; *Duckwitz v. Fuller*, 7 App. Div. 372, 40 N. Y. Supp. 965; *Floyd v. Hotelkiss*, 5 Pa. Super. Ct. 216; *Montague v. Allan*, 78 Va. 592.

As, overruling a motion for a change of judge. *Syndicate Improv. Co. v. Bradley*, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60. Trying and presenting to the jury the case on issues not raised by the pleadings. *Price v. Burlington, C. R. & M. R. Co.* 42 Iowa, 16. Allowing objectionable matter in a pleading to be read to the jury. *Western U. Teleg. Co. v. Smith*, — Tex. Civ. App. —, 33 S. W. 742. Permitting the severance of defenses. *Commercial & R. Bank v. Lump*, 7 How. (Miss.) 414. Refusing to discharge the jury for misconduct of a juror. *Leeser v. Boekhoff*, 38 Mo. App. 445. Limiting the number of witnesses on any particular point. *Skeen v. Mooney*, 8 Utah, 157, 30 Pac. 363. Requiring an election by plaintiff in replevin whether he will proceed for the return of the property or for its value and damages. *Tuckwood v. Hanthorn*, 67 Wis. 326, 30 N. W. 705. Imposing or refusing to impose the burden of proof. *O'Farrell v. Metropolitan L. Ins. Co.* 22 App. Div. 495, 48 N. Y. Supp. 199, 23 App. Div. 623, 48 N. Y. Supp. 695; *Bozzio v. Vaglio*, 10 Wash. 270, 38 Pac. 1042.

(2) *Conduct of trial judge*.—So, the propriety of the conduct or remarks of the judge presiding at the trial will not be considered by the appellate court unless, on a seasonable objection made, an exception was saved to the ruling thereon.¹

¹ *People v. Abbott*, 101 Cal. 645, 36 Pac. 129; *Hall v. First Nat. Bank*, 133 Ill. 234, 24 N. E. 546; *Mulliner v. Bronson*, 114 Ill. 510, 2 N. E. 671; *Vass v. Waukesha*, 90 Wis. 337, 60 N. W. 280.

As stopping the cross-examination of a witness on matters as being immaterial. *Osborn v. Ratliff*, 53 Iowa, 748, 5 N. W. 746. Absenting himself from the courtroom during a portion of the trial. *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269. Leaving the bench and pointing out from plaintiff's chart plaintiff's theory of the action. *Irvin v. Kutruuff*, 152 Pa. 609, 25 Atl. 796. A remark that the jury had evidence enough on a certain point. *Cromer v. State*, 21 Ind. App. 502, 52 N. E. 239.

(3) *Conduct of counsel*.—And it is now settled that, in order to save any question in relation to the misconduct of counsel during the progress of the trial, the court must be called upon to

correct the injury done, and an exception duly saved to its refusal so to do.¹

¹ *Shelp v. United States*, 26 C. C. A. 570, 48 U. S. App. 376, 81 Fed. 694; *Kansas City, M. & B. R. Co. v. Webb*, 97 Ala. 157, 11 So. 888; *Poullain v. Poullain*, 79 Ga. 11, 4 S. E. 81; *Grand Lodge A. O. U. W. v. Belcham*, 145 Ill. 308, 33 N. E. 886; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *Blair v. Madison County*, 81 Iowa, 313, 46 N. E. 1093; *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 712, 16 Pac. 146; *Bland v. Gaither*, 10 Ky. L. Rep. 1033, 11 S. W. 423; *Brinkley v. Platt*, 40 Md. 529; *Bedford v. Penney*, 65 Mich. 667, 32 N. W. 888; *Nichols v. Metzger*, 43 Mo. App. 607; *Littrell v. Wilcox*, 11 Mont. 77, 27 Pac. 394; *Bankers Life Assn. v. Lisco*, 47 Neb. 340, 66 N. W. 412; *Wilkins v. Anderson*, 11 Pa. 399; *Laue v. Madison*, 86 Wis. 453, 57 N. W. 93; *Gulf, C. & S. F. R. Co. v. Greenlee*, 70 Tex. 553, 8 S. W. 129.

But if the transgression be so flagrant, if the offensive remark has stricken so deep and is of such character, that neither rebuke nor retraction can destroy its sinister influence, a new trial should be awarded regardless of the want of objection and exception. *Chicago, B. & Q. R. Co. v. Kellogg*, 55 Neb. 748, 76 N. W. 462.

(4) *Juries and jurors*.—So, too, a seasonable exception is necessary to a review of any alleged error or irregularity in the drawing, summoning, or impaneling of trial jurors;¹ in accepting as competent jurors objected to as incompetent;² and excluding as incompetent jurors claimed to be competent.³

¹ *Alexander v. United States*, 138 U. S. 353, 34 L. ed. 954, 11 Sup. Ct. Rep. 350; *Jones v. State*, 100 Ala. 209, 14 So. 115; *Ohio & M. R. Co. v. Stein*, 140 Ind. 61, 39 N. E. 246; *Preston v. Hannibal & St. J. R. Co.* 132 Mo. 111, 33 S. W. 783; *Com. v. Ware*, 137 Pa. 465, 20 Atl. 680; *Hobbs v. State*, — Tex. Crim. Rep. —, 28 S. W. 814.

² *Territory v. Bryson*, 9 Mont. 32.

³ *Voorhees v. Dorr*, 51 Barb. 580.

(5) *Evidence and witnesses*.—So, failure to except to the action of the trial court in admitting improper evidence,¹ or in excluding proper evidence,² or in passing upon the competency of a witness,³ or the propriety of a question propounded to a witness,⁴ waives any error therein, and precludes its consideration by the appellate court.

So, also, the objection that evidence was offered out of order can be noticed only on proper exception saved.⁵

And a decision on a motion to strike out,⁶ or on an objection to a deposition,⁷ must be excepted to.

¹ *Newport News & M. Valley Co. v. Pace*, 158 U. S. 36, 39 L. ed. 887, 15 Sup. Ct. Rep. 745; *Quinn v. Ft. Payne*, — Ala. —, 12 So. 413; *Wise v. Wakefield*, 118 Cal. 107, 50 Pac. 310; *Colorado M. R. Co. v. Brown*, 15 Colo. 195, 25 Pac. 87; *Alton R. & Illuminating Co. v. Foulds*, 81 Ill. App. 322; *Moffett-West Drug Co. v. Byrd*, 1 Ind. Terr. 612, 43 S. W. 864; *McGarvy v. Roods*, 73 Iowa, 363, 35 N. W. 488; *Crawford v. Anderson*, 129 Ind. 117, 28 N. E. 314; *Benepe v. Wash*, 38 Kan. 407, 16 Pac. 950; *Branson v. Com.* 92 Ky. 330, 17 S. W. 1019; *Gueringer v. His Creditors*, 33 La. Ann. 1279; *McCullough v. Biedler*, 66 Md. 283, 7 Atl. 454; *Powers v. Boston Gaslight Co.* 158 Mass. 257, 33 N. E. 523; *Holman v. Union Street R. Co.* 114 Mich. 308, 72 N. W. 202; *Lancashire Ins. Co. v. Callahan*, 68 Minn. 277, 71 N. W. 261; *Robyn v. Chronical Pub. Co.* 127 Mo. 385, 30 S. W. 130; *Hyman v. State*. 74 Miss. 829, 21 So. 971; *Kleinschmidt v. Iler*, 6 Mont. 123, 9 Pac. 901; *Bennett v. McDonald*, 52 Neb. 278, 72 N. W. 268; *Palmer v. Culverwell*, 24 Nev. 114, 50 Pac. 1; *Wicks v. Thompson*, 129 N. Y. 634, 29 N. E. 301; *Ferrell v. Thompson*, 107 N. C. 420, 10 L.R.A. 361, 12 S. E. 109; *Philadelphia Trust, S. D. & Ins. Co. v. Purves*, 10 Sadler (Pa.) 342, 13 Atl. 936; *Mains v. Lederer*, 21 R. I. pt. 2, p. 164, 43 Atl. 876; *Sahlien v. Bank of Lonoke*, 90 Tenn. 221, 16 S. W. 373; *Collins v. Panhandle Nat. Bank*, 75 Tex. 254, 11 S. W. 1053; *Clark v. Hodges*, 65 Vt. 273, 27 Atl. 726; *Lamberts v. Cooper*, 29 Gratt. 61; *Lewis v. McDougall*, 19 Wash. 388, 53 Pac. 664.

Contra, in equity. *Cochrane v. Breckenridge*, 75 Iowa, 213, 39 N. W. 274. And by statute in actions in the New Jersey district court in which the demand for damages does not exceed \$200. *Oliphant v. Brearley*. 54 N. J. L. 521, 24 Atl. 660.

But failure of a party who has once taken exception to a certain line and character of evidence, to renew the objection at each recurrence of the objectionable matter arising in the examination of other witnesses, will not debar him from having the exception reviewed on appeal. *Green v. Southern P. Co.* 122 Cal. 563, 55 Pac. 577.

² *Marks v. Newmark*, 3 Ariz. 224, 28 Pac. 960; *Texas & St. L. R. Co. v. Kirby*, 44 Ark. 103; *Lucas v. Richardson*, 68 Cal. 618, 10 Pac. 183; *McReynolds v. McReynolds*, 74 Iowa, 89, 36 N. W. 903; *Thorne v. Fox*, 67 Md. 67, 8 Atl. 667; *Chicago, S. F. & C. R. Co. v. Elliott*, 117 Mo. 549, 24 S. W. 53; *Hurlbut v. Hall*, 39 Neb. 889, 58 N. W. 538; *Warfel v. Knott*, 128 Pa. 528, 18 Atl. 390; *Collier v. Jenks*, 19 R. I. 137, 32 Atl. 208; *Durham v. Atwell*, — Tex. Civ. App. —, 27 S. W. 316; *Lewis v. McDougall*, 19 Wash. 388, 52 Pac. 664; *John R. Davis Lumber Co. v. First Nat. Bank*, 90 Wis. 464, 63 N. W. 1018.

So, also, of exclusion of evidence by refusing to reopen the case. *Barnum v. Andrews*, 106 Mich. 81, 63 N. W. 983. And of refusal to permit cross-examination. *Cone v. Montgomery*, 25 Colo. 277, 53 Pac. 1052.

The appellate division of the New York supreme court, however, is not precluded from reviewing the correctness of a ruling on evidence, whether of its admission or exclusion, because of the lack of an exception. *Re Brundage*, 31 App. Div. 348, 52 N. Y. Supp. 362. And see note 1, § 1, *supra*.

³ *Downey v. Hicks*, 14 How. 240, 14 L. ed. 404; *Walker v. State*, 34 Fla. 167, 16 So. 80; *Brown v. Foster*, 112 Mo. 297, 20 S. W. 611; *Case v. Case*, 49 Hun, 83, 1 N. Y. Supp. 714.

⁴ *Scott v. Lloyd*, 9 Pet. 418, 9 L. ed. 178; *Louisville & N. R. Co. v. Binion*, 107 Ala. 645, 18 So. 75; *Tischler v. Apple*, 30 Fla. 132, 11 So. 273; *Hard v. Ashley*, 117 N. Y. 606, 23 N. E. 177.

⁵ *Olmstead v. Webb*, 5 App. D. C. 38.

⁶ *Fleming v. Yost*, 137 Ind. 95, 36 N. E. 705; *Ayers v. Ames*, — Iowa, —, 74 N. W. 741; *State v. McCollum*, 119 Mo. 469, 24 S. W. 1021; *Republican Valley R. Co. v. Boyse*, 14 Neb. 130, 15 N. W. 364.

⁷ *Gardner v. Haynie*, 42 Ill. 291; *Jones v. Loggins*, 37 Miss. 546; *Dawson v. Dawson*, 26 Neb. 716, 42 N. W. 744; *Looper v. Bell*, 1 Head, 373; *Noell v. Bonner*, — Tex. Civ. App. —, 21 S. W. 553; *Vanscoy v. Stinchcomb*, 29 W. Va. 263, 11 S. E. 937. Otherwise, however, of an objection to a deposition on the ground of incompetency. *Vanscoy v. Stinchcomb*, 29 W. Va. 263, 11 S. E. 937.

(6) *View by jury*.—Consideration by the appellate court of a ruling by the trial court on a request for a view by the jury is precluded by failure to save a timely exception thereto.¹

¹ *Chicago, P. & St. L. R. Co. v. Leah*, 152 Ill. 149, 38 N. E. 556; *Gilmore v. H. W. Baker Co.* 12 Wash. 468, 41 Pac. 124.

(7) *Instructions and charges*.—The correctness of instructions and charges given¹ or refused² cannot be questioned in the appellate court if no timely exception was saved in the trial court, unless otherwise expressly provided by statute,³ or failure to except is otherwise excused.⁴

¹ *Eddy v. Lafayette*, 163 U. S. 456, 41 L. ed. 225, 16 Sup. Ct. Rep. 1082; *St. Louis, I. M. & S. R. Co. v. Vincent*, 36 Ark. 451; *Allingham v. Rix*, — Cal. —, 28 Pac. 579; *Pielke v. Chicago, M. & St. P. R. Co.* 6 Dak. 444, 45 N. W. 813; *McSwain v. Howell*, 29 Fla. 248, 10 So. 588; *Jefferson v. Chapman*, 127 Ill. 438, 20 N. E. 33; *Lowell v. Gathright*, 97 Ind. 313; *Liefheit v. Jos. Schlitz Brewing Co.* 106 Iowa, 451, 76 N. W. 730; *Missouri P. R. Co. v. Johnson*, 44 Kan. 660, 24 Pac. 1116; *Kennedy v. Cunningham*, 2 Met. (Ky.) 538; *Pennsylvania R. Co. v. Reichert*, 58 Md. 261; *Rawson v. Plaisted*, 151 Mass. 71, 23 N. E. 722; *Longyear v. Gregory*, 110 Mich. 277, 68 N. W. 116; *Shatto*

- v. Abernethy, 35 Minn. 538, 29 N. W. 325; Drake v. Surget, 36 Miss. 458; McDonald v. Cobb, 44 Mo. App. 167; Burnet v. Cavanaugh, 56 Neb. 190, 76 N. W. 578; Jenkins v. Dean, 130 N. Y. 275, 29 N. E. 126; Curtis v. Winston, 186 Pa. 492, 40 Atl. 786; Greene v. Duncan, 37 S. C. 239, 15 S. E. 956; Hilton v. Advance Thresher Co. 8 S. D. 412, 66 N. W. 816; Thirkfield v. Mountain View Cemetery Asso. 12 Utah, 76, 41 Pac. 564; Wheatley v. Waldo, 36 Vt. 237; State v. Anderson, 20 Wash. 193, 55 Pac. 39; Simonds v. Baraboo, 93 Wis. 40, 67 N. W. 40.
- So, also, as to part of a charge. Norris v. Kipp, 74 Iowa, 444, 38 N. W. 152; Homiston v. Long Island R. Co. 8 Misc. 687, 28 N. Y. Supp. 658; Bremmer v. Green Bay, S. P. & N. R. Co. 61 Wis. 114, 20 N. W. 687.
- Or that it was given orally, when it should have been in writing. Sams Automatic Car Coupler Co. v. League, 25 Colo. 129, 54 Pac. 642.
- ² Barrow v. Reab, 9 How. 366, 13 L. ed. 177; Leahy v. Southern P. R. Co. 65 Cal. 150, 3 Pac. 622; Stewart v. Mills, 18 Fla. 57; Krug v. Ward, 77 Ill. 603; Stewart v. Murray, 92 Ind. 543, 47 Am. Rep. 167; Cox v. Allen, 91 Iowa, 462, 59 N. W. 335; Runnells v. Pentwater, 109 Mich. 512, 67 N. W. 558; Omaha v. McGavock, 47 Neb. 313, 66 N. W. 415; Roberts v. Lloyd, 4 N. Y. Supp. 446; Trumbo v. City Street Car Co. 89 Va. 780, 17 S. E. 124; Blumberg v. McNear, 1 Wash. Terr. 141; Thrasher v. Postel, 79 Wis. 503, 48 N. W. 600.
- So, as to a modification of a requested charge. Greene v. Duncan, 37 S. C. 239, 15 S. E. 956; Trumbo v. City Street Car Co. 89 Va. 780, 17 S. E. 124.
- ³ Waterbury v. Russell, 8 Baxt. 159; International, T. & S. F. R. Co. v. Click, 5 Tex. Civ. App. 224, 23 S. W. 833.
- Thus, a Montana statute declares that instructions shall be deemed excepted to without formal exception thereto being taken. See Gassert v. Bogk, 7 Mont. 585, 1 L.R.A. 240, 19 Pac. 281. But to be reviewed they must be incorporated, together with so much of the evidence as is necessary to explain them, in the bill of exceptions. Kleinschmidt v. McDermott, 12 Mont. 309, 30 Pac. 393.
- So, by statute in Alabama, it is not necessary to except to the action of the court in giving or refusing a charge requested in writing. See Wesson v. State, 109 Ala. 61, 19 So. 514. But the mere indorsement "given" or "refused," with the signature of the trial judge, on charges requested, does not make them a part of the record; but they must be presented by incorporation in a bill of exceptions and properly assigned as errors. Wesson v. State, 109 Ala. 61, 19 So. 514; Nuckols v. State, 109 Ala. 2, 19 So. 504.
- So, in Colorado, the Code dispenses with the necessity of taking exceptions to the giving, refusing, or modifying of instructions. But it has been held that this does not do away with the reason or necessity for making objections in some appropriate way, in such time and manner as to give the trial court an opportunity to correct the instruction,

if found erroneous. *Denver & R. G. R. Co. v. Ryan*, 17 Colo. 98, 28 Pac. 79. And it would seem from *Bourke v. Van Keuren*, 20 Colo. 95, 36 Pac. 882, that if an appellant wishes to preserve his right to an appellate review of the instruction complained of, he should have either the objection or exception appear in the record as having been properly saved. But in *Denver & R. G. R. Co. v. Bedell*, 11 Colo. App. 139, 54 Pac. 280, the appellate court, for the purpose of sustaining a judgment for plaintiff, which was attacked on the ground that there was an inconsistency between the general verdict and a special finding, which entitled defendant to judgment notwithstanding the verdict, took notice that an instruction through which the inconsistency was sought to be deduced was erroneous, although no exception was taken thereto.

In North Carolina it is not necessary to except to charges given or refused at the trial; but it is sufficient under the statute and a rule of court if they are set out by appellant in preparing his case on appeal. *Lee v. Williams*, 111 N. C. 200, 16 S. E. 175; *Morriner v. John L. Roper Lumber Co.* 113 N. C. 52, 18 S. E. 94.

And in Ohio, if the record shows that a motion for a new trial was made on the ground that the verdict was against the law and the evidence and that the overruling of the motion was assigned for error, and that all the evidence offered on the trial, together with the charge of the court, has been properly brought up by the bill, the reviewing court will, in connection with the evidence, examine the charge, whether excepted to or not. *Weybright v. Fleming*, 40 Ohio St. 52; *Little Miami R. Co. v. Fitzpatrick*, 42 Ohio St. 318.

⁴ Thus, failure to except to a further instruction on the jury returning into court after they had retired to consider their verdict, and in the absence of counsel, on a matter material to his client, and adverse to his interests, will not preclude consideration by the appellate court of the correctness of the instruction. *Wheeler v. Sweet*, 137 N. Y. 435, 33 N. E. 483. But *Stewart v. Wyoming Cattle Rancho Co.* 128 U. S. 383, 32 L. ed. 439, 9 Sup. Ct. Rep. 101, disposes of this question thus: "The absence of counsel, while the court is in session, at any time between the impaneling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the law of the case as occasion may require, nor dispense with the necessity of seasonably excepting to his rulings and instructions, nor give jurisdiction to a court of error to decide questions not appearing of record."

If a case is submitted to the jury on an erroneous theory of the law, a party is not prejudiced by his failure to except to the judge's charge; it is sufficient that an exception be taken to the refusal of a new trial on the ground that the verdict is contrary to law. *Goldman v. Swartwout*, 117 App. Div. 185, 102 N. Y. Supp. 302.

And the general term or appellate division of the New York supreme court will review instructions given or refused, though not formally ex-

cepted to on the trial. *Jacobs v. Sire*, 4 Misc. 398, 23 N. Y. Supp. 1063; *Vorce v. Oppenheim*, 37 App. Div. 69, 55 N. Y. Supp. 596. So also will the general term of the common pleas court. *Austin v. Staten Island Rapid Transit R. Co.* 39 N. Y. S. R. 76, 14 N. Y. Supp. 923. Otherwise, however, on appeal from the New York city court to the general term of that court. *Imperial Bldg. Co. v. J. H. Woodbury Dermatological Inst.* 59 N. Y. Supp. 186. Or to the general term of the common pleas court. *Crane v. Schloss*, 39 N. Y. S. R. 92, 14 N. Y. Supp. 886.

To authorize a review by the general term without exceptions it must be evident that the trial court misunderstood the law, and misled and misdirected the jury. *Ackart v. Lansing*, 6 Hun, 476; *Vorce v. Oppenheim*, 37 App. Div. 69, 55 N. Y. Supp. 596. And even this practice does not do away with and revoke the usual and salutary rule that where a trial judge misstates the law to the jury, or omits to state propositions which should properly have been stated, it is the duty of counsel to except to the charge, or request the judge to submit the omitted propositions and except to the refusal. *Goodenough v. Fuller*, 5 N. Y. S. R. 896.

But a local practice of a trial court to regard as excepted to all instructions given or refused will not obviate the necessity of an exception unless that practice is made to appear upon the face of the record. *Steyer v. Curran*, 48 Iowa, 580.

(8) *Verdict*.—Some of the courts will not consider an objection to the form of the verdict unless that objection was called to the attention of the trial court, and an exception duly saved;¹ while others hold that no exception is necessary.²

So, again, the objection that the verdict is not supported by evidence will not be heard by some courts unless presented on a proper exception.³

And the correctness of a ruling on a motion to set aside a verdict will only be considered on a proper exception duly saved.⁴

¹ *Raulerson v. Rockner*, 17 Fla. 809; *McNally v. Weld*, 30 Minn. 209, 14 N. W. 895; *Chapman v. White*, 52 Mo. 179; *Sternberger v. Bernheimer*, 121 N. Y. 194, 24 N. E. 311; *Kuhlman v. Williams*, 1 Okla. 136, 23 Pac. 867; *Texas & P. R. Co. v. Casey*, 52 Tex. 112.

² *French v. Hotchkiss*, 60 Ill. App. 580; *Halderman v. Birdsall*, 14 Ind. 304. Especially where the verdict is based on an erroneous charge. *Levy v. Klepner*, 15 Misc. 643, 37 N. Y. Supp. 582.

³ *Machauer v. Fogel*, 21 Misc. 637, 47 N. Y. Supp. 1056; *Schwinger v. Raymond*, 105 N. Y. 648, 11 N. E. 952.

Contra, of a case on review by the general term of the supreme court. See *Schwinger v. Raymond*, 105 N. Y. 648, 11 N. E. 952.

And the fact that at the close of plaintiff's case a motion to dismiss or for a directed verdict was denied under an exception will not avail without an exception, when the issues were submitted, having been then taken to an adverse ruling upon a like motion to dismiss or for directed verdict. *Machauer v. Fogel*, 21 Misc. 637, 47 N. Y. Supp. 1056.

⁴ *Nicol v. Hyre*, 58 Mo. App. 134.

(9) *Dismissal, nonsuit, directing verdict, etc.*—Failure to except to a ruling granting¹ or denying² a nonsuit or dismissal, or to a ruling on a motion for a directed verdict,³ is fatal to the right of review.

So, also, an exception is necessary to bring up for review a refusal of the court to take off a nonsuit.⁴

¹ *Palmer v. Bice*, 28 Ala. 430; *Vincent v. Rogers*, 30 Ala. 471; *Wyatt v. Evins*, 52 Ala. 285; *Schroeder v. Schmidt*, 74 Cal. 459, 16 Pac. 243; *Nelmes v. Wilson*, — Cal. —, 34 Pac. 341; *McBride v. Latham*, 79 Ga. 661, 4 S. E. 928; *Blair v. Pray*, 103 Ill. 615; *Heddy v. Driver*, 6 Ind. 350; *Stewart v. Davenport*, 23 Minn. 346; *Harper v. Dail*, 92 N. C. 394; *Harrison v. Bank of Illinois*, 9 Mo. 161; *Pendleton v. Weed*, 17 N. Y. 72. The decision not being an order finally determining the rights of the parties and deemed to be excepted to, within the meaning and terms of a California statute. *Flashner v. Waldron*, 86 Cal. 211, 24 Pac. 1063.

² *Witkowski v. Hern*, 82 Cal. 604, 23 Pac. 132; *Oakes v. Thornton*, 28 N. H. 44; *Plumer v. Marathon County Supers*. 46 Wis. 163; *Brown v. Warren*, 16 Nev. 228. So, on appeal to the general term of the New York common pleas court. *VanDoren v. Jelliffe*, 1 Misc. 354, 26 N. Y. Supp. 636.

Contra, *Ballentine v. White*, 77 Pa. 20; *Payton v. Sherburne*, 15 R. I. 213, 2 Atl. 300. And on appeal from the New York city court to the general term of the common pleas. *Hopkins v. Clark*, 14 Misc. 599, 36 N. Y. Supp. 456.

³ *Dunham Towing & Wrecking Co. v. Dandelin*, 143 Ill. 409, 32 N. E. 258; *Stock Quotation Teleg. Co. v. Chicago Bd. of Trade*, 144 Ill. 370, 33 N. E. 42; *Haniford v. Kansas*, 103 Mo. 172, 15 S. W. 753; *Schwartz v. Family Fund Soc.* 26 Jones & S. 515, 12 N. Y. Supp. 717, 13 N. Y. Supp. 888; *Curtis v. Wheeler & W. Mfg. Co.* 141 N. Y. 511, 36 N. E. 596; *Smith v. Simmons*, 66 Hun. 628, 21 N. Y. Supp. 47; *DeLendrecie v. Peek*, 1 N. D. 422, 48 N. W. 342; *Burke v. Noble*, 48 Pa. 168; *Kirch v. Davies*, 55 Wis. 287, 11 N. W. 689; *Holum v. Chicago, M. & St. P. R. Co.* 80 Wis. 299, 50 N. W. 99; *McKinnon v. Atkins*, 60 Mich. 418, 27 N. W. 564.

Contra, *Loving v. Warren County*, 14 Bush. 316; *Collins v. Potts*, 9 Ky. L. Rep. 536. And where the direction is made part of the verdict and embodied in the bill. *Rosenthal v. Vernon*, 79 Wis. 245, 48 N. W. 485.

And refusal to direct a verdict will be reviewed by the general term of the New York supreme court, though no exception was saved. *Benson v. Gerlach*, 51 Hun, 640, 4 N. Y. Supp. 273. But not on an appeal from the New York city court to the general term of the common pleas. *Paige v. Chedsey*, 4 Misc. 183, 23 N. Y. Supp. 879; *Eckensberger v. Amend*, 10 Misc. 145, 30 N. Y. Supp. 915.

And where a verdict has been ordered, subject to the opinion of the court at general term, an exception is not necessary to obtain a review of the determination of a question of law arising upon the verdict so ordered. *Duryea v. Vosburgh*, 121 N. Y. 57, 24 N. E. 309.

So, plaintiff in a case in which exceptions were ordered to the appellate division, who asked leave to submit further evidence on an intimation of an intention to nonsuit him and to allow an exception, is entitled to have the appellate court treat the case as though an exception were taken, though no formal exception was taken when the nonsuit was actually granted. *Deane v. Buffalo*, 42 App. Div. 205, 58 N. Y. Supp. 810.

⁴*Taylor v. Switzer*, 110 Mo. 410, 19 S. W. 735; *Bondz v. Pennsylvania Co.* 138 Pa. 153, 20 Atl. 871; *Anderson v. Oliver*, 138 Pa. 156, 20 Atl. 981; *Harvey v. Pollock*, 148 Pa. 534, 23 Atl. 1127; *Pollock v. Harvey*, 148 Pa. 536, 23 Atl. 1128; *Finch v. Conrade*, 154 Pa. 326, 26 Atl. 368; *Miller v. Balfour*, 138 Pa. 183, 22 Atl. 86.

2. By whom exceptions to be taken.

An exception to be available must be taken by the party ¹ who seeks to have reviewed the ruling or instruction complained of.²

And a joint exception taken by two or more parties is unavailing unless well taken as to all.³

¹It must be taken by a party to the suit. *Conrad v. Johnson*, 20 Ind. 421; *Campbell v. Swasey*, 12 Ind. 70.

So, an exception taken by an attorney as *amicus curiæ* will not be noticed. *Birmingham Loan & Auction Co. v. First Nat. Bank*, 100 Ala. 249, 13 So. 945; *Conrad v. Johnson*, 20 Ind. 421; *Knight v. Low*, 15 Ind. 374; *Martin v. Tapley*, 119 Mass. 116.

But an exception taken by the real party interested in the appeal, though not the nominal appellant, is sufficient. *Fries v. Porch*, 49 Iowa, 351.

²The rule is that an exception taken by one party is not available to his adversary. *Chicago & A. R. Co. v. Heinrich*, 57 Ill. App. 399; *Bingham v. Stage*, 123 Ind. 281, 23 N. E. 756. But that it must be taken

by the party claiming to be injured. *Coates v. Wilkes*, 94 N. C. 174.

But in *Grand Rapids v. Perkins*, 78 Mich. 93, 43 N. W. 1037, it is held that the fact that the objection and exception taken to a charge were not taken by the counsel representing the appellant will not prevent him from availing himself of them.

And in *Duflo v. Juif*, 63 Mich. 513, 30 N. W. 105, it is held that, although it is not strictly for the court to determine whether an exception should be noted, if the party sees fit to accept the judge's action, it is sufficient.

³ *Bosley v. National Mach. Co.* 123 N. Y. 550, 25 N. E. 990; *Schoonmaker v. Bonnie*, 119 N. Y. 565, 23 N. E. 1106; *Gardner v. Friederich*, 25 App. Div. 521, 49 N. Y. Supp. 1077; *Markham v. Washburn*, 45 N. Y. S. R. 683, 18 N. Y. Supp. 355. Especially where the one as to whom the ruling was incorrect made no request that its effect be limited by appropriate instructions. *Gardner v. Friederich*, 25 App. Div. 521, 49 N. Y. Supp. 1077.

3. When to be taken.

And to secure the right of review, an exception must be taken at the time when the ruling¹ or instruction² objected to is given; and should be then noted;³ but if seasonably taken the judge may allow it to be noted before the verdict,⁴ but not after verdict.⁵

¹ *Turner v. Yates*, 16 How. 14, 29, 14 L. ed. 824, 831; *Hanna v. Maas*, 122 U. S. 24, 30 L. ed. 1117, 7 Sup. Ct. Rep. 1055; *Lester v. Georgia C. & N. R. Co.* 90 Ga. 802, 17 S. E. 113; *Horne v. Guiser Mfg. Co.* 74 Ga. 790; *Matsinger v. Fort*, 118 Ind. 107, 20 N. E. 653; *Thomas v. Griffin*, 1 Ind. App. 457, 27 N. E. 754; *Cobb v. Stewart*, 4 Met. (Ky.) 255, 83 Am. Dec. 465; *Lee Gin & Mach. Co. v. Duncan*, 1 Miss. Dec. No. 18, 159, 23 So. 1018; *Eeton v. Kansas City, O. & S. R. Co.* 56 Mo. App. 337; *Allen v. Sallinger*, 108 N. C. 159, 12 S. E. 896; *Stewart v. Huntington Bank*, 11 Serg. & R. 267, 14 Am. Dec. 628; *Stedham v. Creighton*, 28 S. C. 609, 9 S. C. 465; *Bransford v. Karn*, 87 Va. 242, 12 S. E. 404. See also note to *Missouri v. Hope*, 8 L.R.A. 608; *Chicago, I. & E. R. Co. v. Linn*, 30 Ind. App. 88, 65 N. E. 552; *Kenney v. Hampton*, 73 N. H. 45, 58 Atl. 1046; *Alley v. Howell*, 141 N. C. 113, 35 S. E. 821; *Gillou v. Redfield*, 205 Pa. 293, 54 Atl. 886.

So, of exceptions to the improper conduct or remarks of the trial judge. *Yunker v. Marshall*, 65 Ill. App. 667; *Mulliner v. Bronson*, 114 Ill. 510, 2 N. E. 671. Or of counsel. *Chandler v. Thompson*, 30 Fed. 38; *Hoyt v. Carpenter*, 6 Kan. App. 305, 51 Pac. 71; *Kennedy v. Holladay*, 25 Mo. App. 503. The improper restriction of the number

of witnesses on any one point. *Skeen v. Mooney*, 8 Utah, 157, 30 Pac. 363; *Meier v. Morgan*, 82 Wis. 289, 52 N. W. 174. The improper admission or rejection of evidence. *Watson v. LaGrand Roller Skating Rink Co.* 177 Ill. 203, 52 N. E. 317; *Brown v. Kolb*, 8 Pa. Super. Ct. 413; *Feidler v. Motz*, 42 Kan. 519, 22 Pac. 561; *McPhee v. Sullivan*, 77 Wis. 33, 45 N. W. 808; *Hangen v. Hachemeister*, 114 N. Y. 566, 5 L.R.A. 137, 24 N. Y. S. R. 526, 111 Am. St. Rep. 691, 21 N. E. 1046.

In *McAnaw v. Matthis*, 129 Mo. 142, 31 S. W. 344, it is held that, though the record fail to show a prompt exception to certain rulings complained of, by the use of such phrases as "then and there," "at the moment," "immediately," or words of like import, it is sufficient if the record does show that the questions ruled on were raised one after the other on the same day, and that after the ruling on each question an exception was taken.

And in *Laird v. Upton*, 8 N. M. 409, 45 Pac. 1010, the words "during the progress of a trial," in a statute requiring exceptions to decision of the court on any matter of law arising during the progress of a trial to be taken at the time of the decision, were held to mean during the steps taken from the beginning of the trial to its final disposition in the trial court, including a motion in arrest and a motion for a new trial.

In West Virginia, an exception to a ruling of the court upon the trial may be taken at any time before the retirement of the jury. *Gilmer v. Sydenstricker*, 42 W. Va. 52, 24 S. E. 566; *Greenbrier Industrial Exposition v. Ocheltree*, 44 W. Va. 626, 30 S. E. 78.

² *Kansas P. R. Co. v. Twombly*, 100 U. S. 78, 25 L. ed. 550; *Holmes v. Montauk S. B. Co.* 35 C. C. A. 556, 93 Fed. 731. But it is too late after part of the jury have retired. *Spooner v. Handley*, 151 Mass. 313, 23 N. E. 840.

So, of failure to charge on a special point, or refusal to give a requested charge. *Thrasher v. Postel*, 79 Wis. 503, 48 N. W. 660.

And in *Fire Asso. of Philadelphia v. Ruby*, 58 Neb. 730, 79 N. W. 723, reversal on the ground of omission to file the instructions with the clerk before they were read to the jury was refused because no exception was taken on the ground before they were read.

In some of the states, an exception is not necessary to have a review of the action of the trial court as to instructions. For cases, see *supra*, § 1, c (7).

³ An exception to a ruling on a question of evidence must be taken and reduced to writing, or entered in the minutes at the time the ruling is made; but an exception to a charge given to the jury must be taken before verdict. N. Y. Code Civ. Proc. § 995. And see *Rubinfeld v. Rabiner*, 33 App. Div. 374, 54 N. Y. Supp. 68, where an exception to order directing a verdict, taken after the discharge of the jury, was held to have been taken too late.

And § 724, providing for relief from a judgment order or other proceeding taken against one through his mistake, inadvertence, or excusable neglect, and for supplying omissions from any proceedings, cannot be invoked for the purpose of supplying exceptions *nunc pro tunc* claimed to have been omitted through inadvertence and mistake. Fifth Ave. Bank v. Parker, 15 N. Y. Supp. 734.

⁴ Hunnicutt v. Peyton, 102 U. S. 333, 354, 26 L. ed. 113, 116; Gibson v. Beveridge, 90 Va. 696, 19 S. E. 785.

A practice of the trial court, not embodied in a rule, permitting exceptions to be taken after the close of the trial, and included in the bill of exceptions as if taken in proper time, does not obviate the necessity of a timely exception at the trial and before verdict. Johnson v. Garber, 19 C. C. A. 556, 43 U. S. App. 107, 73 Fed. 523.

⁵ United States v. Carey, 110 U. S. 51, 28 L. ed. 67, 3 Sup. Ct. Rep. 424; Renfroe v. Wynne, 74 Ga. 406; Mann v. Maxwell, 83 Me. 146, 21 Atl. 844; Oakley v. Van Noppen, 95 N. C. 60; Virgin Cotton Mills v. Abernathy, 115 N. C. 402, 20 S. E. 522.

So, an exception appearing only in the statement of facts filed after adjournment for the term will not be noticed. Mallory v. Smith, 76 Tex. 262, 13 S. W. 199. So, also, of one raised for the first time on the motion for a new trial. Garner v. State, 31 Fla. 170, 12 So. 638; Barker v. Todd, 37 Minn. 370, 34 N. W. 895. Or for the first time on appeal. Knight v. Chicago, R. I. & P. R. Co. 81 Iowa, 310, 46 N. W. 1112; Smith v. Pearson, 44 Minn. 397, 46 N. W. 849; McGraw v. Franklin, 2 Wash. 17, 25 Pac. 911, 26 Pac. 810.

In Iowa, an exception to a ruling or decision must be taken at the time it is made. Nagel v. Guittar, 62 Iowa, 510, 17 N. W. 671. But an exception to instructions need not be taken at the time, but may be at any time within three days after verdict. Watson v. Stotts, 68 Iowa, 659, 27 N. W. 813. They may be taken on the motion for a new trial, if made within the time limited. Deere v. Needles, 65 Iowa, 101, 21 N. W. 203; Rowen v. Sommers, 101 Iowa, 735, 66 N. W. 897. But extending the time in which to file such motion does not extend the time in which to file exceptions. Leach v. Hill, 97 Iowa, 81, 66 N. W. 69.

In North Carolina an exception to a charge or refusal to charge may be first taken in the appellant's statement of case on appeal; but exceptions as to all other matters must be taken at the time. Lee v. Williams, 111 N. C. 200, 16 S. E. 175; Marriner v. John L. Roper Lumber Co. 113 N. C. 52, 18 S. E. 94; Smith v. Smith, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113. But exceptions to a charge, filed after settlement of the case on appeal, are too late,—especially where no extension of time in which to file them is shown by the record or in writing, and appellant's claim of consent is denied by appellee. Hemphill v. Morrison, 112 N. C. 756, 17 S. E. 535.

4. Sufficiency.

a. Form of exception.—No particular form in alleging and saving exceptions is required; if the court understands that counsel except to a ruling or refusal to rule, instructions given or refusal to instruct, it is sufficient.¹ And the actual use of the word “exception” is not always necessary to show that one was duly taken;² nor on the other hand does its use always indicate that an exception was taken.³

¹ *Leavenworth v. Lafayette Mills*, 6 Kan. 288; *Thwing v. Clifford*, 136 Mass. 482. And that they intend not to abide the ruling. *Woolsey v. Lasher*, 35 App. Div. 108, 54 N. Y. Supp. 737.

The danger in not taking an exception expressly and formally is that the judge may not understand that counsel intend to except, and thus the exception may be lost. So an exception to an order denying a motion for a new trial asked on the ground that certain findings of law are against the law of the land and against the evidence sufficiently saves the question of law for review, though no formal or technical exceptions were saved to the findings themselves. *Leavenworth v. Lafayette Mills*, 6 Kan. 288.

But merely handing to the judge a written request for instructions does not necessarily imply that, if it is not granted, an exception is saved; if the party intends to except to the charge given, as not conforming to his request, it is his duty to allege exceptions in such form that the judge may understand them to be intended as such. *Leyland v. Pingree*, 134 Mass. 367.

So, also, merely objecting to the admission of evidence, the record not showing a specific exception to the ruling on the objection, is insufficient. *Crabtree v. Vanhoozier*, 53 Mo. App. 405.

And simply praying an appeal is not equivalent to an exception to the ruling of the trial court assigned as error so as to dispense with the necessary statutory exception to such ruling. *Fletcher v. Waring*, 137 Ind. 159, 36 N. E. 896.

And an exception taken in the form of an argument will not be noticed. *Hall v. Hall*, 45 S. C. 33, 22 S. E. 777.

But an oral exception to an order or decision is sufficient if entered of record and the grounds appear in the entry at the end of the decision. *Cramer v. White*, 29 Iowa, 336.

In Washington, exceptions to rulings need not be noted in the journal of the trial court or come up to the appellate court in the form of journal entries. *Oregon R. & Nav. Co. v. Owsley*, 3 Wash. Terr. 250, 13 Pac. 710.

³ Thus, a recital in the bill of exceptions, that to the “action of the court in giving said instruction, defendant then and there objected, is *Abbott, Civ. Jur. T.—23.*

sufficient to show that an exception was reserved to such instruction. *Elsner v. Supreme Lodge, K. & L. of H.* 98 Mo. 640, 11 S. W. 991.

So, a statement of the court, in ruling on evidence, that certain testimony was, under objection, subject to the competency of the witness, sufficiently shows that effectual objections and sufficient exceptions were, at some time during the trial, taken to its admission. *Whitney v. Traynor*, 74 Wis. 289, 42 N. W. 267.

And an objection to the exclusion of testimony on the ground of the witness's incompetency, based on a suggestion to the court that there is no evidence of such incompetency, is a proper mode of reserving an exception to the court's ruling. *Cromwell v. Horton*, 94 Ala. 647, 10 So. 358.

3 Thus, counsel's statements, "I except to that statement," "I take exception to that statement," "I except," or statements by the court "let exception be noted," "note the exception," made during counsel's argument to the jury, are not sufficient to present for review the arguments complained of, unless taken to an adverse ruling on previous objections properly raised. *Marder v. Leary*, 137 Ill. 319, 26 N. E. 1093; *North Chicago Street R. Co. v. Southwick*, 165 Ill. 494, 46 N. E. 377.

As to the necessity of an objection preceding the exception, see *supra*, § 1, note 2; and for the necessity generally of objections, see *ante*, chapter IX., *Offers of Evidence and Objections*.

b. Anticipatory note of intended exception.—A previous reservation of the right to except subsequently is not a sufficient exception.¹

¹ *Gregory v. Dodge*, 14 Wend. 593, affirming 4 Paige, 557.

c. Stipulations as to exceptions.—A stipulation of counsel, or a direction by the trial judge to which there is no dissent, that the stenographer should enter an exception to whatever there should be an objection to, does not make a subsequent objection equivalent to an exception; but will entitle an objecting party to have an exception inserted on the settlement of the case.¹

Nor is a stipulation that it is understood that an exception follows every objection on the trial,² or that a general exception shall serve as a particular exception to each objection,³ available as an exception.

¹ *Stephens v. Reynolds*, 6 N. Y. 454; *Briggs v. Waldron*, 83 N. Y. 582. Contra, *Stevenson v. Woltman*, 81 Mich. 200, 45 N. W. 825. And

by statute in some states. Sand. & H. Ark. Dig. § 5845. And see other Codes and statutes.

² Greer v. Greer, 58 Hun, 251, 12 N. Y. Supp. 778.

³ People v. Buddensieck, 103 N. Y. 501, 57 Am. Rep. 766, 9 N. E. 44.

d. Particularity and definiteness. (1) *In general.*—Exceptions to be of any avail must present specifically the ruling or instruction objected to;¹ an exception to one ruling will not avail to bring up for review another.²

¹ Springfield F. & M. Ins. Co. v. Sea, 21 Wall. 162, 22 L. ed. 513; Suttles v. Smith, 75 Ga. 830; Central R. Co. v. Freeman, 75 Ga. 331; Cureton v. Westfield, 24 S. C. 457; Lewis v. New York, L. E. & W. R. Co. 123 N. Y. 496, 26 N. E. 357; Butler v. Oswego, 56 Hun, 358, 10 N. Y. Supp. 768. And see note to State v. Hope, 8 L.R.A. 608; Mt. Nebo Anthracite Coal Co. v. Williamson, 73 Ark. 530, 84 S. W. 779; White v. Black, 14 Pa. Super. Ct. 459; Magoon v. Before, 73 Vt. 231, 50 Atl. 1070; Whipple v. Preece, 24 Utah, 364, 67 Pac. 1072; Pennsylvania Co. v. Whitney, 95 C. C. A. 70, 169 Fed. 573; Wood v. Dodge, 23 S. D. 95, 120 N. W. 774.

² Springer Lithographing Co. v. Falk, 8 C. C. A. 224, 20 U. S. App. 296, 59 Fed. 707; Travelers' Ins. Co. v. Murray, 16 Colo. 296, 26 Pac. 774; East St. Louis Electric R. Co. v. Stout, 150 Ill. 9, 36 N. E. 963; Burke v. Ward, 50 Ill. App. 283; State ex rel. Roe v. Weaver, 123 Ind. 512, 24 N. E. 330; Westlake v. Muscatine, 85 Iowa, 119, 52 N. W. 117; State ex rel. Smith v. Eighteenth District Court Judge, 38 La. Ann. 920; Herman v. Jeffries, 4 Mont. 513, 1 Pac. 11; Schoonmaker v. Bonnie, 119 N. Y. 565, 23 N. E. 1106; King v. Buffalo, 57 Hun, 586, 10 N. Y. Supp. 564; Elk Twp. v. Beaver Twp. 4 Sadler (Pa.) 49, 18 W. N. C. 438, 7 Atl. 133; Schoonover v. Condon, 12 Wash. 475, 41 Pac. 195.

Contra, of a question necessarily involved in the one duly excepted to. Re Parker, 55 Hun, 604, 8 N. Y. Supp. 394. So where the court directs a verdict, an exception to the court's ruling thereon, in the absence of anything from which it may be implied that the right to go to the jury has been waived, is sufficient to present the objection on appeal that there were questions of fact for the jury, though there was no exception to his previous denial to go to the jury. Kumberger v. Congress Spring Co. 158 N. Y. 339, 53 N. E. 3. And so, even though there was no specific request that each fact be submitted and an exception saved to the ruling thereon. Vail v. Reynolds, 118 N. Y. 297, 23 N. E. 301. And when a motion to dismiss the complaint and a motion to go to the jury are substantially simultaneous, an exception to a denial of the latter motion is equivalent to an exception to the granting of the motion to dismiss. Smith v. Stephens, 47 Hun, 318.

(2) *Exceptions in gross*.—So, a general exception directed to several rulings or instructions, or to a charge involving more than a single proposition, is not available if any one of the rulings, instructions, or propositions is correct;¹ but each ruling sought to be reviewed must be presented on a timely exception.²

¹ Whyte v. Rosencrantz, 123 Cal. 634, 56 Pac. 436; Gray v. Elzroth, 10 Ind. App. 587, 37 N. E. 551; Elton v. Markham, 20 Barb. 343; Jones v. Osgood, 6 N. Y. 233; Cronk v. Canfield, 31 Barb. 171; Luttrell v. Martin, 112 N. C. 593, 17 S. E. 573; Neeley v. Democratic Pub. Co. 12 Wash. 659, 41 Pac. 173.

Contra, if the rulings as a whole embrace but a single proposition of law. Henkle v. Keota, 68 Iowa, 334, 27 N. W. 250.

² East St. Louis Electric Street R. Co. v. Cauley, 148 Ill. 490, 36 N. E. 106; Walter v. Walter, 117 Ind. 247, 20 N. E. 148; Kleinschmidt v. Iler, 6 Mont. 122, 9 Pac. 901; Bosley v. National Mach. Co. 123 N. Y. 554, 25 N. E. 990; Meekins v. Tatem, 79 N. C. 546; Murray v. Murray, 6 Or. 17; Pearce v. Suggs, 85 Tenn. 724, 4 S. W. 526; Carroll v. Little, 73 Wis. 52, 40 N. W. 582.

And so taken that there shall be no doubt as to the specific ruling sought to be reserved for review, and no necessity to hunt for it during the progress of the cause. Kimball v. Carter, 95 Va. 77, 38 L.R.A. 570, 27 S. E. 823; Carroll v. Little, 73 Wis. 52, 40 N. W. 582.

(3) *Evidence*.—Whether or not evidence was improperly admitted or excluded will not be determined on an appellate review, unless the exception specifically points out the evidence considered objectionable,¹ or shows what the evidence offered and rejected was.²

Nor can the correctness of a ruling on a motion to strike out evidence be reviewed if the exception fails to point out the evidence in question and its objectionable features.³

¹ Birmingham v. Pettit, 21 D. C. 209; Weston v. Moody, 29 Fla. 169, 10 So. 612; Minter v. State, 104 Ga. 743, 30 S. E. 989; Tucker v. Burkitt, 49 Ill. App. 278; Louisville & N. R. Co. v. Montgomery, 17 Ky. L. Rep. 807, 32 S. W. 738; French v. Day, 89 Me. 441, 36 Atl. 909; Wiley v. Logan, 95 N. C. 358; Howard v. Quattlebaum, 46 S. C. 95, 24 S. E. 93. And see note to Shinnors v. Proprietors of Locks & Canals, 12 L.R.A. 554.

It should be so pointed out as not to subject the court to unnecessary labor and danger of mistakes by being required to search through the record for it. Kimball v. Carter, 95 Va. 77, 38 L.R.A. 570, 27 S. E. 823.

Thus, a mere reference to the evidence as being found upon certain designated pages is insufficient. *White v. Moss*, 92 Ga. 244, 18 S. E. 13.

And upon a general exception to evidence, partly admissible and partly inadmissible, the court is not bound to separate the legal and the illegal portions. *Lowe v. State*, 88 Ala. 8, 7 So. 97.

So, an exception to a question put to a witness must state the name of the witness. *Freney v. Freney*, 80 Md. 406, 31 Atl. 304. And what his answer was. *Baltimore & F. T. Turnp. Co. v. Hebb*, 88 Md. 132, 40 Atl. 879; *Cecconi v. Rodden*, 147 Mass. 164, 16 N. E. 749; *Francis v. Rosa*, 151 Mass. 532, 24 N. E. 1025. And that it was unfavorable to the exceptant. *Cecconi v. Rodden*, 147 Mass. 164, 16 N. E. 749.

And, according to *Toledo, St. L. & K. C. R. Co. v. Jackson*, 5 Ind. App. 547, 32 N. E. 793, and *Carpenter v. Willey*, 65 Vt. 168, 26 Atl. 488, to reserve an available exception to the exclusion of testimony, a proper question must be asked, and, on objection thereto, an offer made, stating the testimony the witness will give if permitted to answer, and an exception taken to the exclusion of the evidence as shown by the question and offer.

2 *Dunton v. Keel*, 95 Ala. 159, 10 So. 333; *Marshall v. Hancock*, 80 Cal. 82, 22 Pac. 61; *DeGraffenreid v. Menard*, 103 Ga. 651, 30 S. E. 560; *Hirschl v. J. I. Case Threshing Mach. Co.* 85 Iowa, 451, 52 N. W. 363; *Gay v. Tower*, 173 Mass. 385, 53 N. E. 999; *Phoenix Ins. Co. v. Padgitt*, — Tex. Civ. App. —, 42 S. W. 800; *Miller v. State*, 28 Tex. App. 445, 13 S. W. 646. And its materiality. *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860; *Meyers v. Cohn*, 4 Misc. 185, 23 N. Y. Supp. 996. And see note to *Shinners v. Proprietors of Locks & Canals*, 12 L.R.A. 554.

So, an exception to rejection of a question proposed to be put to a witness must set out the question (*Masons' Union L. Ins. Asso. v. Brockman*, 20 Ind. App. 206, 50 N. E. 493; *Gipe v. Cummins*, 116 Ind. 511, 19 N. E. 466; *Kern v. Bridwell*, 119 Ind. 226, 21 N. E. 664; *Swearingen v. Hartford Ins. Co.* 52 S. C. 309, 29 S. E. 722), the answer expected (*Tolbert v. State*, 87 Ala. 27, 6 So. 284; *Sullivan County Comrs. v. Arnett*, 116 Ind. 438, 19 N. E. 299; *Paddleford v. Cook*, 74 Iowa, 433, 38 N. W. 137; *Todd v. Louisville & N. R. Co.* 10 Ky. L. Rep. 864, 11 S. W. 8; *Smethurst v. Proprietors of Independent Cong. Church*, 148 Mass. 261, 2 L.R.A. 695, 19 N. E. 387; *Peterson v. Mille Lacs Lumber Co.* 51 Minn. 90, 52 N. W. 1082; *Sellers v. Foster*, 27 Neb. 118, 42 N. W. 907; *Herring v. Mason*, 17 Tex. Civ. App. 559, 43 S. W. 797; *McAuley v. Harris*, 71 Tex. 631, 9 S. W. 679; *Westcott v. Westcott*, 69 Vt. 234, 39 Atl. 199), and show that the answer would have been favorable (*Tolson v. Inland & S. Coasting Co.* 6 Mackey, 39; *Todd v. Louisville & N. R. Co.* 10 Ky. L. Rep. 864, 11 S. W. 8).

3 *Lippitt v. St. Louis Dressed Beef & Provision Co.* 27 Misc. 222, 57 N. Y. Supp. 747.

And an exception to a ruling on a motion to strike out evidence, part of which is legal and part illegal, is unavailing, if it includes both the legal and illegal. *Henry v. Hall*, 106 Ala. 84, 17 So. 187; *Kahn v. New York Elev. R. Co.* 7 Misc. 53, 27 N. Y. Supp. 339.

(4) *Instructions and charges.*—A general exception to a charge, not directed to the portion objected to as incorrectly stating the law, but directed to the charge as a whole, is unavailing,¹ unless the charge contains but a single proposition,² or unless it is erroneous as a whole.³

And a general exception to a charge containing two or more independent and distinct propositions, or an exception in gross to several instructions, will not be noticed if any one of them is correct.⁴

And an exception to a portion of a charge⁵ containing several propositions is insufficient if any of the propositions are correct.⁶

So, an exception to one instruction is not available to bring up for review another instruction not excepted to.⁷

But in taking an exception to the charge of the court on a particular proposition it is not necessary to segregate the remarks of the court on that exception from all other portions of the charge and object to the very words of the judge; it is sufficient if the proposition complained of and the ground of complaint are clearly called to the attention of the court.⁸

¹ *Brown v. Kentfield*, 50 Cal. 129; *Rogers v. Rogers*, 74 Ga. 598; *Haskins v. Haskins*, 67 Ill. 446; *Hunting v. Downer*, 151 Mass. 275, 23 N. E. 832; *Rheiner v. Stillwater Street R. & Transfer Co.* 31 Minn. 193, 17 N. W. 279; *Booth v. Suezey*, 8 N. Y. 276; *Hemphill v. Morrison*, 112 N. C. 756, 17 S. E. 535; *Behrens v. Behrens*, 47 Ohio St. 323, 25 N. E. 209; *Bauskett v. Keitt*, 22 S. C. 200; *Brigham City v. Crawford*, 20 Utah, 130, 57 Pac. 842; *Rowell v. Fuller*, 59 Vt. 688, 10 Atl. 853; *Smith v. Coleman*, 77 Wis. 343, 46 N. W. 664.

Thus, a general exception to the charge as given is too indefinite. *Pearce v. North Carolina R. Co.* 124 N. C. 83, 44 L.R.A. 316, 32 S. E. 399; *Marks v. Thompkins*, 7 Utah, 421, 27 Pac. 6. Or to each part of a charge. *Potter v. Seymour*, 4 Bosw. 140; *Nevins v. Bay State S. B. Co.* 4 Bosw. 225. Or to the charge of the court as given, and to each and every part thereof. *McAllister v. Engle*, 52 Mich. 56, 17 N. W. 694. Or to the charge and to each and every part and to the whole thereof. *Yates v. Bachley*, 33 Wis. 185. Or to so much of the "following charge" as is set forth in a statement containing many independent propositions. *Bouck v. Enos*, 61 Wis. 660, 21 N. W.

825. Or to the last half of the charge. *Bigelow v. West Wisconsin R. Co.* 27 Wis. 478. And an exception to a charge covering several pages, as follows: At the conclusion of the charge, counsel called the attention of the court to those portions of the charge inclosed in brackets, and, after having the same read to the court by the reporter, thereupon stated that he excepted to all of said portions so read, and to which the attention of the court was so called, and to the whole and to each and every part thereof,—presents nothing for review. *Tucker v. Salem Flouring Mills Co.* 15 Or. 581, 16 Pac. 426.
- ² *Eddy v. Howard*, 23 Iowa, 175; *Requa v. Holmes*, 16 N. Y. 193; *Nickum v. Gaston*, 24 Or. 380, 33 Pac. 671, 35 Pac. 31; *Buffalo Barb Wire Co. v. Phillips*, 67 Wis. 129, 30 N. W. 295. So of a charge which is not a portion of the main charge but stands in the record disconnected from and independent of it. *Smith v. Matthews*, 9 Misc. 427, 29 N. Y. Supp. 1058.
- ³ *Memphis & C. R. Co. v. Reeves*, 10 Wall. 189, 19 L. ed. 912; *May v. Gamble*, 14 Fla. 467; *Snyder v. Viola Min. & Smelting Co.* 2 Idaho, 771, 26 Pac. 127; *Hentig v. Kansas Loan & T. Co.* 28 Kan. 617; *Redman v. Voss*, 46 Neb. 512, 64 N. W. 1094; *Langford v. Jones*, 18 Or. 307, 22 Pac. 1064.
- ⁴ *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 39 L. ed. 624, 15 Sup. Ct. Rep. 491; *Anthony v. Louisville & N. R. Co.* 132 U. S. 172, 33 L. ed. 301, 10 Sup. Ct. Rep. 53; *Stevenson v. Moody*, 83 Ala. 418, 3 So. 695; *Quertermous v. Hatfield*, 54 Ark. 16, 14 S. W. 1096; *Cockrill v. Hall*, 76 Cal. 192, 18 Pac. 318; *Cavallaro v. Texas & P. R. Co.* 110 Cal. 348, 42 Pac. 918; *Wooton v. Seigel*, 5 Colo. 424; *Campbell v. Carruth*, 32 Fla. 264, 13 So. 432; *Kelly v. John*, 13 Ind. App. 579, 41 N. E. 1069; *Reeves Bros. v. Harrington*, 85 Iowa, 741, 52 N. W. 517; *Ryan v. Madden*, 46 Kan. 245, 26 Pac. 679; *State v. Flaherty*, — Mc. —, 2 New Eng. Rep. 699; *Woods v. Berry*, 7 Mont. 195, 14 Pac. 758; *Brooks v. Litcher*, 22 Neb. 644, 36 N. W. 128; 24 Neb. 300, 38 N. W. 780; *Reynolds v. Boston & M. R. Co.* 43 N. H. 580; *Probst v. Domestic Missions of General Assembly*, 3 N. M. 373, 5 Pac. 702; *McAlister v. Long*, 33 Or. 368, 54 Pac. 194. See also *Lichty v. Tannatt*, 11 Wash. 37, 39 Pac. 260, where it is said that a more liberal rule should perhaps be applied as to oral instructions; the court holding, however, that a general exception to the whole of the instructions, but particularly mentioning portions thereof, will be available only as to those portions particularly mentioned. But see *McCosker v. Banks*, 84 Md. 292, 35 Atl. 935, where it is held that the action of the court on several prayers for instructions made at the same time is but a single decision, a general exception to which is sufficient.
- Illustrations of insufficient exceptions within the above rule:—to each and every part of the charge.* *Caldwell v. Murphy*, 11 N. Y. 416; *Shull v. Raymond*, 23 Minn. 66. To all and each part of the foregoing charge and instructions. *Block v. Darling*, 140 U. S. 234, 35 L.

ed. 476, 11 Sup. Ct. Rep. 832. To each of the charges made by the court at plaintiff's request. *Piper v. New York C. & H. R. R. Co.* 89 Hun, 75, 34 N. Y. Supp. 1072. To each of the instructions given to the jury respectively. *Banbury v. Sherin*, 4 S. D. 88, 55 N. W. 723. To every line, sentence, and paragraph of the charge. *Danielson v. Dyckman*, 26 Mich. 169. To each paragraph of the charge. *Scoville v. Salt Lake City*, 11 Utah, 60, 39 Pac. 481. An exception severally and separately to each and every section and each and every paragraph of said charge as given. *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176, 16 So. 46. To the charge and each and every part thereof. *Edwards v. Smith*, 16 Colo. 529, 27 Pac. 809; *Luedtke v. Jeffery*, 89 Wis. 136, 61 N. W. 292. Contra, *Lorie v. Adams*, 51 Kan. 692, 33 Pac. 599. To the giving of said charge and such several propositions of law therein contained. *Keith v. Wells*, 14 Colo. 321, 23 Pac. 991. To the giving of which and to the giving of each part thereof. *Meeker v. Gardella*, 1 Wash. 139, 23 Pac. 837. To which charge and each and every part of it defendant excepted. *Mayberry v. Leech*, 58 Ala. 339. To the whole of the charge and to each part of it. *Jones v. Osgood*, 6 N. Y. 233. To the whole charge and every part thereof. *Nichols & S. Co. v. Chase*, 103 Wis. 570, 79 N. W. 772. To an entire charge or to all the instructions not included in brackets. *Crosby v. Maine C. R. Co.* 69 Me. 418. To the charge in its entirety and to the following portions thereof, followed by several propositions embracing substantially the same charge. *Vider v. O'Brien*, 10 C. C. A. 385, 18 U. S. App. 711, 62 Fed. 326. To said oral instructions and each and every part thereof by the court. *Moore v. Moore*, — Cal. —, 34 Pac. 90. An exception in the abstract at the close of the instructions, to all of which the plaintiff "then and there" excepted. *Hallenbeck v. Garst*, 96 Iowa, 509, 65 N. W. 417.

But in *Phoenix Ins. Co. v. Moog*, 81 Ala. 335, 1 So. 108, an exception following several charges given and expressed thus: "The defendant excepted and now excepts to each one of these charges as given,"— was held a sufficient reservation of a separate exception to each.

And where instructions are in separate paragraphs and numbered, an exception to the instructions and to each and every of them then and there duly taken, is sufficient. *Ritchey v. People*, 23 Colo. 314, 47 Pac. 272, 384. So, too, is an exception to the giving of each of such instructions duly and severally taken at the close of all the instructions, which had been preceded by the specific exception to the instruction objected to, sufficient to bring it up for review. *Bradbury v. Alden*, 13 Colo. App. 208, 57 Pac. 490. And in *Adams v. Chicopee*, 147 Mass. 440, 18 N. E. 231, an exception to so much of the charge as related to counsel's contention, which was substantially incorporated therein, was held sufficient.

⁵ The rule that exceptions should not be based upon mere extracts from the judge's charge, in which no distinct legal proposition is stated, does not apply where the judge, in his charge, has stated a distinct and

separate legal proposition as applicable to the case. *Garrick v. Florida C. & P. R. Co.* 53 S. C. 448, 31 S. E. 334.

- ⁶ *Rice v. Schloss*, 90 Ala. 416, 7 So. 802; *Hughes v. Heyman*, 4 App. D. C. 444; *Small v. Williams*, 87 Ga. 681, 13 S. E. 589; *Main v. Oien*, 47 Minn. 89, 49 N. W. 523; *Detroit Water Comrs. v. Burr*, 3 Jones & S. 523; *Dickerman v. Quincy Mut. F. Ins. Co.* 67 Vt. 609, 32 Atl. 489; *Corcoran v. Harran*, 55 Wis. 120, 12 N. W. 468.

According to *Anderson v. Southern R. Co.* 107 Ga. 500, 33 S. E. 644, the rule is that a general exception to an extract from the charge makes the simple question whether the whole extract is erroneous, and, unless the whole of it be illegal, the exception must specifically point out the illegal part; otherwise, it cannot be ascertained whether the party is complaining of the part that is sound, or of that which is erroneous.

To raise the question of the use of a particular word by the trial judge in charging the jury, exception must be made to the word specifically, and not to the portion of the charge in which it appears. *National Cash-Register Co. v. Leland*, 37 C. C. A. 372, 94 Fed. 502.

- ⁷ *Ryall v. Central P. R. Co.* 76 Cal. 474, 18 Pac. 430; *Varnum v. Taylor*, 10 Bosw. 148.

- ⁸ *What Cheer Coal Co. v. Johnson*, 6 C. C. A. 148, 12 U. S. App. 490, 56 Fed. 810.

(5) *Refusal or failure to instruct.*—So, a general exception to a refusal or failure to give several requested instructions or to charge several propositions is insufficient,¹ unless all of the instructions or charges were proper and should have been given² unless otherwise expressly provided by statute or rule of court.³

- ¹ *Fleming v. Latham*, 48 Kan. 773, 30 Pac. 166; *Wimbish v. Hamilton*, 47 La. Ann. 246, 16 So. 856; *Edgell v. Francis*, 86 Mich. 232, 48 N. W. 1095; *Carroll v. Williston*, 44 Minn. 287, 46 N. W. 352; *Newall v. Bartlett*, 114 N. Y. 399, 21 N. E. 990; *Foote v. Kelley*, 126 Ga. 799, 55 S. E. 1045; *Walnut Ridge Mercantile Co. v. Cohn*, 79 Ark. 338, 96 S. W. 413; *White v. Lumiere North American Co.* 79 Vt. 206, 6 L.R.A.(N.S.) 807, 64 Atl. 1121; *Graham v. Edwards*, — Tex. Civ. App. —, 99 S. W. 436.

Thus, an exception to so much of the charge as is variant from the request is insufficient. *Beaver v. Taylor*, 93 U. S. 46, 23 L. ed. 797. So, also, is an exception to the refusal and charge of the court. *Jones v. East Tennessee, V. & G. R. Co.* 157 U. S. 682, 39 L. ed. 856, 15 Sup. Ct. Rep. 719.

And an exception to a refusal to charge as requested and to the charge as given, is too general. *Copp v. Hollins*, 56 Hun, 640, 9 N. Y. Supp. 57; *Bishop v. Goshen*, 120 N. Y. 337, 24 N. E. 720. Especially

where some of the requests were given as requested, others modified, and some refused. *Read v. Nichols*, 118 N. Y. 224, 7 L.R.A. 130, 23 N. E. 468. But *Brick v. Bosworth*, 162 Mass. 334, 39 N. E. 36, treated an exception to rulings on requests as made as saving to the exceptant exceptions to rulings at variance with those requested and to which the attention of the judge was specifically directed by request to rule. And *Hayes v. Bush & D. Mfg. Co.* 102 N. Y. 648, 5 N. E. 784, holds that a single exception to refusal to charge as requested and to the court's charging to the contrary is not open to the objection that it is a single exception to two propositions.

So, a statement by the judge that it is understood that every omission and modification of requests is deemed excepted to by each counsel, is insufficient, where the record shows no omissions or modifications. *Gray v. Eschen*, 125 Cal. 1, 57 Pac. 664. But *Weber v. Kansas City Cable R. Co.* 100 Mo. 205, 7 L.R.A. 822, 13 S. W. 587, holds that a statement in the bill that, to the refusal to give certain numbered requested instructions, counsel then and there excepted at the time, is not a general exception to the refusal of the instruction as a whole.

² *Teague v. Lindsey*, 106 Ala. 266, 17 So. 538; *Ingalls v. Oberg*, 70 Minn. 102, 72 N. W. 841; *Gardner v. State*, 55 N. J. L. 17, 26 Atl. 30; *Powers v. Hazelton & L. R. Co.* 33 Ohio St. 429; *Salomon v. Cress*, 22 Or. 177, 29 Pac. 439; *Marks v. Tompkins*, 7 Utah, 421, 27 Pac. 6; *Gross v. Hays*, 73 Tex. 515, 11 S. W. 523.

So, a general exception to matter superadded to a requested charge given is unavailing if any part of it is correct. *Verdery v. Savannah, F. & W. R. Co.* 82 Ga. 685, 9 S. E. 1133.

On a general exception to the refusal of several instructions the appellate review is confined to the question whether some one of them was incorrect and therefore properly refused. *Yager v. McCormack*, 41 Fla. 204, 25 So. 883.

But, though an exception be irregularly taken, the question sought to be raised and reviewed may be reviewed if all the parties understood what it was, and the judge was satisfied with the exceptions as presented to him. *National Cash-Register Co. v. Leland*, 37 C. C. A. 372, 94 Fed. 502.

³ Thus, in Alabama, where an exception to a ruling of the court giving or refusing an instruction requested in writing need not be reserved. Code, § 613. And see *supra*, § 1, c (7), note 3. And in Iowa. See *White v. Elgin Creamery Co.* 108 Iowa, 522, 79 N. W. 233.

See also note 3 to next succeeding section.

(6) *Specifying error.*—The grounds of the alleged error in the question sought to be reviewed must be presented in a direct and positive form; ¹ and an exception taken on one ground will not support an assignment of error on another.²

So, the correctness of a ruling admitting or excluding evidence will not be considered unless the grounds of objection are made to appear in the exception;³ nor will an objection on a ground not specified in the exception be noticed.⁴

And exceptions to charges and instructions,⁵ or refusal or failure to charge as requested,⁶ must point out with particularity the errors complained of, unless otherwise expressly provided by statute.⁷

And an exception assigning one ground of error is not available to question the correctness or sufficiency of a charge or instruction on another ground.⁸

¹ *Guggenheim v. Kirchhofer*, 14 C. C. A. 72, 26 U. S. App. 664, 66 Fed. 755; *Heilbron v. Centerville & K. Irrig. Ditch Co.* 76 Cal. 8, 17 Pac. 932; *Georgia R. Co. v. Olds*, 77 Ga. 673; *Coble v. Eltzroth*, 125 Ind. 429, 25 N. E. 544; *Brantz v. Marcus*, 73 Iowa, 64, 35 N. W. 115; *Topeka Primary Asso. University of Builders v. Martin*, 39 Kan. 750, 18 Pac. 941; *Jones v. Worden*, 12 Ky. L. Rep. 105, 13 S. W. 911; *Warner v. Clark*, 45 La. Ann. 863, 21 L.R.A. 502, 13 So. 203; *Baltimore & O. R. Co. v. Mali*, 66 Md. 53, 5 Atl. 87; *Hooper v. Chicago, St. P. M. & O. R. Co.* 37 Minn. 52, 33 N. W. 314; *Carr v. Moss*, 36 Mo. App. 565; *Rosina v. Trowbridge*, 20 Nev. 105, 17 Pac. 751; *Kinsley v. Norris*, 61 N. H. 639; *Hunter v. Manhattan R. Co.* 141 N. Y. 281, 36 N. E. 400; *Warlick v. Lowman*, 104 N. C. 403, 10 S. E. 474; *Swift v. Mulkey*, 17 Or. 532, 21 Pac. 871; *McCullough v. Kervin*, 49 S. C. 445, 27 S. E. 456; *Betts v. Letcher*, 1 S. D. 182, 46 N. W. 193; *Pearce v. Suggs*, 85 Tenn. 724, 4 S. W. 526; *Buchanan v. Cook*, 70 Vt. 168, 40 Atl. 102; *Boburg v. Prah*, 3 Wyo. 325, 23 Pac. 70.

But an exception that "the court below should have granted the nonsuit asked for by the defendant at the close of plaintiff's testimony, and it was error of law in him not to have done so," is not objectionable as an allegation of error by mere reference back. *Huggins v. Watford*, 38 S. C. 504, 17 S. E. 363.

² *Gambrill v. Schooley*, 89 Md. 546, 43 Atl. 918; *Willey v. Portsmouth*, 64 N. H. 214, 9 Atl. 220; *Lewis v. New York, L. E. & W. R. Co.* 123 N. Y. 496, 26 N. E. 357.

³ *Toplitz v. Hedden*, 146 U. S. 252, 36 L. ed. 961, 13 Sup. Ct. Rep. 70; *Larkin v. Baty*, 111 Ala. 303, 18 So. 666; *Oakes v. Miller*, 11 Colo. App. 374, 55 Pac. 193; *Daniel v. Hannah*, 106 Ga. 91, 31 S. E. 734; *Joliet v. Johnson*, 177 Ill. 178, 52 N. E. 498; *Sievers v. Peters Box & Lumber Co.* 151 Ind. 642, 662, 50 N. E. 877, 52 N. E. 399; *Puth v. Zimbleman*, 99 Iowa, 641, 68 N. W. 895; *Holman v. Union Street R. Co.* 114 Mich. 208, 72 N. W. 202; *Woodbury v. District of Columbia*, 5 Mackey, 127; *Safety Fund Nat. Bank v. Westlake*, 21 Mo. App. 565; *Brown v. Third Ave. R. Co.* 19 Misc. 504, 43 N. Y. Supp. 1094;

Saugerties Bank v. Mack, 35 App. Div. 398, 54 N. Y. Supp. 950; Tilley v. Bivens, 110 N. C. 343, 14 S. E. 920; Burton v. Severance, 22 Or. 91, 29 Pac. 200; Land Mortg. Invest. & Agency Co. v. Gillam, 49 S. C. 345, 26 S. E. 990, 29 S. E. 203; Allen v. Cooley, 53 S. C. 77, 30 S. E. 721; Calhoun v. Quinn, — Tex. Civ. App. —, 21 S. W. 705; Foster v. Dickerson, 64 Vt. 233, 24 Atl. 255. Contra, of an exception to the exclusion of evidence. Hurlbut v. Hall, 39 Neb. 889, 58 N. W. 538; Crow v. Stevens, 44 Mo. App. 137.

And the omission is not cured by a subsequent statement of the grounds to the assignment of errors. North Chicago Street R. Co. v. St. John, 29 C. C. A. 654, 57 U. S. App. 366, 85 Fed. 806.

But failure to so state the grounds of objection to either the admission or exclusion of evidence is of no moment if the evidence in question was in fact illegal. Pittsburgh & W. R. Co. v. Thompson, 27 C. C. A. 333, 54 U. S. App. 222, 82 Fed. 720; McClellan v. State, 117 Ala. 140, 23 So. 653; Crow v. Stevens, 44 Mo. App. 137; Hardcastle v. Heine, 25 Misc. 146, 54 N. Y. Supp. 169; Louisville & N. R. Co. v. Reagan, 96 Tenn. 128, 33 S. W. 1050. So, even though the objection stated be not put upon the proper ground. Witherow v. Slayback, 158 N. Y. 649, 53 N. E. 681.

And failure to state the grounds of the objection at the time of the ruling is immaterial, if the court is in fact advised thereof when the evidence is offered. Gray v. Brooklyn Union Pub. Co. 35 App. Div. 286, 55 N. Y. Supp. 35.

But indefiniteness of an exception to the admission of evidence contained in the bill of exceptions containing the evidence is obviated by a sufficiently definite exception reserved by a special bill. Starnes v. Allen, 151 Ind. 108, 119, 45 N. E. 330, 51 N. E. 78.

⁴ Tippet v. Sue, 125 Cal. 544, 58 Pac. 160; Springfield v. McCarthy, 79 Ill. App. 388; Burdick v. Raymond, 107 Iowa, 228, 77 N. W. 833; Turnbull v. Richardson, 69 Mich. 400, 37 N. W. 499; Johnson v. Okerstrom, 70 Minn. 303, 73 N. W. 147; Sloan v. Wherry Bros. 51 Neb. 703, 71 N. W. 744; Hunter v. Batterson, 28 Misc. 479, 59 N. Y. Supp. 502; Fort Worth & D. C. R. Co. v. Hogsett, 67 Tex. 685, 4 S. W. 365; Foster v. Dickerson, 64 Vt. 233, 24 Atl. 253; Coleman v. Montgomery, 19 Wash. 610, 53 Pac. 1102. So of exceptions to depositions, except on the ground of incompetency of the witness. Long v. Perine, 41 W. Va. 314, 23 S. E. 611.

⁵ Hartranft v. Langfeld, 125 U. S. 128, 31 L. ed. 672, 8 Sup. Ct. Rep. 732; Frost v. Grizzly Bluff Creamery Co. 102 Cal. 525, 36 Pac. 929; Bell v. Sheridan, 21 D. C. 370; Anderson v. Southern R. Co. 107 Ga. 500, 33 S. E. 644; Young v. Youngman, 45 Kan. 65, 25 Pac. 209; Rock v. Indian Orchard Mills, 142 Mass. 522, 8 N. E. 401; Mattice v. Wilcox, 147 N. Y. 624, 42 N. E. 270; McKinnon v. Morrison, 104 N. C. 354, 10 S. E. 513; Kendrick v. Dellinger, 117 N. C. 491, 23 S. E. 438; Serviss v. Stockstill, 30 Ohio St. 418; Kearney v. Snodgrass,

12 Or. 315, 7 Pac. 309; *Davis v. Elmore*, 40 S. C. 533, 19 S. E. 204; *Eddy v. Still*, 3 Tex. Civ. App. 346, 22 S. W. 525; *Goodwin v. Perkins*, 39 Vt. 598; *Hamlin v. Haight*, 32 Wis. 237; *Newton v. Whitney*, 77 Wis. 515, 46 N. W. 882.

Thus, a general exception will not raise the question of definiteness or completeness of the instruction. *Hamilton v. Great Falls Street R. Co.* 17 Mont. 334, 42 Pac. 860, 43 Pac. 713. And an exception based merely on error in the instructions is too vague. *Boggan v. Hone*, 97 N. C. 268, 2 S. E. 224. So, also, an exception for misdirection in the charge, without specifying any particulars, is too general. *Everett v. Williamson*, 107 N. C. 204, 12 S. E. 187. So also is an exception that the court erred in its general charge because it charged the law in the abstract and failed to apply it to the facts proved. *Holman v. Herscher*, — Tex. —, 16 S. W. 984. Or because a charge clearly indicates to the jury the judge's opinion on the facts of the case. *Dobson v. Cothran*, 34 S. C. 518, 13 S. E. 679; *Greene v. Duncan*, 37 S. C. 239, 15 S. E. 956. Or because it is argumentative and does not present the appellant's claims as fully as those of his adversary. *Owen v. Brown*, 70 Vt. 521, 41 Atl. 1025. Or that it is not a correct statement of the law of the state as applied to the testimony in the case. *Disher v. South Carolina & G. R. Co.* 55 S. C. 187, 33 S. E. 172. Or that it does not cover the case made by the declaration and proof. *Whelan v. Georgia Midland & G. R. Co.* 84 Ga. 506, 10 S. E. 1091. Or that it misstates the testimony, without showing in what particular. *Keystone Lumber & Salt Mfg. Co. v. Dole*, 43 Mich. 370, 5 N. W. 412. Or that it states principles of law correct in an action between grantor and grantee, but incorrect in an action in which the issues of boundary and possession are raised by a stranger. *Connor v. Johnson*, 53 S. C. 90, 30 S. E. 833. And if the absence of a qualifying word is the ground of error alleged, the exception should so specify. *Western Coal & Min. Co. v. Ingraham*, 17 C. C. A. 71, 36 U. S. App. 1, 70 Fed. Rep. 219.

* *Bishop v. Goshen*, 120 N. Y. 337, 24 N. E. 720; *Welcome v. Mitchell*, 81 Wis. 566, 51 N. W. 1080. So, an exception assigning as error qualifications of requested charges, which it is claimed should have been given as requested, is too general. *Garrick v. Florida C. & P. R. Co.* 53 S. C. 448, 69 Am. St. Rep. 874, 31 S. E. 334; *Greene v. Duncan*, 37 S. C. 239, 15 S. E. 956. Or that portions of the charges given were variant from the requests, without pointing out the variance. *Beaver v. Taylor*, 93 U. S. 46, 23 L. ed. 797; *Salomon v. Cress*, 22 OOr. 177, 29 Pac. 439.

And where the court fails to write the word "given" on the margin as required by statute, the exception must be specifically taken on that ground. *Omaha & F. Land & T. Co. v. Hansen*, 32 Neb. 449, 49 N. W. 456.

* *Sexton v. School Dist. No. 34*, 9 Wash. 5, 36 Pac. 1052.

So, in Montana, it is not necessary, in an exception to an instruction, to point out the particular error complained of, whether it be that the instruction is against the law or against the evidence. *Woods v. Berry*, 7 Mont. 195, 14 Pac. 758.

And, in Iowa, exceptions to the giving or refusing of instructions may, under the express provision of the Code, be noted by the shorthand reporter, and no reason for such exception need be given. *White v. Elgin Creamery Co.* 108 Iowa, 522, 79 N. W. 283. But the exception must be taken at the time; otherwise the grounds thereof must be stated. *Byford v. Girton*, 90 Iowa, 661, 57 N. W. 588; *Boyce v. Wabash R. Co.* 63 Iowa, 70, 50 Am. Rep. 730, 18 N. W. 673; *Hall v. Gibbs*, 43 Iowa, 380, 384.

In North Carolina an exception to a refusal to give specific instructions will be reviewed, although it specifies no particular error therein. See *Everett v. Williamson*, 107 N. C. 204, 12 S. E. 187, *dictum*.

⁸ *Walker v. Liddell*, 103 Ga. 574, 30 S. E. 294; *Carlson v. Dow*, 47 Minn. 335, 50 N. W. 232; *Ganaway v. Salt Lake Dramatic Asso.* 17 Utah, 37, 53 Pac. 830.

XIII.—WITHDRAWING AND STRIKING OUT EVIDENCE.

1. Withdrawing.
2. Moving to strike out.
 - a. After omitting to object.
 - b. After adversary's omission.
 - c. After unsuccessful objection.
 - d. Where part of evidence is admissible.
 - e. Striking depositions.
3. Delay in moving.
4. Form of motion.
 - a. Specifying evidence.
 - b. Specifying grounds.
5. Power of the court.

1. Withdrawing.

One who has adduced evidence against objection, as by calling forth a responsive answer or by reading a document, has not a right to withdraw it or have it struck out;¹ but may be allowed in the discretion of the court, to withdraw it, although the other party has taken an exception,² provided that it be wholly harmless to the other party, and the latter be allowed to have the benefit of it, in his own favor, if he desire.

If it is, or may be, injurious to the party who has excepted, it cannot be withdrawn without his consent, for he has the right to meet it.³

¹ Decker v. Bryant, 7 Barb. 182, 189; Furst v. Second Ave. R. Co. 72 N. Y. 542, 546; Hubner v. Metropolitan Street R. Co. 177 N. Y. 523, 69 N. E. 1124; Southern Coal & Coke Co. v. Swinney, 149 Ala. 405, 42 So. 808; Hunnicutt v. Higginbotham, 138 Ala. 472, 100 Am. St. Rep. 45, 35 So. 469; Sweeney v. Sweeney, 121 Ga. 293, 48 S. E. 984; O'Brien v. Knotts, 165 Ind. 308, 75 N. E. 594.

² State v. Towler, 13 R. I. 661, and cases cited; Boone v. Purnell, 28 Md. 607, 92 Am. Dec. 713; Providence L. Ins. & Invest. Co. v. Martin, 32 Md. 310; Fuller v. Jamestown Street R. Co. 75 Hun, 273, 26 N. Y. Supp. 1078; Kopetzky v. Metropolitan Elev. R. Co. 14 Misc. 311, 35 N. Y. Supp. 766; Bell v. Clarion, 120 Iowa, 332, 94 N. W. 907; Berry v. W. M. Ritter Lumber Co. 141 N. C. 386, 54 S. E. 278.

³ A party cannot withdraw his own evidence if it is favorable to his adversary, without the latter's consent. *Zipperer v. Savannah*, 128 Ga. 135, 57 S. E. 311.

But one who has opposed its exclusion and objected to its withdrawal from the jury cannot complain of its admission, though he duly objected to it when offered and admitted. *New York, C. & St. L. R. Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809.

If the answer is not so irresponsive as to relieve the party eliciting it from the responsibility of it, and its legality is doubtful, he should disclaim it and decline to receive it. *O'Hagan v. Dillon*, 76 N. Y. 170.

Whether the withdrawal will cure the error is often another question.

2. Moving to strike out.

a. After omitting to object.—A party who has allowed obviously incompetent evidence to be received without objection is not entitled to have it struck out,¹ but at most to have the jury instructed to disregard it.² The motion is, however, addressed to the discretion of the trial judge.³

But, although a question be proper and pertinent, if the answer be irresponsive and objectionable the remedy of the party aggrieved is to move that the objectionable part of the answer be stricken out, or to request that the jury be instructed to disregard it,⁴ before the case is submitted.⁵

And a party desiring the exclusion of evidence apparently legal when given, on the ground that it has since become illegal, should move to have it stricken out.⁶

¹ *Payne v. Long*, 121 Ala. 385, 25 So. 780; *Southern Coal & Coke Co. v. Swinney*, 149 Ala. 405, 42 So. 808; *Churchill v. More*, 4 Cal. App. 219, 88 Pac. 290; *Lissak v. Crocker Estates Co.* 119 Cal. 442, 51 Pac. 688; *Lake Shore & M. S. R. Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476; *Mabry v. State*, 71 Miss. 716, 14 So. 267; *Hickman v. Green*, 123 Mo. 165, 29 L.R.A. 39, 22 S. W. 455, 27 S. W. 440; *Brown v. Cleveland*, 44 Neb. 239, 62 N. W. 463; *Hoyt v. Hoyt*, 112 N. Y. 514, 20 N. E. 402; *Rodee v. Detroit F. & M. Ins. Co.* 74 Hun, 146, 26 N. Y. Supp. 242; *Re Morgan*, 104 N. Y. 74, 9 N. E. 861; *Dallmeyer v. Dallmeyer*, — Pa. —, 16 Atl. 72; *Ingram v. Sumter Music House*, 51 S. C. 281, 28 S. E. 936; *Way v. Johnson*, 5 S. D. 237, 58 N. W. 552; *Atchison, T. & S. F. R. Co. v. Bryan*, — Tex. Civ. App. —, 37 S. W. 234; *Wead v. St. Johnsbury & L. C. R. Co.* 66 Vt. 420, 29 Atl. 631; *Werner v. Ashland Lighting Co.* 84 Wis. 652, 54 N. W. 996.

Contra, *Bloun v. Beall*, 95 Ga. 182, 22 S. E. 52. Especially where the

evidence is clearly irrelevant and hurtful. *Murray v. Silver City*, D. & P. R. Co. 3 N. M. 580, 9 Pac. 369.

The rule is one of practice, and is applied in order to save the time of the court, which otherwise would be uselessly consumed in listening to testimony and then striking it out; and also to prevent a party from obtaining an advantage by deliberately consenting that a witness may give evidence upon a certain point with the expectation and belief that it may be favorable to him, and then having it excluded when the evidence is not satisfactory. *People v. Wallace*, 89 Cal. 158, 26 Pac. 650.

And the right to move to have testimony stricken out is waived by withdrawing the objection to the question put to the witness testifying. *Re Wax*, 106 Cal. 343, 39 Pac. 624. Or by proceeding, without objection or motion, to cross-examine the witness. *Brown v. Morrill*, 45 Minn. 483, 48 N. W. 328. So, also, it is too late to object to the evidence as being improperly admitted where cross-examination is proceeded with. *Hannum v. Powell*, 187 Pa. 292, 41 Atl. 29.

A motion to strike out the testimony of witnesses is not the proper remedy for their refusal to prepare tables required by counsel. *Northern P. R. Co. v. Keyes*, 91 Fed. 47.

A motion to exclude evidence received without objection comes too late. *Alabama Consol. Coal & I. Co. v. Heald*, 168 Ala. 626, 53 So. 162.

² *Ponder v. Cheeves*, 104 Ala. 307, 16 So. 145; *Lutton v. Vernon*, 62 Conn. 1, 23 Atl. 1020, 27 Atl. 389; *Quin v. Lloyd*, 41 N. Y. 349, 355 (per Woodruff, J., error to strike it out; but the better view is that it is discretionary); *Marks v. King*, 64 N. Y. 628, affirming 1 Hun, 435; *Pontius v. People*, 82 N. Y. 339, affirming 21 Hun, 328; *Woolsey v. Ellenville*, 155 N. Y. 573, 50 N. E. 270; *Holmes v. Moffat*, 120 N. Y. 159, 24 N. E. 275; *Brockett v. New Jersey S. B. Co.* 18 Fed. 157.

³ *De Forest v. United States*, 11 App. D. C. 458; *McClellan v. Hein*, 56 Neb. 600, 77 N. W. 120; *Flynn v. Manhattan R. Co.* 1 Misc. 188, 20 N. Y. Supp. 652, and cases cited; *Merslahn v. Irving Nat. Bank*, 62 App. Div. 231, 70 N. Y. Supp. 988. Even though the objection to the testimony be well founded. *Darling v. Klock*, 33 App. Div. 270, 53 N. Y. Supp. 593.

And its refusal, if error, is harmless where the evidence was subsequently stricken out by consent. *Weber Wagon Co. v. Kehl*, 139 Ill. 644, 29 N. E. 714.

Or it has been received absolutely and unconditionally, and not upon an unperformed promise to show its relevancy. *Hickman v. Green*, 123 Mo. 165, 29 L.R.A. 39, 22 S. W. 455, 27 S. W. 440.

Or the interrogatory sought to be stricken out is not answered. *Boruff v. Hudson*, 138 Ind. 280, 37 N. E. 786.

So, granting or refusing the motion, if error, is not fatal where other testimony to the same effect was admitted without objection. *Spear Abbott*, Civ. Jur. T.—24.

v. Lyon, 89 Cal. 36, 26 Pac. 619; Saatoff v. Scott, 103 Iowa, 201, 72 N. W. 492; Baltimore & O. R. Co. v. State, 81 Md. 371, 32 Atl. 401; Hart v. McSwegan, 14 Misc. 540, 36 N. Y. Supp. 11; Landa v. Obert, 5 Tex. Civ. App. 620, 25 S. W. 342.

Or the same facts had been previously established by competent testimony. Manning v. Den, — Cal. —, 24 Pac. 1092; State v. Severson, 78 Iowa, 653, 43 N. W. 533; Roe v. Kansas City, 100 Mo. 190, 13 S. W. 404; Perrin v. State, 81 Wis. 135, 50 N. W. 516.

And that evidence so admitted was subsequently stricken out, if error, is not fatal where the record discloses that it was in fact irrelevant. Re Lasak, 131 N. Y. 624, 30 N. E. 112.

According to Lowrey v. Robinson, 141 Pa. 189, 21 Atl. 513, refusal of such a motion is not revisable on appeal.

But according to some authorities it is the duty of the court when properly moved, at any stage of the trial, to exclude or direct the jury to disregard incompetent testimony. Smith v. State, 25 Fla. 517, 6 So. 482; Sailors v. Nixon-Jones Printing Co. 20 Ill. App. 509. See also South Covington & C. Street R. Co. v. McCleave, 18 Ky. L. Rep. 1036, 38 S. W. 1055, where it is held that the court should, when properly moved, exclude the testimony of an incompetent witness upon being informed by counsel making the motion that he had allowed the witness to be sworn inadvertently and while suffering from a severe headache.

And in Wendt v. Chicago, St. P. M. & O. R. Co. 4 S. D. 476, 57 N. W. 226, refusal to strike out material incompetent evidence was held presumptively prejudicial, requiring reversal unless no prejudice is shown to have resulted.

⁴ McDonald v. Wood, 118 Ala. 589, 24 So. 86; People v. Dixon, 94 Cal. 255, 29 Pac. 504; Woodiey v. Baltimore & P. R. Co. 8 Mackey, 542; Lake Side Press & Photo-Engraving Co. v. Campbell, 39 Fla. 523, 22 So. 878; Chicago, P. & St. L. R. Co. v. Blume, 137 Ill. 448, 27 N. E. 601; Jones v. State, 118 Ind. 39, 20 N. E. 634; Duer v. Allen, 96 Iowa, 36, 64 N. W. 682; Atchison v. Rose, 43 Kan. 605, 23 Pac. 561; Mulliken v. Corunna, 110 Mich. 212, 68 N. W. 141; Hall v. Austin, 73 Minn. 134, 75 N. W. 1121; Burns v. Lindell R. Co. 24 Mo. App. 10; German Nat. Bank v. Leonard, 40 Neb. 676, 59 N. W. 107; Standard Life & Acci. Ins. Co. v. Davis, 59 Kan. 521, 53 Pac. 856; Holmes v. Roper, 141 N. Y. 64, 36 N. E. 180; Parsons v. New York C. & H. R. R. Co. 113 N. Y. 355, 3 L.R.A. 683, 21 N. E. 145; Deming v. Gainey, 95 N. C. 528; Smith v. Northern P. R. Co. 3 N. D. 555, 58 N. W. 345; Price v. Richmond & D. R. Co. 38 S. C. 199, 17 S. E. 732; Wendt v. Chicago, St. P. M. & O. R. Co. 4 S. D. 476, 57 N. W. 226; Lindner v. St. Paul F. & M. Ins. Co. 93 Wis. 526, 67 N. W. 1125; Supple v. Suffolk Sav. Bank, 198 Mass. 393, 126 Am. St. Rep. 451, 84 N. E. 432; Com. v. Howe, 35 Pa. Super. Ct. 554; Herbert v. Herbert, 20 S. D. 85, 104 N. W. 911.

Re McKenna, 143 Cal. 580, 77 Pac. 461; **Diamond Block Coal Co. v. Cuthbertson**, 166 Ind. 290, 76 N. E. 1060; **Davis v. Holy Terror Min. Co.** 20 S. D. 399, 107 N. W. 1374; **Southern R. Co. v. Crowder**, 135 Ala. 417, 33 So. 335; **Levidow v. Starin**, 77 Conn. 600, 60 Atl. 123; **Arabian Horse Co. v. Bivens**, 4 Neb. (Unof.) 823, 96 N. W. 621; **McDermott v. Brooklyn Heights R. Co.** 94 N. Y. Supp. 516; **Bibby v. Thomas**, 131 Ala. 350, 31 So. 432; **Germinder v. Machinery Mut. Ins. Asso.** 129 Iowa, 614, 94 N. W. 1108; **Borin v. Johnson**, 63 Kan. 885, 65 Pac. 640; **Helmken v. New York**, 90 App. Div. 135, 85 N. Y. Supp. 1048; **Brown v. Brown**, 110 App. Div. 913, 96 N. Y. Supp. 1002; **Kramer v. Wolf Cigar Stores Co.** 99 Tex. 597, 97 S. W. 775; **Buckley v. Westchester Lighting Co.** 183 N. Y. 506, 76 N. E. 1090. See also **Blake v. Meyer**, 110 App. Div. 734, 97 N. Y. Supp. 424; **Missouri P. R. Co. v. Fox**, 60 Neb. 531, 83 N. W. 744.

Especially if there was no opportunity to previously object because the question did not indicate the nature of the answer. **Nichols v. Howe**, 43 Minn. 181, 45 N. W. 14. And the answer was given too quickly to permit the interposition of an objection. **Barkly v. Copeland**, 86 Cal. 483, 25 Pac. 1, 405; **Tate v. Fratt**, 112 Cal. 613, 44 Pac. 1061; **Board of Trade Teleg. Co. v. Blume**, 176 Ill. 247, 52 N. E. 258; **Vernon Ins. Co. v. Glenn**, 13 Ind. App. 340, 40 N. E. 759, 41 N. E. 829.

Otherwise, however, if the question clearly discloses the nature of the answer. **Campbell v. Connor**, 15 Ind. App. 23, 43 N. E. 453, 42 N. E. 688; **Larson v. Kelly**, 72 Minn. 116, 75 N. W. 13.

⁵ **Farmers' Bank v. Cowan**, 2 Abb. App. Dec. 88.

⁶ **Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.** 27 Fla. 1, 157, 17 L.R.A. 33, 65, 9 So. 661, 689; **State v. Farrell**, 82 Iowa, 553, 48 N. W. 940; **Beaudette v. Gagne**, 87 Me. 534, 33 Atl. 23; **St. Louis Dredging Co. v. Crown Coal & Tow Co.** 77 Mo. App. 362.

So, counsel may, after eliciting on cross-examination facts showing that statements made voluntarily by the witness on his direct examination were irrelevant and incompetent, have the statements stricken out. **Brandon v. Lake Shore & M. S. R. Co.** 8 Ohio C. D. 642.

b. After adversary's omission.—One who has drawn out incompetent evidence, even from his own witness, which has been received without exception being taken by his adversary, may be allowed, in the discretion of the court, to have it struck out¹ before the case is submitted.²

¹ **Birmingham Lumber Co. v. Brinson**, 94 Ga. 517, 20 S. E. 437; **Clark v. Boston & M. R. Co.** 164 Mass. 434, 41 N. E. 666; **Durant v. Lexington Coal Min. Co.** 97 Mo. 62, 10 S. W. 484; **Carpenter v. Ward**, 30 N. Y. 243, 246 (where the adversary's right to impeach was reserved); **Roberts v. Johnson**, 5 Jones & S. 157, affirmed in 58 N. Y. 613, with-

out distinctly passing on this question (motion granted, though made after long delay); *Rutledge v. Mayfield*, — Tex. Civ. App. —, 26 S. W. 910. According to *Lynch v. McNally*, 7 Daly, 126, the motion must be immediately made (affirmed in 73 N. Y. 347, without passing on the question).

And it is error to allow withdrawal from the jury of an improper statement volunteered by a witness, or made by mistake or inadvertence, on his cross-examination in answer to a proper question. *Chicago, K. & W. R. Co. v. Muller*, 45 Kan. 85, 25 Pac. 210; *American Oak Extract Co. v. Ryan*, 112 Ala. 337, 20 So. 644. Unless the party himself was at fault in calling it out. *American Oak Extract Co. v. Ryan*, 112 Ala. 337, 20 So. 644.

Other courts, however, hold that a party calling out illegal evidence has no right to have it excluded on his own motion. *Toliver v. State*, 94 Ala. 111, 10 So. 428; *Wheelock v. Godfrey*, 100 Cal. 578, 35 Pac. 317; *Byrne v. Reed*, 75 Cal. 277, 17 Pac. 201; *Reeves Bros. v. Harrington*, 85 Iowa, 741, 52 N. W. 517; *Bryan v. Olsen*, 20 Misc. 604, 46 N. Y. Supp. 349; *Faulcon v. Johnston*, 102 N. C. 264, 9 S. E. 394. And that it is error to grant his motion over his adversary's objection. *Toliver v. State*, 94 Ala. 111, 10 So. 428.

² *Farmers' Bank v. Cowan*, 2 Abb. App. Dec. 88.

c. After unsuccessful objection.—A party against whose objection and exception evidence has been received, because apparently competent,¹ or upon the faith of a promise to connect,² is not, on subsequently establishing its incompetency, or on failure to connect, entitled as matter of right to have it stricken out, but only to have the jury instructed to disregard it. But the court may, in its discretion, grant a motion to strike it out.³

¹ This is the rule in New York. *Gawtry v. Doane*, 51 N. Y. 84, affirming 48 Barb. 148 (notary's certificate afterward shown void by extrinsic evidence).

Other courts, however, have not allowed this rule, but hold that a motion to strike is proper and should be granted. *People v. Wallace*, 89 Cal. 158, 26 Pac. 650; *Collar v. Collar*, 86 Mich. 507, 13 L.R.A. 621, 49 N. W. 551. Even though, after repeated objections, the party objecting finally consented on request of juror that the evidence be allowed. *People v. Wallace*, 89 Cal. 158, 26 Pac. 650.

And cross-examining a witness as to illegal evidence which he has been allowed to give over objection does not waive the right to have the evidence stricken out on motion. *Babcock v. Murray*, 69 Minn. 199, 71 N. W. 913; *Achilles v. Achilles*, 137 Ill. 589, 28 N. E. 45.

² *Marks v. King*, 64 N. Y. 628, affirming 1 Hun, 435; *Platner v. Platner*, 78 N. Y. 90; *Kolka v. Jones*, 6 N. D. 461, 71 N. W. 558.

On the other hand, other courts hold that in such case the motion to strike out is proper and should be granted. *People v. Powell*, 87 Cal. 348, 11 L.R.A. 75, 25 Pac. 481; *Wood v. Chapman*, 24 Colo. 134, 49 Pac. 136; *Seligman v. Ten Eyck*, 60 Mich. 267, 27 N. W. 514; *Little Klamath Water Ditch Co. v. Ream*, 27 Or. 129, 39 Pac. 998; *Huckins v. Kapf*, 4 Tex. App. Civ. Cas. (Willson), 37, 14 S. W. 1016.

And in Florida the court should of its own motion exclude the evidence. *Jenkins v. State*, 35 Fla. 737, 18 So. 182.

³ *Stokes v. Johnson*, 57 N. Y. 673.

The motion ought to be granted where the evidence is so prejudicial that instructions would not remove its effect. *Anderson v. Rome*, W. & O. R. Co. 54 N. Y. 334; *O'Sullivan v. Roberts*, 7 Jones & S. 360.

Or where evidence to meet it has been excluded on the ground that the point is immaterial. *Gilbert v. Cherry*, 57 Ga. 128.

Or where its remaining in is sought to be used as a foundation for further evidence not otherwise admissible.

d. Where part of evidence is admissible.—Where part of the evidence is admissible, a general motion to strike out is improper, since all the evidence cannot be stricken because some of it is improper.¹

¹ *Barnewell v. Stephens*, 142 Ala. 609, 39 So. 662; *Southern P. R. Co. v. San Francisco Sav. Union*, 146 Cal. 290, 70 L.R.A. 221, 106 Am. St. Rep. 36, 79 Pac. 961, 2 A. & E. Ann. Cas. 962; *Spencer's Appeal*, 77 Conn. 638, 60 Atl. 289; *Leath v. Hinsor*, 117 Ga. 589, 43 S. E. 985; *Fitzsimons & C. Co. v. Braun*, 199 Ill. 390, 59 L.R.A. 421, 65 N. E. 249; *Hollingworth v. Ft. Dodge*, 125 Iowa, 627, 101 N. W. 455; *Wilson v. Pritchett*, 99 Md. 583, 58 Atl. 360; *Einolf v. Thompson*, 95 Minn. 230, 103 N. W. 1026, 104 N. W. 547; *Hopkins v. Modern Woodmen*, 94 Mo. App. 402, 68 S. W. 226; *Powell v. Hudson Valley R. Co.* 88 App. Div. 133, 84 N. Y. Supp. 337; *Circleville v. Sohn*, 20 Ohio C. C. 368, 11 Ohio C. D. 193; *Texas & P. R. Co. v. Hall*, 31 Tex. Civ. App. 464, 72 S. W. 1052; *Spokane v. Costello*, 42 Wash. 182, 84 Pac. 652; *Metz v. Willitts*, 14 Wyo. 511, 85 Pac. 380; *Swafford v. Board of Education*, 127 Cal. 484, 59 Pac. 900; *Jarman v. Rea*, 137 Cal. 339, 70 Pac. 216; *Powley v. Swenson*, 146 Cal. 471, 80 Pac. 722; *Hoodless v. Jernigan*, 51 Fla. 211, 41 So. 194; *Dorais v. Doll*, 33 Mont. 314, 83 Pac. 884; *Murray v. Montana Lumber Mfg. Co.* 25 Mont. 14, 63 Pac. 719; *Ventresca v. Beckwith*, 112 App. Div. 72, 98 N. Y. Supp. 134; *Schultz v. Ford Bros.* 133 Iowa, 402, 109 N. W. 614, 12 A. & E. Ann. Cas. 428; *Ray County Sav. Bank v. Hutton*, 224 Mo. 42, 123 S. W. 47.

e. Striking depositions.—Depositions should be stricken out after the witnesses appear.¹

¹ *Flannery v. Central Brewing Co.* 70 N. J. 715, 59 Atl. 157; *O'Brien v. Knotts*, 165 Ind. 308, 75 N. E. 594; *Wysor Land Co. v. Jones*, 24 Ind. App. 451, 56 N. E. 46; *Waddell v. Metropolitan Street R. Co.* 113 Mo. App. 680, 88 S. W. 765; *Travelers' Ins. Co. v. Hunter*, 30 Tex. Civ. App. 489, 70 S. W. 798; *Vale v. Suiter*, 58 W. Va. 353, 52 S. E. 313; *Re Evans*, 114 Iowa, 240, 86 N. W. 283; *Birmingham R. Light & P. Co. v. Livingston*, 144 Ala. 313, 39 So. 374; *Metz v. Willitts*, 14 Wyo. 511, 85 Pac. 380.

3. Delay in moving.

Omission to object to the evidence at the time is not fatal to a motion to strike it out at any time before the close of the evidence, if the delay is shown to have been from mistake or inadvertence; but the discretion should be carefully exercised, so that no harm may come to the other party.¹ If the motion be not made with reasonable promptitude it is not error to deny it.²

¹ *Miller v. Montgomery*, 78 N. Y. 282, affirming in effect 3 Redf. 154; *South Covington & C. Street R. Co. v. McCleave*, 18 Ky. L. Rep. 1036, 38 S. W. 1055.

Contra, if there is nothing to excuse the delay. *Falvey v. Jackson*, 132 Ind. 176, 31 N. E. 531.

² *Goldman v. State*, 75 Md. 621, 23 Atl. 1097; *Gilmore v. Pittsburgh, V. & C. R. Co.* 104 Pa. 275.

Thus, where the motion is not made until the close of the cross-examination. *Bower v. Bower*, 142 Ind. 194, 41 N. E. 525; *Briesenmeister v. Supreme Lodge K. of P. of the World*, 81 Mich. 525, 45 N. W. 977 (error to grant); *Caldwell v. Central Park, N. & E. River R. Co.* 7 Misc. 67, 27 N. Y. Supp. 397; *Bruce v. State*, 31 Tex. Crim. Rep. 590, 21 S. W. 681. Or until after plaintiff's testimony in chief is all in. *Warden v. Philadelphia*, 167 Pa. 523, 31 Atl. 928. Or until after the evidence is closed. *East Tennessee, V. & G. R. Co. v. Turvaille*, 97 Ala. 122, 12 So. 63; *Yetzer v. Young*, 3 S. D. 263, 52 N. W. 1054 (error to grant); *Robertson v. Coates*, 1 Tex. Civ. App. 664, 20 S. W. 875; *Lashus v. Chamberlain*, 6 Utah, 385, 24 Pac. 188. And the case partially argued. *Kansas City, M. & B. R. Co. v. Phillips*, 98 Ala. 159, 13 So. 65. Or the trial closed. *Yetzer v. Young*, 3 S. D. 263, 52 N. W. 1054.

But according to *Galveston, H. & S. A. R. Co. v. Scott*, 18 Tex. Civ. App. 321, 44 S. W. 589, and *Edisto Phosphate Co. v. Standford*, 112 Ala. 493, 20 So. 613, the motion is not too late even after the evidence has closed, if the evidence is, in fact, illegal: the party injured by the

ruling, if surprised, having his remedy by asking for an adjournment. *Edisto Phosphate Co. v. Standford*, 112 Ala. 493, 20 So. 613.

And *Hamilton v. New York C. & H. R. R. Co.* 51 N. Y. 100, holds that omission to object when evidence is offered does not so concede its legality as to absolutely preclude its subsequently being withdrawn from the consideration of the jury, at the instance of the party objecting.

4. Form of motion.

a. Specifying evidence.—A motion to strike out evidence should be directed specifically to the particular evidence considered objectionable, and it is not error to deny a motion if any of the evidence to which it is directed was properly admitted.¹

¹*Preferred Acci. Ins. Co. v. Gray*, 323 Ala. 482, 26 So. 517; *Hellman v. McWilliams*, 70 Cal. 494, 11 Pac. 659; *Colorado Mortg. & Invest. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42; *Woods v. Trinity Parish*, 21 D. C. 540; *Birmingham Lumber Co. v. Brinson*, 94 Ga. 517, 20 S. E. 437; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Southern Kansas R. Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938; *Wicks v. Dean*, 19 Ky. L. Rep. 1708, 44 S. W. 397; *Roeller v. Hall*, 62 Minn. 241, 64 N. W. 559; *Magee v. State*, — Miss. —, 21 So. 130; *Lee v. Brugmann*, 37 Neb. 232, 55 N. W. 1053; *Delaney v. State*, 51 N. J. L. 37, 16 Atl. 267; *McCabe v. Brayton*, 38 N. Y. 196; *Thomas Roberts Stevenson Co. v. Tucker*, 14 Misc. 297, 35 N. Y. Supp. 682; *Fleck v. Rau*, 9 App. Div. 43, 41 N. Y. Supp. 64; *Minneapolis, St. P. & S. Ste. M. R. Co. v. Nester*, 3 N. D. 480, 57 N. W. 510; *Finnegan v. Sullivan*, 1 Ohio Dec. 231; *Jennings v. Garner*, 30 Or. 344, 48 Pac. 177; *Eifert v. Lytle*, 172 Pa. 356, 33 Atl. 573; *Knoxville, C. G. & L. R. Co. v. Beeler*, 90 Tenn. 548, 18 S. W. 391; *Brown v. Mitchell*, 88 Tex. 350, 36 L.R.A. 64, 31 S. W. 621; *Norfolk & W. R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Yake v. Pugh*, 13 Wash. 78, 42 Pac. 528.

b. Specifying grounds.—And the motion should specify the grounds upon which it is based.¹

¹*Ætna Ins. Co. v. Le Roy*, 15 Ind. App. 49, 43 N. E. 570. The motion is in the nature of an objection to testimony, and even though there are grounds for objection, if they are not stated the court is not required to sustain the motion. *Smith v. Dawley*, 92 Iowa, 312, 60 N. W. 625.

See also *Gaffney v. Mentele*, 23 S. D. 38, 119 N. W. 1030; *Coburn v. Moline*, E. M. & W. R. Co. 243 Ill. 448, 134 Am. St. Rep. 377, 90 N. E. 741.

So, a motion directed to evidence both irresponsible and incompetent should specify both grounds, and be carefully limited to such part of the evi-

dence as is considered objectionable. *Gundlin v. Hamburg-American Packet Co.* 8 Misc. 291, 28 N. Y. Supp. 572; *People v. Spiegel*, 75 Hun, 161, 26 N. Y. Supp. 1041.

5. Power of the court.

Irrelevant evidence may be stricken out by the court¹ at any stage of the cause;² but a party who objected and excepted to its reception, and has been prejudiced by it, still has a right to meet it.³

¹ *Monfort v. Rowland*, 38 N. J. Eq. 181; *Durant v. Lexington Coal Min. Co.* 97 Mo. 62, 10 S. W. 484; *People v. Wilson*, 141 N. Y. 185, 36 N. E. 230. Especially where the court gave notice at the time of its introduction of his intention to do so. *First Nat. Bank v. Home Ins. Co.* 33 Or. 234, 52 Pac. 1055. And in *Mandeville v. Guernsey*, 51 Barb. 99; *Newman v. Goddard*, 3 Hun, 70, and *Koehue v. New York & Q. County R. Co.* 32 App. Div. 419, 52 N. Y. Supp. 1088, the practice was followed by the trial court, but not passed on by the appellate court, its consideration of the case being confined to the effect of the ruling, rather than the action itself. And in Florida it is the duty of the court to strike out evidence of its own motion received conditionally, when the condition is not complied with. *Jenkins v. State*, 35 Fla. 737, 18 So. 182.

Contra, *Lewars v. Weaver*, 121 Pa. 268, 15 Atl. 514, where it was held error for the court of its own motion to exclude as privileged communications certain statements, where no such claim was raised in opposition to their introduction when elicited. And according to *Thomas v. State*, 103 Ala. 18, 16 So. 4, the court should not, of its own motion, strike out testimony of a witness, elicited on cross-examination, as to statements made by him apparently contradicting his testimony in chief, together with his explanation of those statements.

The question seems to be, however, not so much the power of the court, but rather the proper exercise of its judicial discretion, so that the party who gave the evidence shall not be misled or placed at a disadvantage. *Re Lasak*, 131 N. Y. 624, 30 N. E. 112.

Where the court has already, of its own motion, excluded evidence from the jury, it is not error to refuse to again exclude it on a motion to strike out. *Rollins v. O'Farrel*, 77 Tex. 90, 13 S. W. 1021.

See the following cases as to striking out on judge's motion: *Boyer v. Pacific Mut. L. Ins. Co.* 1 Cal. App. 54, 81 Pac. 671 (refusal to receive inadmissible papers attached to judgment roll); *McCartney v. Washington*, 124 Iowa, 382, 100 N. W. 80 (witness repeating statement); *Brown v. Moosic Mountain Coal Co.* 211 Pa. 579, 61 At. 76 (incompetent, privileged communication, counsel should move); *Rhodes v. Rhodes*, 18 Pa. Super. Ct. 231 (incompetent, relevant testi-

mony by executor, court has no power to strike out); *Baker v. Mathew*, 137 Iowa, 410, 115 N. W. 15 (illegal testimony); *Bean v. Missoula Lumber Co.* 40 Mont. 31, 104 Pac. 869 (incompetent evidence); *Spotswood v. Spotswood*, 4 Cal. App. 711, 89 Pa. 362 (improper evidence).

² *Maurice v. Worden*, 54 Md. 233, 251, 39 Am. Rep. 384; *Schiels v. Horbach*, 49 Neb. 262, 68 N. W. 524; *Wright v. Gillespie*, 43 Mo. App. 244.

As, during argument of counsel. *Dunn v. Jaffray*, 36 Kan. 408, 13 Pac. 781. And even after it has been commented on in the argument of counsel who adduced it. *Crenshaw v. Johnson*, 120 N. C. 270, 26 S. E. 810.

³ See, for instance, *Anderson v. Rome, W. & O. R. Co.* 54 N. Y. 334, and *O'Sullivan v. Roberts*, 7 Jones & S. 360.

XIV.—USE OF THE PLEADINGS.

1. Reading adversary's pleading.
 - a. In general.
 - b. Amending.
 - c. Original, after amendment.
 - d. Showing personal sanction.
 - e. Contradicting part.
 - f. Allegations in verification of adversary's pleading.
 - g. Mere extract may be read.
 - h. But adversary may read residue.
2. Pleading of one party not admissible against another.
3. Reading one's own pleading.
 - a. Matter in issue.
 - b. Matter admitted.
4. Necessity of putting a pleading in evidence.
5. Reading pleadings in another action.
6. Copy not best evidence.

1. Reading adversary's pleading.

a. *In general*.—The pleading of a party in the action on trial is competent evidence against him of any relevant matter of fact contained therein, and is conclusive,¹ unless the court allow an amendment. A party whose pleading admits a conclusion of law is not thereby estopped from contesting it.²

¹ *McNail v. Welch*, 26 Ill. App. 482, affirmed in 125 Ill. 623, 18 N. E. 737; *Cook v. Barr*, 44 N. Y. 156, 158 (Earl, C.); *Neely v. Bair*, 144 Pa. 250, 22 Atl. 673; *Stockwell v. Loecher*, 9 Pa. Super. Ct. 241, following *Bowen v. De Lattre*, 6 Whart. 430; *Cook v. Hughes*, 37 Tex. 343; *Garrett v. McMahan*, 34 Tex. 307; *Lindner v. St. Paul F. & M. Ins. Co.* 93 Wis. 526, 67 N. W. 1125; *Lederer v. Rosenthal*, 99 Wis. 235, 74 N. W. 971, citing *Cook v. Barr* with approval.

Even though the pleading offered has been prepared by the party without the knowledge or consent of his counsel. *Pence v. Sweeney*, 3 Idaho. 181, 28 Pac. 413.

The disclosure of a garnishee is competent evidence in favor of an intervening claimant, as against plaintiff, to show that the property impounded by the garnishment is the same property to which the claimant is asserting a right, but not to support his claim. *Bradley v. Thorne*, 67 Minn. 281, 69 N. W. 909.

But where an answer in a libel suit pleads the truth of the matter charged to be libelous, and also a general denial, it is error to admit in evidence against defendant the former plea as a republication to show malice. *Young v. Kuhn*, 71 Tex. 645, 9 S. W. 860. The reason is that the effect of its admission would be to destroy defendant's right to plead inconsistent defenses.

In Massachusetts, by statute, pleadings in a cause are not evidence in a trial, but are allegations only. This rule, however, is limited to the suit in which they are pleaded; outside of that, admissions and declarations of a party in his pleadings are competent against him if they appear to be his act, and not merely that of his attorney. *Johnson v. Russell*, 144 Mass. 409, 11 N. E. 670. See further, *infra*, § 5.

But the weight to be given to it as evidence is solely for the jury. *Whitney v. Ticonderoga*, 53 Hun, 214, 6 N. Y. Supp. 844, citing *Mott v. Consumers' Ice Co.* 73 N. Y. 543.

² *People ex rel. Purdy v. Marlborough Highway Comrs.* 54 N. Y. 276, 13 Am. Rep. 581; *Greer v. Latimer*, 47 S. C. 176, 25 S. E. 136.

A conclusion of law in a pleading is not admitted by failure to deny. *Dix v. German Ins. Co.* 65 Mo. App. 34.

b. Amending.—The court has a discretionary power to refuse to allow a party to amend at the trial by striking out an admission which his adversary relies on, where the applicant does not show that it was made under a mistake of fact;¹ and where the amendment proposed presents issues entirely new and different from those framed by the pleadings as they stand.²

¹ *Miller v. Moore*, 1 E. D. Smith, 739.

So, also, if the pleading sought to be amended contain averments which, though claimed merely to be immaterial and unnecessary, may, if true, and not wholly irrelevant, be advantageous to the adversary as an admission. *Heller v. Royal Ins. Co.* 151 Pa. 101, 25 Atl. 83.

Leave to amend may be granted without prejudice to using the admission. *Kenah v. The John Markee, Jr.*, 3 Fed. 45; *Strong v. Dwight*, 11 Abb. Pr. N. S. 319.

² *McGill v. Holmes*, 22 Misc. 514, 49 N. Y. Supp. 1000.

Or where it is sought by amending the answer so as to deny defendant's liability, at the commencement of the second trial, after a previous trial and appeal on the same pleadings. *Bishop v. Averill*, 19 Wash. 490, 53 Pac. 726.

But where defendant, though he admits signing a paper similar to the contract sued on, has not knowledge or information sufficient to form a belief as to whether the one set out as such is it, in fact, and therefore denies same, and asks leave to amend his answer so as to deny

the genuineness of the signature, after the original contract has been put in evidence, it is error to refuse the amendment. *Corn Palace & Interstate Fair Asso. v. Hornick*, 100 Iowa, 578, 68 N. W. 1018.

c. Original, after amendment.—A pleading or an admission or allegation in a pleading, notwithstanding it had been withdrawn or struck from the record by amendment, is competent in evidence against the party from whom it proceeded, like any other admission or declaration, subject, however, to explanation by himself.¹ This rule rests on the general principle that whatever a party has said about his case may be proved against him. In its application, a question remains as to whether he who offers a pleading not signed or verified by the adverse party must give evidence to bring knowledge of it home to him.²

The weight of the evidence is another question.³

¹ *Barton v. Laws*, 4 Colo. App. 212, 35 Pac. 284, and cases cited; *Bloomingtondale v. DuRell*, 1 Idaho, 33; *Baltimore & O. & C. R. Co. v. Evarts*, 112 Ind. 533, 14 N. E. 369; *Ludwig v. Blackshire*, 102 Iowa, 366, 71 N. W. 356; *Junciau v. Stunkle*, 40 Kan. 756, 20 Pac. 473; *Walser v. Wear*, 141 Mo. 443, 42 S. W. 928, and cases cited (overruling in effect all earlier conflicting cases); *Woodworth v. Thompson*, 44 Neb. 311, 62 N. W. 456; *Strong v. Dwight*, 11 Abb. Pr. N. S. 319 (where the pleading has been verified by the party personally); *Fogg v. Edwards*, 20 Hun, 90; *New York & L. C. Transp. Co. v. Hurd*, 44 Hun, 17, and cases cited; *Alliance Review Pub. Co. v. Valentine*, 9 Ohio C. C. 387. 6 Ohio C. D. 323; *Willis v. Tozer*, 44 S. C. 1, 21 S. E. 617; *Goodbar Shoe Co. v. Sims*, — Tex. Civ. App. —, 43 S. W. 1065 (overruling previous cases to the contrary, and holding it error to exclude); *Kilpatrick-Koch Dry Goods Co. v. Box*, 13 Utah, 494, 45 Pac. 629; *Oregon R. & Nav. Co. v. Dacres*, 1 Wash. 195, 23 Pac. 415 (unless a mistake is shown); *Lindner v. St. Paul F. & M. Ins. Co.* 93 Wis. 526, 67 N. W. 1125; *Frearson v. Loe*, L. R. 9 Ch. Div. 48, 66, 25 Moak, Eng. Rep. 747, 763, 27 Week. Rep. 183 (Jessel, M. R.). Contra, *Mecham v. McKay*, 37 Cal. 154, and *Ponce v. McElvy*, 51 Cal. 222 (reversing judgments for error in admitting the original after amendment); *Gilmore v. Borders*, 2 How. (Miss.) 824; *Little Rock & Ft. S. R. Co. v. Clark*, 58 Ark. 490, 25 S. W. 504, and cases cited; *Stern v. Loewenthal*, 77 Cal. 340, 19 Pac. 579, and cases cited; *Wheeler v. West*, 71 Cal. 126, 11 Pac. 871, and cases cited; *Osment v. McElrath*, 68 Cal. 466, 9 Pac. 731; *Ralphs v. Hensler*, 114 Cal. 196, 45 Pac. 1062; *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076, 47 Pac. 360; *Lane v. Bryant*, 100 Ky. 138, 36 L.R.A. 709, 37 S. W. 584 (where the portion sought to be introduced had been abandoned on a motion to compel election between counts); *Smith v. Davidson*, 41 Fed. 172 (where the pleading was verified by counsel for the pleader).

So, an original pleading verified by the pleader may be used to impeach him as a witness, if its statements plainly contradict his evidence. *Re O'Connor*, 118 Cal. 69, 50 Pac. 4.

² According to the considered case of *Vogel v. Osborne*, 32 Minn. 167, 20 N. W. 129, this is necessary, and without such evidence it is error to admit it. To the same effect is *Corbett v. Clough*, 8 S. D. 176, 65 N. W. 1074.

According to *Bowen v. Powell*, 1 Lans. 1, it would be error to hold that the mere fact that the party had obtained standing in court by a pleading not signed nor verified by him, nor otherwise brought home to him, was evidence of an admission of the truth of all contained in it.

So, an original complaint of an infant stating the cause of action on information and belief cannot be read against him where it was verified only by his guardian *ad litem*, and it was not shown that plaintiff was in any way responsible for it. *Geraty v. National Ice Co.* 16 App. Div. 174, 44 N. Y. Supp. 659.

³ It was justly said in *Elizabethport Mfg. Co. v. Campbell*, 13 Abb. Pr. 86, that a reference to original will not alone falsify statements of the amended pleading. The *prima facie* effect of amendment is an acknowledgment of mistake, and not an implication of having wilfully or knowingly made a false statement, its value depending upon its language and the circumstances under which signed, and the explanation, if any, given of it. *Kilpatrick-Koch Dry Goods Co. v. Box*, 13 Utah, 494, 45 Pac. 629. So, in *Graham v. Graham*, 50 N. J. Eq. 701, 25 Atl. 358, where an amendment was allowed on counsel's representation that the averment sought to be used as an admission was made inadvertently, and that the amendment alleged what was really intended to be said, it was held that while the averment might have probative force to the extent that the pleader made the admission, it was of but small moment in view of counsel's explanation.

d. Showing personal sanction.—The party may be asked whether he has given the facts to his attorney or counsel, for the purpose of pleading; because, if the conversation is not called for, this does not violate the rule of privilege.¹

¹ *Ross-Lewin v. Redfield*, 68 N. Y. 627.

e. Contradicting part.—A party who puts in evidence his adversary's pleading is not thereby estopped from denying or disproving statements contained in it.¹

¹ *Mott v. Consumers' Ice Co.* 73 N. Y. 543; *Young v. Katz*, 22 App. Div. 542, 48 N. Y. Supp. 187 (*dictum*); *Cleveland, C. C. & St. L. R. Co. v. Gray*, 148 Ind. 266, 46 N. E. 675, and cases cited. *Contra*, *McCord v. Durant*, 134 Pa. 184, 19 Atl. 489.

So held where plaintiff suing a master put in evidence, to show the injury, the answer alleging the act to have been the wilful, and not negligent, act of the servant. Held, error to hold plaintiff estopped thereby. See also *Fogg v. Edwards*, 20 Hun, 90.

f. Allegations in verification of adversary's pleading.—Allegations of agency, etc., in past transactions, contained in the usual affidavit of verification, are not competent evidence of such agency against the party whose pleading is thus verified, without other evidence to connect him therewith.¹

¹ *Bowen v. Powell*, 1 Lans. 1; *Omaha & G. Smelting & Ref. Co. v. Tabor*, 13 Colo. 41, 5 L.R.A. 236, 21 Pac. 925.

g. Mere extract may be read.—A party may read in evidence a mere extract from his adversary's pleading, however brief, provided he does not omit a part of the sentence or clause which qualifies that part which he reads, so as to pervert the sense or render it uncertain.¹

¹ *Granite Gold Min. Co. v. Maginness*, 118 Cal. 131, 50 Pac. 269; *Jones v. United States Mut. Acci. Asso.* 92 Iowa, 652, 61 N. W. 485; *Bompart v. Lucas*, 32 Mo. 123; *Algase v. Horse Owners' Mut. Indemnity Asso.* 77 Hun, 472, 29 N. Y. Supp. 101; *Cromwell v. Hughes*, 12 Misc. 372, 33 N. Y. Supp. 643; *Gossler v. Wood*, 120 N. C. 69, 27 S. E. 33, and cases cited; *McDonald v. McDonald*, 16 Vt. 630.

Thus, the answer of the defendant may be read in evidence by the plaintiff in an action for conversion to prove possession of the goods by the defendant, even though defendant by his other allegations avers that such possession was lawful by virtue of a purchase of the goods from a person having title thereto, and even though such admission constitutes the only evidence of possession by defendant, and plaintiff relies on other evidence to show the wrongful possession. *Foster v. Henry*, 5 Alb. L. J. 173.

But it is not fatal error to exclude a paragraph of a pleading offered in evidence to establish a certain fact, where the fact is shown by the testimony of a witness. *Western U. Teleg. Co. v. Sanders*, — Tex. Civ. App. —, 26 S. W. 734.

h. But adversary may read residue.—When one party has read in evidence an extract from his adversary's pleadings, the adversary has a right to read as much more as may be necessary

to qualify or explain that which has been read, but not an allegation of a distinct fact in avoidance.¹

¹ This appears to be the sound rule and in harmony with the general principle as to putting in evidence the whole of the declaration or admission (*Rouse v. Whited*, 25 N. Y. 170, 80 Am. Dec. 337, reversing 25 Barb. 279), which is properly applicable to written declarations, affidavits, etc., as well as oral. *Grattan v. Metropolitan L. Ins. Co.* 92 N. Y. 274, 284, 44 Am. Rep. 372; *Honstine v. O'Donnell*, 5 Hun, 472, 474. It was applied to a pleading in *Goodyear v. De La Vergne*, 10 Hun, 537, 539.

The conflict of opinion on this point may be shortly stated as the question: Which should prevail,—the old common-law rule that when a party has read a portion of a book or other document on his own behalf the adverse party is entitled to read anything else from the same document, or the modern rule as to admissions generally, that when a party proves an admission or declaration the adverse party is entitled to prove as much of the residue as tends to explain or qualify it, but not statements of distinct matters?

The latter I deem to be the true rule applicable to the reading of pleadings as evidence, because they are read simply as admissions; and it is supported by *Gunn v. Todd*, 21 Mo. 303; *Granite Gold Min. Co. v. Maginness*, 118 Cal. 131, 50 Pac. 269; *Spencer v. Fortescue*, 112 N. C. 268, 16 S. E. 898; *Medlin v. Wilkens*, 1 Tex. Civ. App. 465, 20 S. W. 1026.

To the contrary in *Godden v. Pierson*, 42 Ala. 370, and the headnote in *Gildersleeve v. Mahoney*, 4 Duer, 383, which, however, is not borne out by the decision.

See, further, on the origin of this question, *Hart v. Ten Eyck*, 2 Johns. Ch. 90; *Green v. Hart*, 1 Johns. 580; *McDonald v. McDonald*, 16 Vt. 634.

2. Pleading of one party not admissible against another.

It is a general rule, however, that the pleading of one party is not admissible in evidence against another party, unless there is shown to be a joint interest, privity, fraud, collusion, or combination between them,¹ or unless it is adopted by the party against whom it is sought to introduce.²

¹ *Indianapolis, D. & W. R. Co. v. Center Twp.* 143 Ind. 63, 40 N. E. 134; *Walker v. Cole*, — Tex. Civ. App. —, 27 S. W. 882; *Wytheville Crystal Ice & Dairy Co. v. Frick Co.* 96 Va. 141, 30 S. E. 491.

So, statements in an answer of one defendant, admitting his authority as agent for a codefendant to make the contract sued on, are not competent evidence as against his codefendant to prove the agency. *Fisher v. White*, 94 Va. 236, 26 S. E. 573.

And in an action against the infant and other heirs of a decedent, an answer by the personal representative of decedent, though it contains admissions of facts alleged in the bill, is not evidence against the infant heirs. *Ingram v. Illges*, 98 Ala. 511, 13 So. 548.

But in an action by a vendee of land against his vendor and a grantee under a conveyance from the vendor, to cancel the conveyance and for specific performance, the answer of the vendor is admissible against his grantee. *Lockman v. Miller*, — Miss. —, 22 So. 822.

² *Hanover Nat. Bank v. Klein*, 64 Miss. 141, 8 So. 208, and cases cited.

3. Reading one's own pleading.

a. Matter in issue.—A party is not entitled to read to the jury from his own pleading anything which has been put in issue,¹ except so far as it may be necessarily read to explain a responsive pleading necessarily in evidence, even though the jury be instructed by the court that it is not evidence.²

¹ *Green v. Morse*, 57 Neb. 391, 77 N. W. 925; *Stewart v. Demming*, 54 Neb. 7, 74 N. W. 265; *Corcoran v. Trich*, 9 Sadler (Pa.) 110, 20 W. N. C. 372, 11 Atl. 677; *Scales v. Gulf, C. & S. F. R. Co.* — Tex. Civ. App. —, 35 S. W. 205, and cases cited.

And according to *Sweetzer v. Claflin*, 74 Tex. 667, 12 S. W. 395, pleadings that have been formally withdrawn during the trial cannot be subsequently introduced in evidence by the pleader.

² The principle is well stated in *Lancaster v. Arendell*, 2 Heisk. 434, a case, however, which arose on the reading of a petition for discovery. Judgment reversed for error in allowing it to be read even with such instructions.

But a defendant who, on a petition for discovery being read in evidence, fails to ask any instruction or ruling limiting its use to showing to what the answer is responsive, where the answer would otherwise be unintelligible, cannot complain on appeal that its use was not so limited,—especially if he cannot have been prejudiced by the reading of any portion of the petition to which the answer was responsive. *Grimes v. Hilliary*, 150 Ill. 141, 36 N. E. 977.

b. Matter admitted.—Material allegations in a complaint which are not put in issue, or in an answer requiring a reply and admitted by failure to reply, are competent evidence¹ in favor of the party making the allegation, except allegations as to amount of damages.²

¹ *Lettick v. Honnold*, 63 Ill. 335; *Boeker v. Hess*, 34 Ill. App. 332.

² *Jennings v. Asten*, 5 Duer, 695, 3 Abb. Pr. 373 (*dictum*).

The reason of this exception is, that allegations of damages are not admitted by failure to deny.

4. Necessity of putting a pleading in evidence.

The pleadings in a cause are before the court and jury, and may be read and commented upon for the purpose of defining the issue and showing what part of the charge to be tried is admitted without having been formally put in evidence.¹

¹ *Shepard v. Mills*, 70 Ill. App. 72; *Sturgeon v. Sturgeon*, 4 Ind. App. 232, 30 N. E. 805; *School Town v. Grant*, 104 Ind. 168, 1 N. E. 302; *Claffin v. New York Standard Watch Co.* 3 Misc. 629, 23 N. Y. Supp. 324; *Holmes v. Jones*, 69 Hun, 346, 23 N. Y. Supp. 631; *Holmes v. Jones*, 121 N. Y. 461, 24 N. E. 701, and see ante, chapter vi. § 2; *White v. Smith*, 46 N. Y. 418 (before a referee); *Baltzer v. Chicago, M. & N. R. Co.* 89 Wis. 257, 60 N. W. 716. Contra, *Fash v. Third Ave. R. Co.* 1 Daly, 148; *Mullen v. Union Cent. L. Ins. Co.* 182 Pa. 150, 37 Atl. 988; *Carpenter v. Carpenter*, 126 Mich. 217, 85 N. W. 576; *Page v. Life Ins. Co.* 131 N. C. 115, 42 S. E. 543. And see *Frank v. Davenport*, 105 Iowa, 588, 75 N. W. 480, where the court prefaced its oral charge by reading a pleading not supported by any evidence, which, while not expressly declared to be error, was held not to be fatal, because later in the charge it called attention specially to the issues which had support in the testimony.

This principle was impliedly recognized in *Cook v. Merritt*, 15 Colo. 212, 25 Pac. 176, where, although an attempt by one to read his own pleadings in order to show admissions by his adversary was denied, the denial was held justifiable because the issue framed by the pleadings was clearly defined, and thoroughly understood at the trial by all parties.

The rule was, however, held not to apply to original pleadings which had been superseded by amendment or otherwise, in *Leach v. Hill*, 97 Iowa, 81, 66 N. W. 69, and *Folger v. Boyinton*, 67 Wis. 447, 30 N. W. 715. Contra, *Smith v. Pelott*, 63 Hun, 632, 18 N. Y. Supp. 301.

According to *Greenville Comrs. v. Old Dominion S. S. Co.* 104 N. C. 91, 10 S. E. 147, the pleadings furnish no evidence on which the jury can act, unless they are formally introduced.

5. Reading pleadings in another action.

The pleading of a party in another action is competent evidence against him of any relevant¹ matter of fact contained therein, if it be shown that the matter was inserted with his knowledge and sanction.² Like other admissions, however, they are subject to rebuttal and explanation or qualification, unless the circumstances render them estoppels under the law.³

But a pleading in another action is not competent evidence as against one who was a stranger thereto, and in no way, by privacy or otherwise, connected with the pleader.⁴

Nor can either party read in evidence in his own favor his own pleadings in another action.⁵

¹ *Gibson v. Herriott*, 55 Ark. 85, 17 S. W. 589; *Miles v. Strong*, 68 Conn. 273, 36 Atl. 55; *Robinson v. Woodmansee*, 80 Ga. 249, 4 S. E. 497; *Printup v. Patton*, 91 Ga. 422, 18 S. E. 311; *Kankakee & S. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621; *Wadsworth v. Duncan*, 164 Ill. 360, 45 N. E. 132; *Wadsworth v. Laurie*, 164 Ill. 42, 45 N. E. 435; *Anglo-American Pkg. & Provision Co. v. Baier*, 31 Ill. App. 653; *Fairbanks v. Badger*, 46 Ill. App. 644; *Kentucky & I. Cement Co. v. Cleveland*, 4 Ind. App. 171, 30 N. E. 802; *Manatt v. Scott*, 106 Iowa, 203, 76 N. W. 717; *Parsons v. Copeland*, 33 Me. 370, 54 Am. Dec. 628; *Radcliffe v. Barton*, 161 Mass. 327, 37 N. E. 373; *Goodrich v. McDonald*, 77 Mich. 486, 43 N. W. 1019; *O'Riley v. Clampet*, 53 Minn. 539, 55 N. W. 740; *Rich v. Minneapolis*, 40 Minn. 82, 41 N. W. 455 (not error to reject when irrelevant); *Murphy v. St. Louis Type Foundry*, 29 Mo. App. 541; *Williamson Corset & Brace Co. v. Western Corset Co.* 70 Mo. App. 424 (not error to exclude if irrelevant); *Neudecker v. Kohlberg*, 81 N. Y. 296 (holding it error to receive it when not relevant); *Feldman v. McGuire*, 34 Or. 309, 55 Pac. 872; *Kline v. First Nat. Bank*, 2 Monaghan (Pa.) 448, 15 Atl. 433; *Buzard v. McAnulty*, 77 Tex. 438, 14 S. W. 138, and cases cited (where the pleading was signed and sworn to by the party); *Davis v. Converse*, — Tex. Civ. App. —, 46 S. W. 910; *Lee v. Chicago, St. P. M. & O. R. Co.* 101 Wis. 352, 77 N. W. 714 (error to exclude). See, also, *Kashman v. Parsons*, 70 Conn. 295, 39 Atl. 179, where this principle was applied to a request for special findings in a former similar action between the same parties; *Keesling v. Doyle*, 8 Ind. App. 43, 35 N. E. 126, an action for malicious prosecution by the defendant in a former ejectment suit against the plaintiffs therein and their grantee, in which the complaint and judgment in the ejectment suit were held competent evidence against defendants, as tending to show malice and want of probable cause, and plaintiff's right to possession of the land, even though defendant's grantee was not a party to the ejectment suit. But *Keyser v. Pickrell*, 4 App. D. C. 198, seems to hold that the record of another and different action by another plaintiff, although against the same defendant, cannot be introduced against defendant to show admissions or recitals of facts made by him therein.

But relevancy is necessary as well as sanction and knowledge. *New York v. Fay*, 53 Hun, 553, 23 Abb. N. C. 390, 6 N. Y. Supp. 400. And there is no error in excluding a pleading offered to show a fact expressly admitted by the pleader *Boseli v. Doran*, 62 Conn. 311, 25 Atl. 242. Nor is its improper admission fatal error where the fact is otherwise fully established. *Solari v. Snow*, 101 Cal. 387, 35 Pac. 1004.

A verified answer in another action by another plaintiff against the same defendant cannot be introduced as part of the cross-examination of the pleader to contradict or impeach him, though it seems it may be introduced for that purpose after he has been properly examined as to whether he had made statements therein variant from his testimony. *Williams v. Miller*, 6 Kan. App. 626, 49 Pac. 703.

According to *Gardner v. Meeker*, 169 Ill. 40, 48 N. E. 307, a second action against the same parties on the same cause of action, a plea of set-off and copy of account attached thereto are inadmissible without the declaration.

² *Duff v. Duff*, 71 Cal. 513, 12 Pac. 570, and cases cited; *Cook v. Barr*, 44 N. Y. 156; *Eisenlord v. Clum*, 126 N. Y. 552, 12 L.R.A. 836, 27 N. E. 1024 (*dictum*).

So held where the other action was brought in the name and for the benefit of the party by his attorney in fact, and was prosecuted with his knowledge and consent. *Kamm v. Bank of California*, 74 Cal. 191, 15 Pac. 765. Otherwise, however, where the agency is established only by the declaration of the alleged agent in verifying the pleading. Its only legitimate purpose in such case is to impeach the testimony of the agent. *Omaha & G. Smelting & Ref. Co. v. Tabor*, 13 Colo. 41, 5 L.R.A. 236, 21 Pac. 925.

This principle was recognized, though not directly involved in *Crocker v. Carpenter*, 98 Cal. 418, 33 Pac. 271, where a general objection to the introduction of an unverified pleading as irrelevant, etc., was held to have been properly overruled as too general, the court stating that if the objection had specified insufficient showing of knowledge and sanction as the true ground on which exclusion was sought, knowledge and sanction might have been shown and the objection obviated.

So, under a statute providing that an allegation in a complaint not denied in the answer shall be taken as true, the pleadings in a former action against the same defendant on the same cause of action are admissible to show that defendant had, in the former action, admitted by not denying a fact pleaded in defense of the present action. *Grant v. Gooch*, 105 N. C. 278, 11 S. E. 571.

In California, although a superseded original pleading is not competent evidence against the pleader in the same action (see *supra*, § 1, c), this rule does not apply to a superseded original pleading in another action. *Coward v. Clanton*, 79 Cal. 23, 21 Pac. 359.

The fact that the pleading is made on information and belief does not affect its competency, but goes only to its weight, as evidence. *Pope v. Allis*, 115 U. S. 363, 29 L. ed. 393, 6 Sup. Ct. Rep. 69, and cases cited.

So, as to a pleading signed only by counsel, specific and particular allegations of matters of action or defense which cannot be presumed to have been made under a general authority of the attorney, but are obviously from specific instructions of the party, are competent. *Johnson v. Russell*, 144 Mass. 409, 11 N. E. 670; *Dennie v. Williams*, 135 Mass. 28,

and cases cited. Especially where it further appears that the pleader in effect adopted the pleading by making it the basis of his claim for the judgment in his favor which he obtained in the other action. *Miles v. Strong*, 68 Conn. 273, 36 Atl. 55, and cases cited. And it is error to exclude such a pleading, notwithstanding the pleader testifies that he had never seen the pleading and did not know its contents, though not denying that he had given instructions, as his testimony cannot overcome the presumption that it was made under his instructions. *Johnson v. Russell*, 144 Mass. 409, 11 N. E. 670.

But a pleading signed by an attorney containing formal allegations which may be presumed to have been made without special instruction from his client, or at least are not shown to have been made on information from, or with knowledge of, the client, is not competent. *Delaware County Comrs. v. Diebold Safe & Lock Co.* 133 U. S. 473, 33 L. ed. 674, 10 Sup. Ct. Rep. 399; *Solari v. Snow*, 101 Cal. 387, 35 Pac. 1004; *Dennie v. Williams*, 135 Mass. 28, and cases cited; *Farr v. Rouillard*, 172 Mass. 303, 52 N. E. 443; *Brown v. Jewett*, 120 Mass. 215. And so, even though the pleading contain express admissions of fact, where the attorney who drew it testifies that his client, in stating the case to him, did not make the admissions. *International & G. N. R. Co. v. Mulliken*, 10 Tex. Civ. App. 663, 32 S. W. 152.

And in *McDermott v. Mitchell*, 47 Cal. 249, a joint answer by two defendants, signed by their attorneys and verified by only one of them, was held inadmissible in a subsequent action against the defendant who did not sign or verify it.

But in Georgia all allegations of fact material and necessary to the pleading, though it be unverified and signed only by counsel, are regarded as having been made by the party himself, and, as such, are his declarations, and if against his interest are admissible against him. *Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92.

A pleading signed by an attorney is not, in a subsequent action between other parties, competent as against a party thereto, on the ground that the party for whom the pleading was filed was acting as his agent, where there is no evidence that they were made on information furnished by or with knowledge of the agent. *London & L. F. Ins. Co. v. Schwulst*, — Tex. Civ. App. —, 46 S. W. 89.

³ *Gibson v. Herriott*, 55 Ark. 85, 17 S. W. 589; *Robinson v. Parker*, 11 App. D. C. 132; *Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92; *Harris v. Amoskeag Lumber Co.* 101 Ga. 641, 29 S. E. 302; *Kentucky & I. Cement Co. v. Cleveland*, 4 Ind. App. 171, 30 N. E. 802, and cases cited; *Sweet v. Tuttle*, 14 N. Y. 465.

But refusal to permit a party to introduce an entire complaint verified by him in a former action, to explain the portion admitted in behalf of his adversary, is proper, where the court's offer to receive any portion which it is thought will explain the portion admitted is unaccepted,

and no effort is made to specify the explanatory portions of the complaint. *Loftus v. Fischer*, 113 Cal. 286, 45 Pac. 328.

- ⁴ *Southern Kansas R. Co. v. Pavey*, 57 Kan. 521, 46 Pac. 969; *Stockbridge v. Fahnestock*, 87 Md. 127, 39 Atl. 95; *Tyler v. Old Colony R. Co.* 157 Mass. 336, 32 N. E. 227; *Hodge v. Eastern R. Co.* 70 Minn. 193, 72 N. W. 1074; *Davis v. Green*, 102 Mo. 170, 11 L.R.A. 90, 14 S. W. 876; *Missouri P. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608; *Eules v. Russell*, — Tex. Civ. App. —, 34 S. W. 176.

So, allegations or admissions made in a petition filed by former receivers after the commencement of the present action and signed only by their solicitor, reciting the facts on which they sought an order of court authorizing them to settle the account and differences with the plaintiff, their successor, are not admissible against the plaintiff. *Liverpool & L. & G. Ins. Co. v. McNeill*, 32 C. C. A. 173, 59 U. S. 499, 89 Fed. 139.

- ⁵ *Bush v. Monroe*, 20 Ky. L. Rep. 547, 47 S. W. 215; *Johnson v. Stone*, 69 Miss. 826, 13 So. 858; *Bell v. Throop*, 140 Pa. 641, 21 Atl. 408.

6. Copy not best evidence.

If a pleading is offered in evidence as an admission of the party, his original, and not a copy of record, is the best evidence.¹

- ¹ *Nash v. Hunt*, 116 Mass. 237, 248. Contra, by statute in Georgia. *Belt v. State*, 103 Ga. 12, 29 S. E. 451. And in *Withrow v. Adams*, 4 Tex. Civ. App. 438, 23 S. W. 437, record copies were admitted, their legitimacy as evidence being questioned, not as being secondary, but as being irrelevant, etc.

But the admission of record proof of undenied allegations is not prejudicial. *Jones v. Allen*, 29 C. C. A. 318, 56 U. S. App. 529, 85 Fed. 523. Whether the original copy served by him on the party offering it would be competent, compare *Pratt v. Norton*, 5 Thomp. & C. 8, 3 Abb. N. Y. Dig. new ed., p. 60, § 869, etc.

XV.—EXHIBITION AND VIEW; EXPERIMENTS.

1. Exhibiting person.
 - a. Identity.
 - b. Age; legitimacy; paternity.
 - c. Personal injury.
2. Exhibiting chattel.
3. Photographs.
4. View.
 - a. In general.
 - b. Discretion of court.
 - c. Object.
 - d. Application.
 - e. Vacating order.
 - f. Time.
 - g. Mode.
 - h. Experiment upon ground viewed.
 - i. Unauthorized view.
5. Experiments.

1. Exhibiting person.

a. Identity.—On the trial of an issue involving the identity of a person, the court may allow him to be brought before the jury in order that a witness may look upon him and testify.¹

And a party summoned as a witness, though not sworn, may, on request of his adversary, be required to uncover his face to permit a witness on the stand to identify him.²

¹Att'y. Gen. v. Fadden, 1 Price, 403 (where *habeas corpus ad testificandum* was allowed, to bring him up).

²Rice v. Rice, — N. J. Eq. —, 19 Atl. 736.

This for the purpose of identification only, however; whether he may be required to do some act in or out of court by which he will be furnishing or giving testimony against himself is another question.

b. Age; legitimacy; paternity.—On the trial of an issue involving the age of a child, the court may allow the child to be shown to the jury.¹

So, also, on an issue of the legitimacy of a child alleged to be of mixed blood.²

But as to whether, on an issue of paternity, the court should allow the child to be shown to the jury, the decisions are not harmonious.³ Some of the courts allow it to be done⁴ irrespective of the child's age.⁵ Others have, however, refused to do so when the child was a mere infant,⁶ but allow it to be done if the child has attained an age when its features have assumed some degree of maturity and permanency.⁷ Still others go to the extent of excluding the child, irrespective of its age.⁸

¹ N. Y. Laws 1882, p. 421, chap. 340; Pen. Code, § 19. In any proceeding it is a matter of right to exhibit the child, on a question of age.

² Warlick v. White, 76 N. C. 175 (refusal to allow it to be exhibited held error).

³ See note, renewing all the authorities, in 52 L.R.A. 502.

⁴ It is allowed for the purpose of having the jury by inspection trace any possible resemblance between the child and its alleged father, the court proceeding on the theory that any such resemblance, if traceable, is relevant to the issue, and the best evidence of it is produced by an inspection. *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871; *Gaunt v. State*, 50 N. J. L. 490, 14 Atl. 600; *Crow v. Jordan*, 49 Ohio St. 655, 32 N. E. 750. And that, although taken by itself, proof of such resemblance would be insufficient to establish paternity. It clearly is a circumstance to be considered in connection with other facts tending to prove the issue on which the jury are to pass. *Finnegan v. Dugan*, 14 Allen, 197 (where the judge's charge that the jury might consider whether there was any resemblance between the child, who was in court, and the defendant, was upheld). And the same court in *Eddy v. Gray*, 4 Allen, 435, sustained a ruling rejecting testimony upon the same subject, upon the ground that it did not come within the rule of expert testimony.

In *State v. Woodruff*, 67 N. C. 89, the charge of the court that the resemblance of a child to its alleged father was relevant, was held good.

And in *State v. Horton*, 100 N. C. 443, 6 S. E. 238, a prosecution for seduction, the child was exhibited to the jury on the theory that the resemblance traceable was corroborative of the fact of sexual intercourse between the prosecutrix and the defendant.

In *Jones v. Jones*, 45 Md. 144, the court permitted the jury to judge as to a personal resemblance, but not to hear testimony on that subject, on the ground that where the parties are before the jury whatever resemblance there is will be directly apparent, capable of being traced by the jurors themselves, but to permit third persons to give their opinions would be raising a class of experts where expertism does not exist.

In the New York cases which prohibit testimony upon resemblances, the question of inspection by the jury does not arise. But in *Petrie v. Howe*, 4 Thomp. & C. 85, the court in rejecting testimony says: "If this species of physiological evidence is admissible, it should not be covertly introduced." In that case, which was for *crim. con.*, the court had received testimony as to the color of the hair of the plaintiff's other children, the illegitimate child having hair of a different color.

In *Gilmanton v. Ham*, 38 N. H. 108, counsel commented on the resemblance of the child to defendant, and his right to do so was sustained on the ground that the matter was relevant and the parties before the jury. See also *People v. Wing*, 115 Mich. 698, 74 N. W. 179.

⁵ *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871, and cases cited. Its youth going rather to the weight of the evidence.

⁶ *Overlock v. Hall*, 81 Me. 348, 17 Atl. 169 (child six months old); *Clark v. Bradstreet*, 80 Me. 454, 15 Atl. 56 (child six weeks old), a well-considered case in which many cases are collated and classified; *State v. Harvey*, 112 Iowa, 416, 52 L.R.A. 500, 84 Am. St. Rep. 350, 84 N. W. 535 (child nine months old).

And in *Copeland v. State*, — Tex. Crim. Rep. —, 40 S. W. 589, the profert of a child six weeks old was held to have been properly refused, in the absence of any offer to prove a resemblance as to features.

⁷ *Shorten v. Judd*, 56 Kan. 43, 42 Pac. 337. Even though the comparison is to be made with a photograph of the putative father who is dead. *Ibid.*

Thus, an infant two years old may be exhibited to the jury (*State v. Smith*, 54 Iowa, 104, 6 N. W. 153), while an infant three months old cannot (*State v. Danforth*, 48 Iowa, 45).

This discrimination was disapproved in 22 Alb. L. J. 43, and in *Gaunt v. State*, 50 N. J. L. 490, 14 Atl. 600, was said to rest "upon a physiological notion adopted by the court, which can scarcely find justification as a rule of evidence."

⁸ *Robnett v. People*, 16 Ill. App. 299; *Hanawalt v. State*, 64 Wis. 84, 24 N. W. 489.

In *Ingram v. State ex rel. McIntosh*, 24 Neb. 33, 37 N. W. 943, the prosecuting attorney's request that the prosecutrix turn the child's face to the jury for inspection was denied by the court and the child at once removed from the jury's presence.

In *Risk v. State ex rel. Vestal*, 19 Ind. 152, a child three months old was put in evidence, but the court held that, as there had been no objection to the evidence, the jury had a right to consider it.

In *Reitz v. State ex rel. Holden*, 33 Ind. 187, while showing the child was regarded as improper, the error was cured by the court charging the jury that they must regard only the oral evidence on the question of resemblance.

In *LaMatt v. State ex rel. Lucas*, 128 Ind. 123, 27 N. E. 346, while this question was not directly involved it was held that any misconduct of the jury in inspecting the child during a recess of court was not ground for new trial, where the court subsequently instructed the jury that they must consider only the oral testimony given.

c. Personal injury.—The court may allow a witness testifying in his own behalf respecting injuries to his person, to exhibit the injured part to the jury.¹

And the court may allow a physician testifying as an expert on behalf of the party injured to examine the injured parts in the presence of the jury, and exhibit and describe the then condition of the party.²

But whether the court can compel the witness to so exhibit his wounds, or to submit to a medical examination in presence of the jury, is contested.³

¹*Townsend v. Briggs*, — Cal. —, 32 Pac. 307; *Chicago & A. R. Co. v. Clausen*, 173 Ill. 100, 50 N. E. 680; *Indiana Car Co. v. Parker*, 100 Ind. 199; *Hess v. Lowrey*, 122 Ind. 225, 7 L.R.A. 90, 23 N. E. 156, and cases cited; *Topeka v. Bradshaw*, 5 Kan. App. 879, 48 Pac. 751; *Edwards v. Three Rivers*, 96 Mich. 625, 55 N. W. 1003; *Hiller v. Sharon Springs*, 28 Hun, 344; *Mulhado v. Brooklyn City R. Co.* 30 N. Y. 370; *Jordan v. Bowen*, 14 Jones & S. 355; *Cunningham v. Union P. R. Co.* 4 Utah, 206, 7 Pac. 795; *Carrico v. West Virginia C. & P. R. Co.* 39 W. Va. 86, 24 L.R.A. 50, 19 S. E. 571; *Lapointe v. Berlin Mills Co.* 75 N. H. 294, 73 Atl. 406; *Felsch v. Babb*, 72 Neb. 736, 101 N. W. 1011. But see *Carstens v. Hanselman*, 61 Mich. 426, 28 N. W. 159. In this case, however, an action for malpractice, several years had elapsed since the date of treatment, and the court based its refusal on the ground that as the injury was healed no inspection, apart from some knowledge of the character of the injury and the method of treatment, could enable even a medical expert to decide upon the merits or demerits of the treatment; and that the jury's guessing from an inspection would be of no value whatever; and on the further ground that by reason of the location of the injury the inspection would have been improper, if not indecent. And according to *French v. Wilkinson*, 93 Mich. 322, 53 N. W. 530, a suit for injuries caused by a dog bite, in which the trial took place over three years after the bite and nine months after the expiration of the time fixed by the declaration during which plaintiff suffered from the bite, he could not exhibit the then condition of his limb without any testimony tending to show no change for the worse.

The propriety of the practice cannot be questioned on the ground that the exhibition would tend to unduly excite the sympathy of the jury by

reason of the youth and comeliness of the witness, who is a female. *Omaha Street R. Co. v. Emminger*, 57 Neb. 240, 77 N. W. 675. Nor on the ground that the injury has not been properly treated. *Plummer v. Milan*, 79 Mo. App. 439.

And the jury may be permitted to examine with their fingers the scars caused by the alleged blow, for which damages are asked. *Jackson v. Wells*, 13 Tex. Civ. App. 275, 35 S. W. 528.

So, the court may allow the witness to be brought in on a cot or lounge and remain thereon while testifying. *Sherwood v. Sioux Falls*, 10 S. D. 405, 73 N. W. 913; *Selleck v. Janesville*, 100 Wis. 157, 1 L.R.A. 563, 75 N. W. 975. His right to be present certainly cannot be questioned, and if his condition as thus exhibited excites sympathy it is the result of defendant's negligence.

In *Blanchard v. Holyoke Street R. Co.* 186 Mass. 582, 72 N. E. 94, however, the court denied a motion to permit plaintiff to be brought into court on a stretcher for the purpose of appearing as a witness in her own behalf.

² *Lanark v. Dougherty*, 153 Ill. 163, 38 N. E. 892; *Freeman v. Hutchinson*, 15 Ind. App. 639, 43 N. E. 16.

And place him in different attitudes, to enable the jury to determine the extent of his disability. *Citizens' Street R. Co. v. Willooby*, 134 Ind. 563, 33 N. E. 637.

But where a person who alleged that he suffered an injury to his eye exhibited it to the jury, and his physician attempted to point out the injury, the adverse party was held entitled to call medical experts in rebuttal. *St. Louis Southwestern R. Co. v. Smith*, 38 Tex. Civ. App. 507, 86 S. W. 943.

³ Affirmative:—*Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 9 L.R.A. 442, 8 So. 90; *St. Louis S. W. R. Co. v. Dobbins*, 60 Ark. 486, 31 S. W. 147 (discretionary to order it to be made in court or out); *Hall v. Manson*, 99 Iowa, 698, 34 L.R.A. 207, 68 N. W. 922; *Schroeder v. Chicago, R. I. & P. R. Co.* 47 Iowa, 375 (a well-reasoned case); *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466, 49 Am. Rep. 484 (citing and quoting with approval *Schroeder v. Chicago, R. I. & P. R. Co.* 47 Iowa, 375); *Hatfield v. St. Paul & D. R. Co.* 33 Minn. 130, 53 Am. Rep. 14, 22 N. W. 176; *Miami & M. Turnp. Co. v. Baily*, 37 Ohio St. 104; *Bagley v. Mason*, 69 Vt. 175, 37 Atl. 287; *White v. Milwaukee City R. Co.* 61 Wis. 536, 50 Am. Rep. 154, 21 N. W. 524. And according to *Demenstein v. Richardson*, 2 Pa. Dist. R. 825, one suing for personal injuries the extent of which can be determined only by such an examination puts his person in evidence, and whether the examination is required of him in the court room or in an adjacent room, during trial or before trial, is mere matter of detail. See also *Graves v. Battle Creek*, 95 Mich. 266, 19 L.R.A. 641, 54 N. W. 757 (sustaining the power on the theory that as the injured party may exhibit his wounds to the jury, the right to compel him to do so ought to be ac-

corded his adversary, if it can be done with due regard to decency, and in the orderly conduct of the trial).

Some courts, however, seem to regard this power as discretionary, to be exercised or not, according as there is shown to be a necessity for, and a profitable benefit to be derived from, the examination. *Terre Haute & I. Co. v. Brunker*, 128 Ind. 542, 26 N. E. 178. And if such a showing be made, refusal of the application is fatal error. *Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 9 L.R.A. 442, 8 So. 90.

But the application should not be granted if the examination will necessarily involve the use of anæsthetics. *Sturgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616.

As to abuse of discretion in refusing order for physical examination, see also note in 15 L.R.A.(N.S.) 663.

This power is recognized, however, if the party has already voluntarily submitted the injured part to the inspection of the jury as evidence. (*Heynes v. Trenton*, 123 Mo. 326, 27 S. W. 622; *Winner v. Lathrop*, 67 Hun, 511, 22 N. Y. Supp. 516), the courts proceeding on the theory that as it is then in evidence, it stands on the same footing as any other evidence, the character or quality of which is in issue, and cannot be withdrawn until the party affected by it has had an opportunity to apply every proper test for the purpose of overcoming or reducing its probative force and effect.

As to waiver of right to object to physical examination or exhibition of person, see note in 2 L.R.A.(N.S.) 386.

Negative:—*Illinois C. R. Co. v. Griffin*, 25 C. C. A. 413, 53 U. S. App. 22, 80 Fed. 278; *Mills v. Wilmington City R. Co.* 1 Marv. (Del.) 269, 40 Atl. 1114; *Peoria, D. & E. R. Co. v. Rice*, 144 Ill. 227, 33 N. E. 951, and cases cited; *Parker v. Enslow*, 102 Ill. 272, 40 Am. Rep. 588; *People v. McCoy*, 45 How. Pr. 216 (criminal cases).

In *McQuigan v. Delaware, L. & W. R. Co.* 129 N. Y. 50, 14 L.R.A. 466, 29 N. E. 235, the rule laid down by *Union P. R. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000, that neither the common law nor the inherent power of courts in the exercise of their jurisdiction warrants or authorizes a physical examination of the party without his consent, was followed. And this rule was applied to compulsory examinations both before and at trial. *Ibid.*, and cases cited. But in 1893-94, by amendment to § 873, Code of Civil Procedure, power was expressly given trial courts to order a compulsory physical examination of one suing for personal injuries, if the requisite showing be made by the party applying therefor. But this power is limited to examinations before trial (*Lyon v. Manhattan R. Co.* 142 N. Y. 298, 25 L.R.A. 402, 37 N. E. 113; *Green v. Middlesex Valley R. Co.* 31 App. Div. 412, 53 N. Y. Supp. 500; *Sewell v. Butler*, 16 App. Div. 77, 44 N. Y. Supp. 1074), and does not apply to examinations during trial and in the presence of the jury. *Cole v. Fall Brook Coal*

Co. 87 Hun, 584, 34 N. Y. Supp. 572; Neill v. Brooklyn Elev. R. Co. 13 Misc. 403, 34 N. Y. Supp. 1144.

In several states the express question stated in the text seems never to have been directly involved and passed upon; the cases involving, rather, the question of the existence or nonexistence of the power of the court during trial to compel the injured party to submit himself to a physical examination by experts, to be either selected by the court or agreed upon by the parties, with a view to their subsequently testifying as to the nature and extent of the injuries as shown by the examination. See, for instance, *Missouri P. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325; *Gulf, C. & S. F. R. Co. v. Norfleet*, 78 Tex. 321, 14 S. W. 703; *Gulf, C. & S. F. R. Co. v. Pendery*, 14 Tex. Civ. App. 60, 36 S. W. 793; *Houston & T. C. R. Co. v. Berling*, 14 Tex. Civ. App. 544, 37 S. W. 1083; *Smith v. Spokane*, 16 Wash. 403, 47 Pac. 888; *Savannah, F. & W. R. Co. v. Wainwright*, 99 Ga. 255, 25 S. E. 622; *Southern Kansas R. Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938; *Belt Electric Line Co. v. Allen*, 19 Ky. L. Rep. 1656, 44 S. W. 89; *Owens v. Kansas City, St. J. & C. B. R. Co.* 95 Mo. 169, 8 S. W. 350, and cases cited (a leading case); *Fullerton v. Fordyce*, 121 Mo. 1, 25 S. W. 587; *Chadron v. Glover*, 43 Neb. 732, 62 N. W. 62; *Lane v. Spokane Falls & N. R. Co.* 21 Wash. 119, 46 L.R.A. 153, 75 Am. St. Rep. 821, 57 Pac. 367 (considering and classifying the cases).

For other cases and a full review of the subject, see note in 14 L.R.A. 466, and supplemental note in 23 L.R.A.(N.S.) 463.

See also note in 15 L.R.A.(N.S.) 663, on question when the refusal of an order for physical examination amounts to an abuse of discretion, and note in 2 L.R.A.(N.S.) 386, on waiver of the right to object to physical examination or exhibition of person.

That the court cannot compel plaintiff in an action for personal injuries to submit to the taking of an X-ray photograph of the injured portion is declared in *Dean v. Wabash R. Co.* 229 Mo. 425, 129 S. W. 953, on the ground that injuries sometimes result to the patient from the application of such photographic process.

2. Exhibiting chattel.

On the trial of an issue involving the quality or condition of a chattel the court may allow the thing to be shown to the jury, upon proper evidence as to the identity of the thing and of its condition at the time in question;¹ but not where its condition at the time of the trial is such that the determination of its original condition or quality is not a question of common knowledge, but necessarily requires a particular scientific knowledge and expertness.² Whether the court can compel a party to pro-

duce a chattel for such examination, even though it be in court, is not clear.³

And it is proper to exhibit to the jury any physical object which tends to establish any controverted fact or issue.⁴

¹ Von Reeden v. Evans, 52 Ill. App. 209; Columbia City v. Langohr, 20 Ind. App. 395, 50 N. E. 831 (a board from the walk at the place where plaintiff was injured); Fogg v. Rodgers, 84 Ky. 558, 2 S. W. 248; Hudson v. Roos, 76 Mich. 173, 42 N. W. 1099; Stevenson v. Michigan Log Towing Co. 103 Mich. 412, 61 N. W. 536; King v. New York C. & H. R. R. Co. 72 N. Y. 607 (iron hook broken from alleged flaw. In this case some stress was laid on the fact that the question was one of common knowledge as justifying the exhibition of the object); People v. Gonzalez, 35 N. Y. 49; Ruloff's Case, 11 Abb. Pr. N. S. 245, s. c., less fully, as Ruloff v. People, 45 N. Y. 213; People v. Muller, 32 Hun, 209 (photographs; on indictment for the sale of them, as deemed obscene); Cleveland, C. C. & St. L. R. Co. v. McKelvey, 12 Ohio C. C. 426, 5 Ohio C. D. 561 (sparks shown to have come from an engine claimed to have set buildings on fire); Luie v. Taylor, 3 Post. & F. 731.

But its condition must be shown to have remained unchanged. Foote v. Woodworth, 66 Vt. 216, 28 Atl. 1034.

And it must be fully identified. McGrail v. Kalamazoo, 94 Mich. 52, 53 N. W. 955.

In California, by statute, "material objects presented to the senses" are made evidence and may be exhibited to the jury if they have such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence. And according to Thomas Fruit Co. v. Stark, 107 Cal. 206, 40 Pac. 336, samples of work done under contract, although not shown to be fair samples, may be exhibited on the question of defective performance of the contract. Whether they are fair samples or not is a circumstance affecting their weight, and not their admissibility, as evidence.

Whether articles proposed to be exhibited in court are too cumbersome or not is a question addressed to the discretion of the presiding judge. Jackson v. Pool, 91 Tenn. 448, 19 S. W. 324.

² So held, on an issue of the soundness or unsoundness of a railroad rail, as to pieces of the broken rail claimed to have been picked up at the time of and six months after the accident, during which time they had been exposed to the weather. Stewart v. Evarts, 76 Wis. 35, 44 N. W. 1092.

³ According to Hunter v. Allen, 35 Barb. 42, and Withey v. Pere Marquette R. Co. 141 Mich. 412, 1 L.R.A.(N.S.) 352, 113 Am. St. Rep. 353, 104 N. W. 773, 7 A. & E. Ann. Cas. 948, it is not error to refuse. *Dictum*, that it would be error to compel it. But query. But Groundwater

v. Washington, 92 Wis. 56, 65 N. W. 871, holding that granting such an application is within the discretion of the trial court.

⁴ As the clothing worn by a party when injured, as tending to show which of two conflicting theories as to the cause of the accident is correct. *Senn v. Southern R. Co.* 108 Mo. 142, 18 S. W. 1007. See also *Tudor Iron Works v. Weber*, 129 Ill. 535, 21 N. E. 1078; *McMurrin v. Rigby*, 80 Iowa, 322, 45 N. W. 877.

Or a boot showing the indentations on it as tending to show that the wearer's foot had been run over by a car wheel, and that the brake had not been applied. *Hays v. Gainsville Street R. Co.* 70 Tex. 602, 8 S. W. 491.

And according to *Williams v. Nally*, 20 Ky. L. Rep. 244, 45 S. W. 874, the bones of a fractured leg which had to be amputated may be introduced for inspection by experts, upon the question as to whether the leg was properly treated.

In *Cohankus Mfg. Co. v. Rogers*, 29 Ky. L. Rep. 747, 96 S. W. 437, permitting jury to examine dangerous machine was held to be within the discretion of the court.

Otherwise, if the inspection is merely an appeal to the feelings and sympathies of the jurors. *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176 (a boot worn by plaintiff when injured).

And *Rost v. Brooklyn Heights R. Co.* 10 App. Div. 477, 41 N. Y. Supp. 1069, holds that the amputated foot of a child cannot be shown to the jury to show the size of the child at the time, where she is present in court at the trial, and defendant admits that the amputation was properly done.

Permitting jury to inspect, through a microscope, particles of steel and iron collected with a magnet from a building alleged to have been injuriously affected by the erection of an elevated railroad, was disapproved in *Cotton v. Boston Elev. R. Co.* 191 Mass. 103, 77 N. E. 698.

3. Photographs.

On the trial of an issue involving the condition, appearance, or identity of a person,¹ place,² or thing,³ at a previous time, a photograph taken at the time in question is competent upon proper evidence of its fidelity.⁴

¹ *Ruloff's Case*, 11 Abb. Pr. N. S. 245; less fully as *Ruloff v. People*, 45 N. Y. 213; s. p. *Cowley v. People*, 83 N. Y. 465; *Alberti v. New York, L. E. & W. R. Co.* 118 N. Y. 77, 6 L.R.A. 765, 23 N. E. 35. Thus, a photograph of a child seven years old at the time of its death alleged to have been caused by another's negligence is competent on the question of its physical development, as tending to show probable further development, although it was taken two years before the death of the child. *Taylor, B. & H. R. Co. v. Warner*, 88 Tex. 642, 32 S. W. 868.

The fact that it had been taken two years before the death of the child is a circumstance affecting its weight only.

X-ray photographs are subject to the rules applicable to ordinary photographs, and are admissible under similar conditions, including the testimony of experts to explain the process of taking such pictures and the difference between them and ordinary photographs.

The subject of X-ray photographs and their use as evidence is considered in *State v. Matheson*, 130 Iowa, 440, 114 Am. St. Rep. 427, 103 N. W. 137, 8 A. & E. Ann. Cas. 430; *DeForge v. New York, N. H. & H. R. Co.* 178 Mass. 59, 86 Am. St. Rep. 464, 59 N. E. 669; *Carlson v. Benton*, 66 Neb. 486, 92 N. W. 600, 1 A. & E. Ann. Cas. 159; *Miller v. Minturn*, 73 Ark. 183, 83 S. W. 918; *Chicago & J. Electric R. Co. v. Spence*, 213 Ill. 220, 104 Am. St. Rep. 213, 72 N. E. 796; *Jameson v. Weld*, 93 Me. 345, 45 Atl. 299; *Geneva v. Burnett*, 65 Neb. 464, 58 L.R.A. 287, 101 Am. St. Rep. 628, 91 N. W. 275; *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816; *Miller v. Dumon*, 24 Wash. 648, 64 Pac. 804.

So, also, as to a photograph taken by the cathode or X-ray process, to show the condition of bones as affected by an injury. *Smith v. Grant* (Colo. Dist. Ct.) 29 Chicago Leg. News, 145; *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. 445.

So held, also, as to copies of photographs of a deceased person sought to be identified, which were recognized by witnesses well acquainted with him in his lifetime as true likenesses of him. *Wilcox v. Wilcox*, 46 Hun, 32.

Otherwise, however, if the photograph will be of no assistance to the jury, but will rather tend to confuse them. *Ortiz v. State*, 30 Fla. 256, 11 So. 611; *Rock Island v. Drost*, 71 Ill. App. 613. And its exhibition is merely calculated to arouse their sympathy. *Selleck v. Janesville*, 104 Wis. 570, 47 L.R.A. 691, 76 Am. St. Rep. 892, 80 N. W. 944.

So, on an issue of mental or testamentary capacity, a testator's photograph is not admissible, even though shown to fairly represent him. *Varner v. Varner*, 16 Ohio C. C. 386, 9 Ohio C. D. 273. (Error to admit.)

And a photograph offered to show physical appearance is properly excluded where direct evidence may be easily obtained. *Gilbert v. West End Street R. Co.* 160 Mass. 403, 36 N. E. 60.

For further cases on the question of the admissibility of photographs of persons, see note to *Dederichs v. Salt Lake City R. Co.* 35 L.R.A. 802, 805, and supplemental note in 15 L.R.A.(N.S.) 1162.

² *Kansas City, M. & B. R. Co. v. Smith*, 90 Ala. 25, 8 So. 43; *Dyson v. New York & N. E. R. Co.* 57 Conn. 9, 17 Atl. 137; *Bedell v. Berkey*, 76 Mich. 435, 43 N. W. 308; *People v. Buddensieck*, 103 N. Y. 487, 9 N. E. 44; *Archer v. New York, N. H. & H. R. Co.* 106 N. Y. 589, 13 N. E. 318; *Williams v. Brooklyn Elev. R. Co.* 57 Hun, 591, 10 N. Y. Supp. 929, reversed on other grounds in 126 N. Y. 96, 26 N. E. 1048; *Warner v. Randolph*, 18 App. Div. 458, 45 N. Y. Supp. 1112; *Cozzens*

v. Higgins, 1 Abb. App. Dec. 451; Beardslee v. Columbia Twp. 188 Pa. 496, 41 Atl. 617; Missouri, K. & T. R. Co. v. Moore, 4 Tex. App. Civ. Cas. (Willson) 323, 15 S. W. 714 (error to exclude); Dederichs v. Salt Lake City R. Co. 14 Utah, 137, 35 L.R.A. 802, 46 Pac. 656, and cases cited. But in North Carolina the rule seems to be that photographs may only be used by a witness in connection with and to explain his testimony, and are not admissible as evidence per se. See also notes in 35 L.R.A. 809, and 15 L.R.A.(N.S.) 1162.

According to Scott v. New Orleans, 21 C. C. A. 402, 41 U. S. App. 498, 75 Fed. 373, the difference between the images produced upon the photographic plate and the retina of the human eye does not affect the admissibility of the photograph; but is merely a circumstance affecting its weight. But the jury should, by proper instructions, be warned against the liability of such evidence to mislead.

Nor is its admissibility affected by the fact that there has been a change in the condition or appearance of the place since the time in question and before the photograph was taken, due to some action of the party opposing its admission. Stott v. New York, L. E. & W. R. Co. 66 Hun, 633, 21 N. Y. Supp. 353. So held in Beardslee v. Columbia Twp. 188 Pa. 496, 41 Atl. 617, if the substantial identity of the place be not destroyed, and the changes are pointed out to the jury. Contra of a photograph taken long after the time in question and after material changes had taken place, from both natural and human causes, —especially where the party offering it has had the benefit of a map of his own making and introduced by him. Hampton v. Norfolk & W. R. Co. 120 N. C. 534, 35 L.R.A. 808, 27 S. E. 96.

Otherwise if the photograph be not a true representation of the place. Threlkeld v. Wabash R. Co. 68 Mo. App. 127; Leidlein v. Meyer, 95 Mich. 586, 55 N. W. 367. And its only effect would be to mislead and confuse the jury. Carey v. Hubbardston, 172 Mass. 106, 51 N. E. 521.

And a photograph is not admissible if the jury have viewed the premises. Dobson v. Philadelphia, 7 Pa. Dist. R. 321. Contra if the view, though proper, be impracticable. Omaha Southern R. Co. v. Beeson, 36 Nev. 361, 54 N. W. 557.

For further cases on the admissibility of photographs of places, see notes in 35 L.R.A. 802 and 15 L.R.A.(N.S.) 1162.

³ Turner v. Boston & M. R. Co. 158 Mass. 261, 33 N. E. 520; Wurmser v. Frederick, 62 Mo. App. 634; Conrad v. Richter, 13 Pa. Co. Ct. 478; Chestnut Hill & S. H. Turnp. Co. v. Piper, 15 W. N. C. 55.

⁴ The court will not judicially notice the fidelity of a photograph offered in evidence; but that fact must be established by proper evidence. Varner v. Varner, 16 Ohio C. C. 386, 9 Ohio C. D. 273, and cases cited; Goldsboro v. Central R. Co. 60 N. J. L. 49, 37 Atl. 433; Beardslee v. Columbia Twp. 188 Pa. 496, 41 Atl. 617, and cases in notes in 35 L.R.A. 803, and 15 L.R.A.(N.S.) 1162.

And while it is usually the better practice to verify the fidelity of a photograph by testimony of the photographer who took it, it is not absolutely necessary that it be so verified. *Roosevelt Hospital v. New York Elev. R. Co.* 66 Hun, 633, 21 N. Y. Supp. 205, 206. But it may be verified by any person of equally correct vision and powers of observation who is familiar with the object photographed. *Roosevelt Hospital v. New York Elev. R. Co.* supra; *Nies v. Broadhead*, 75 Hun, 255, 27 N. Y. Supp. 52.

Where witnesses in a negligence case had on cross-examination described the passenger who claimed to have been injured, it was held that a photograph of the passenger could not be introduced to contradict such witnesses, they not having been interrogated concerning it. *Stiasny v. Metropolitan Street R. Co.* 58 App. Div. 172, 68 N. Y. Supp. 694.

4. View.

a. In general.—The right to send the jury out to have a view, although of common-law origin,¹ is now generally regulated by statute,² though it may be done with the consent of the parties.³

¹ While it is uncertain when a view by the jury would be granted or refused at common-law, the prevailing opinion seemed to be that views were sanctioned by the common-law practice, although allowed only in certain real actions. The view was not a matter of right, however, but proceeded upon the opinion of the judge as to its propriety and necessity. See *Springer v. Chicago*, 135 Ill. 552, 12 L.R.A. 609, 26 N. E. 514, and cases in note to *People v. Thorn*, 42 L.R.A. 368. And in *Newham v. Taite*, 6 Scott, 575, 1 Arnold, 244, the court refused a view, saying it had difficulty in seeing how the rule could be enforced if granted.

And a statute making it obligatory on a court to permit a jury in eminent domain proceedings to view the premises on application of either party was held, in *Springer v. Chicago*, 135 Ill. 552, 12 L.R.A. 609, 26 N. E. 514, not to preclude the common-law power of the court in other cases to permit a view in its discretion.

In *Jenkins v. Wilmington & W. R. Co.* 110 N. C. 438, 15 S. E. 193, the practice is characterized as one not to be encouraged and as "most usually unnecessary for any good purpose, . . . productive of delay and expense, and, on occasions, possibly, of irregularities," though it is held discretionary with the trial judge to grant or refuse the view; and should be refused if a map of the locality and evidence of witnesses are sufficient to convey to the jury an intelligent comprehension of the issues.

² Under the general form of statutes authorizing a view whenever, in the opinion of the judge, it is proper for the jury to have a view, it is usually allowed in any kind of action, without reference to the subject-matter. *Washburn v. Milwaukee & L. W. R. Co.* 59 Wis. 364,

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18 N. W. 328 But it is not a matter of right, the application being discretionary with the trial judge. *Leidlein v. Meyer*, 95 Mich. 586, 55 N. W. 367; *Andrews v. Youmans*, 82 Wis. 81, 52 N. W. 23. The question being whether the view is proper and necessary. See also cases cited in notes to *People v. Thorn*, 42 L.R.A. 370; and *Springer v. Chicago*, 12 L.R.A. 611. See also the next succeeding section.

And statutes apparently designed for other purposes have been held to authorize views by the jury. Thus, in Illinois the court, in a proceeding providing that in cases of this character the hearing shall be conducted to confirm a special assessment, may, in its discretion, under a statute as any other case at law, order a view of the *locus in quo* by the jury. *Vane v. Evanston*, 150 Ill. 616, 37 N. E. 901. And according to *Traut v. New York, C. & St. L. R. Co.* 1 *Monaghan* (Pa.) 394, 15 Atl. 678, a statute giving the court to which an appeal from the report of reviewers is taken power to order what notices shall be given, connected with any part of the proceedings, and to make all such orders connected therewith as may be deemed requisite, authorizes an order in eminent domain proceedings directing the jury to view the premises after they are impaneled and sworn.

There is express statutory authority for views in some particular classes of cases. Thus, in New York a view by the jury in actions of waste is provided for in N. Y. Code Civ. Proc. § 1659.

Whether the United States courts must follow the state practice on applications for view does not appear to have been settled. If it were a mode of taking evidence the state practice would not be applicable (see *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724), but doubtless it still might be allowed on consent, though consent would not make it matter of right. Considered as simply qualifying the jury to understand evidence, the question whether the state practice controls in the United States courts depends on the application of the distinction in *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286. *Owens v. Missouri P. R. Co.* 38 Fed. 571, did not involve this question, but merely held that permitting the jury in an action for damages for personal injuries caused by a collision with a locomotive to examine a railroad engine, though against the objection of the defendant, was not a ground for a new trial where, in reaching a verdict, the jury had to decide for themselves whether the person was struck by the engine and how he came to be struck, and whether he was walking or lying down on the track when he was struck.

When view is allowed, they follow the state practice as to expenses. *Huntress v. Epson*, 15 Fed. 732.

³ *Milledgeville v. Brown*, 87 Ga. 599, 13 S. E. 638 (where no question was made as to the duty or power of the court, because the view was had by consent of both parties).

b. Discretion of court.—It is not a matter of right, however, but the application, whether under the practice at common law or under the statutes, is addressed to the discretion of the trial judge,¹ and may be granted by him if he deems it proper and necessary.²

¹ *Saint v. Guerrerio*, 17 Colo. 448, 30 Pac. 335; *Broyles v. Prisock*, 97 Ga. 643, 25 S. E. 389; *Springer v. Chicago*, 135 Ill. 552, 12 L.R.A. 609, 26 N. E. 514; *Chicago v. Baker*, 39 C. C. A. 318, 98 Fed. 830; *Jackson County v. Nichols*, 139 Ind. 611, 38 N. E. 526; *Banning v. Chicago, R. J. & P. R. Co.* 89 Iowa, 74, 56 N. W. 277; *Lenderson & C. Gravel Road Co. v. Cosby*, 19 Ky. L. Rep. 1851, 44 S. W. 639; *Memphis & C. Packet Co. v. Buckner*, 108 Ky. 701, 57 S. W. 482; *Mulliken v. Corunna*, 110 Mich. 212, 68 N. W. 141; *Dupuis v. Saginaw Valley Traction Co.* 146 Mich. 151, 109 N. W. 413; *Brown v. Kohout*, 61 Minn. 113, 63 N. W. 248; *Jenkins v. Wilmington & W. R. Co.* 110 N. C. 438, 15 S. E. 193; *Rudolph v. Pennsylvania S. Valley R. Co.* 186 Pa. 541, 40 Atl. 1083; *Bellingham Bay & B. C. R. Co. v. Strand*, 4 Wash. 311, 30 Pac. 144; *Gunn v. Ohio River R. Co.* 36 W. Va. 165, 14 S. E. 465; *Andrews v. Youmans*, 82 Wis. 81, 52 N. W. 23; *Koepke v. Milwaukee*, 112 Wis. 475, 88 N. W. 238; *Bibb County v. Reese*, 115 Ga. 346, 41 S. E. 636; *Maloney v. King*, 30 Mont. 158, 76 Pac. 4; *Alberts v. Husenetter*, 77 Neb. 699, 110 N. W. 657.

² The court must always determine from the peculiar facts in each case as to whether it is necessary and proper for the jury to have a view to enable them to reach a just decision. *Henderson & C. Gravel Road Co. v. Cosby*, 19 Ky. L. Rep. 1851, 44 S. W. 639. And its decision will not be disturbed on appeal, unless it clearly appears that the view was necessary and practicable, and that its denial probably injured the party applying. *Gunn v. Ohio River R. Co.* 36 W. Va. 165, 14 S. E. 465.

If the jury is granted a view, the information derived from such a view cannot control their deliberations, which must be based on the evidence in the case, and not on the view. *Keller v. Harrison*, — Iowa, —, 128 N. W. 851.

In the following cases inspection by the jury was permitted: *Jones v. F. S. Royster Guano Co.* 6 Ga. App. 506, 65 S. E. 361 (inspecting fertilizer factory in action for nuisance); *Wood County v. Shinnew*, 30 Ohio C. C. 158 (ditch improvement; second view refused); *Lee v. Northwestern R. Co.* 84 S. C. 125, 65 S. E. 1031 (place of alleged injury); *Olsen v. North Pacific Lumber Co.* 55 C. C. A. 665, 119 Fed. 77 (sawmill in operation); *Cram v. Chicago*, 94 Ill. App. 199 (premises claimed to have been injured by the construction of a viaduct); *Cleveland, C. C. & St. L. R. Co. v. Penketh*, 27 Ind. App. 210, 60 N. E. 1095 (railroad crossing at place of accident); *Louisville A. & P. Valley Electric R. Co. v. Whipps*, 27 Ky. L. Rep. 977, 87 S. W. 298

(premises intended for a railroad station); *Louisville v. Caron*, 28 Ky. L. Rep. 844, 90 S. W. 604 (change of grade resulting in injury to abutting owner); *Flint v. Union Water Power Co.* 73 N. H. 483, 62 Atl. 788 (premises injured by flowage of water); *Hampton v. Macon*, 113 Ga. 93, 38 S. E. 387 (defective street); *Board of Internal Improvement v. Moore*, 23 Ky. L. Rep. 1885, 66 S. W. 417 (injured phaeton); *Northwestern Mut. L. Ins. Co. v. Sun Ins. Office*, 85 Minn. 65, 88 N. W. 272 (building injured by fire. But knowledge so acquired cannot be used in determining the total loss); *Dobbins v. Little Rock, R. & Electric Co.* 79 Ark. 85, 95 S. W. 794, 9 A. & E. Ann. Cas. 84 (inspection of controller on a street car).

And a view is properly refused where the conditions existing at the time in question have changed materially (*Henderson & C. Gravel Road Co. v. Cosby*, 19 Ky. L. Rep. 1851, 44 S. W. 639; *Broyles v. Prisock*, 97 Ga. 643, 25 S. E. 389; *Stewart v. Cincinnati, W. & M. R. Co.* 89 Mich. 315, 17 L.R.A. 539, 50 N. W. 852); or the facts involved are of such a character that they can be accurately described to the jury (*Ohio & M. R. Co. v. Wrape*, 4 Ind. App. 100, 30 N. E. 428); or where request is made after evidence is all in (*Sanitary Dist. v. McGuirl*, 86 Ill. App. 392). See further, as to the discretion of the court, cases cited in note to *People v. Thorn*, 42 L.R.A. 372.

c. Object.—Whether a view when had is merely to enable the jury to understand the evidence, or is to be also a source of additional evidence, is a disputed question.¹

¹There seem to be three different lines of authorities. According to one view what the jury may observe when sent out to view the premises in dispute can, under no circumstances, become evidence, nor can the jury take it into consideration otherwise than as affording them means to better understand and apply the evidence adduced. *Lanin v. Chicago, W. & N. R. Co.* 33 Fed. 415; *Machader v. Williams*, 54 Ohio St. 344, 43 N. E. 324; *Wright v. Carpenter*, 49 Cal. 607; *Close v. Samm*, 27 Iowa, 503.

Hence it is error to instruct the jury that they are to take into consideration their personal examination, like the evidence. *Wright v. Carpenter*, 49 Cal. 607; *Close v. Samm*, 27 Iowa, 503.

Where referees, upon the trial, inspected premises (in the presence of counsel) and based their findings upon the proofs and such view,—*Held*, that if such inspection was additional ocular evidence it must appear in the case on appeal, or the appellate court could not regard it in determining whether the findings were justified by the evidence. *Claflin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467, reversing 11 Jones & S. 1. Compare *Maxted v. Seymour*, 56 Mich. 129, 22 N. W. 219; *Omaha & R. Valley R. Co. v. Walker*, 17 Neb. 432, 23 N. W. 348.

According to another line, what may perhaps be termed "mute" evidence may be used by the jury in reaching their conclusion like any other evidence offered, and under some circumstances it may even be taken as determinative of the dispute, to the exclusion of the oral evidence. *Rock Island & P. R. Co. v. Leisy Brewing Co.* 174 Ill. 547, 51 N. E. 572; *Chicago, K. & W. R. Co. v. Willits*, 45 Kan. 110, 25 Pac. 576.

Still other authorities, taking the middle ground, permit the jury to use their observations as evidence, but not as preponderating, and in order to uphold the verdict as supported by the evidence the conclusions of the jury must, measurably at least, be supported by what actually appears in the record. *Topeka v. Martineau*, 42 Kan. 387, 5 L.R.A. 775, 22 Pac. 419; *Detroit v. Detroit*, G. H. & M. R. Co. 112 Mich. 304, 70 N. W. 573; *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570.

According to *Denver, T. & Ft. W. R. Co. v. Pulaski Irrig. Ditch Co.* 11 Colo. App. 41, 52 Pac. 224, the jury should be told that they are to use what they see to aid them in understanding the testimony, and unless the fact be an absolute physical one which is evident to the eye, and not dependent upon any other consideration or any other proof, they must not use it as against the testimony offered and base their verdict on their own judgment other than the exact fact seen by them. It was held in that case, however, that allowing them to consider what they had observed just as they consider the testimony of the witnesses was not so inherently and fatally vicious as to require reversal if in fact there was abundant evidence, aside from that acquired by observation at the view, to sustain the verdict.

For a comprehensive discussion of the cases illustrative of the three phases of this question and suggesting an explanation of the apparent conflict, see note to *People v. Thorn*, 42 L.R.A. 385.

d. Application.—It is not error to allow counsel, in arguing his application for a view, to state to the judge in the hearing of the jury what they will see.¹

¹ *Boardman v. Westchester F. Ins. Co.* 54 Wis. 364, 11 N. W. 417.

In Pennsylvania it is held necessary to move before trial. *Bure v. Hoffman*, 79 Pa. 71, 21 Am. Rep. 42.

But participating without objection waives the omission of previous motion. *Brown v. O'Brien*, 3 Clark (Pa.) 115.

e. Vacating order.—The court may vacate a previous order for a view upon its appearing unnecessary.¹

¹ *Nesbit v. Kerr*, 3 Yeates, 194.

f. Time.—The time when the jury shall take the view, if it be allowed, is in the discretion of the court.¹

¹Galena & S. W. R. Co. v. Haslam, 73 Ill. 494; Springer v. Chicago, 135 Ill. 552, 12 L.R.A. 609, 26 N. E. 514; Leidlein v. Meyer, 95 Mich. 586, 55 N. W. 367. See, also, cases cited in note to People v. Thorn, 42 L.R.A. 375.

g. Mode.—If a view is demanded in a proper case the jury should be sent in a body, in charge of a sworn officer.¹

¹Brooklyn v. Patchin, 8 Wend. 47, 65, 84, affirming 2 Wend. 377, 384.

The omission of the court to cause the officers in charge of the jury to take the statutory oath is an irregularity only, and may be waived by defendant. People v. Johnson, 110 N. Y. 134, 17 N. E. 684. As to the attendance, supervision, and conduct of jury while out on a view, see note to People v. Thorn, 42 L.R.A. 377.

A request for the judge to participate in a view with the jury must be made before a motion for a view is decided; otherwise the failure of the judge to make the view will not be available as error. Moritz v. Larsen, 70 Wis. 569, 36 N. W. 331. See further, as to the necessity of the presence of the judge, note to People v. Thorn, 42 L.R.A. 381.

h. Experiment upon ground viewed.—It is not matter of right to have an experiment tried in the presence of the jury, upon the ground viewed.¹

¹Smith v. St. Paul City R. Co. 32 Minn. 1, 18 N. W. 827; Moore v. Chicago, St. P. & K. C. R. Co. 93 Iowa, 484, 61 N. W. 992 (reversible error to permit, although a verdict is directed by the court upon the evidence without regard to such proceedings). But allowing it by consent is not error. Stockwell v. Chicago, C. & D. R. Co. 43 Iowa, 470. See also cases cited in note to People v. Thorn, 42 L.R.A. 383, 384.

i. Unauthorized view.—Misconduct of a juror in going to take a view is waived, if objection to continuing the trial before him is not promptly made, on discovery of the fact.¹

¹Consolidated Ice-Mach. Co. v. Trenton Hygienian Ice Co. 57 Fed. 898; Stampofski v. Steffens, 79 Ill. 303; Shelbyville v. Brant, 61 Ill. App. 153; Easley v. Missouri P. R. Co. 113 Mo. 236, 20 S. W. 1073; Whit-cher v. Peacham, 52 Vt. 242. See further, on the question of unauthorized views, note to People v. Thorn, 42 L.R.A. 394 et seq.

5. Experiments.

The court may allow experiments or demonstrations to be made in the presence of the jury, if they are made under similar conditions and like circumstances to those existing at the time of the thing sought to be demonstrated,¹ or if the question is within the range of ordinary knowledge or experience.²

¹ *Leonard v. Southern P. Co.* 21 Or. 555, 15 L.R.A. 221, 28 Pac. 887, and cases cited; *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9, 40 N. E. 938. See also 15 L.R.A. 221, note.

But this does not mean that a witness should be allowed to illustrate to the jury the manner in which, *in his opinion*, an accident happened, which he did not himself see. *Chicago & E. R. Co. v. Lee*, 17 Ind. App. 215, 46 N. E. 543.

² Thus, where plaintiff claimed to be paralyzed by a fall, her medical attendant, though not sworn, may demonstrate her loss of feeling by thrusting a pin into the side said to be paralyzed. *Osborne v. Detroit*, 32 Fed. 36. See also cases cited in note to *Leonard v. Southern P. Co.* 15 L.R.A. 221.

In the following cases physical tests were permitted: *Birmingham R. Light & P. Co. v. Rutledge*, 142 Ala. 195, 39 So. 338; *Minden v. Vedene*, 72 Neb. 657, 101 N. W. 330 (permitting injured person to walk before jury); *Adams v. Thief River Falls*, 84 Minn. 30, 86 N. W. 767 (illustrating power to use an injured arm, by movements before the jury); *Missouri, K. & T. R. Co. v. Lynch*, 40 Tex. Civ. App. 543, 90 S. W. 511 (permitting a physician, by experimenting with plaintiff in the presence of the jury, to demonstrate the nature and extent of the injury); *American Brake Shoe & Foundry Co. v. Jankus*, 121 Ill. App. 267 (jury permitted to take hold of plaintiff's arm and move it to ascertain extent of injuries).

But permitting plaintiff in an action for personal injury to give a spectacular exhibition of symptoms of what he or his physicians have testified to be some nervous affection resulting from the injury; as, by taking a glass of water with both hands and spilling the water through the trembling of his hands,—was held in *Clark v. Brooklyn Heights R. Co.* 177 N. Y. 359, 69 N. E. 647, to be improper, and, while not an abuse of judicial discretion, to be on the border line of such error.

In *Chicago Teleph. Supply Co. v. Marne & E. Teleph. Co.* 134 Iowa, 252, 111 N. W. 935, a telephone test was allowed in the presence of the jury.

But an application to use chemicals to test the quality and composition of ink alleged to have been used in preparing a will should be refused, without proper safeguards to preserve the paper and ink as presented. *Re Gartland*, 60 Misc. 33, 112 N. Y. Supp. 719.

And in *Hughes v. General Electric Light & P. Co.* 107 Ky. 485, 54 S. W. 723, the right to perform an experiment showing the manner of operating an electric plant was denied, the other party and his counsel not being present.

XVI.—USEFUL AUTHORITIES ON EVIDENCE.

1. Accounts.
2. Acknowledgment.
3. Admissions.
 - a. In general.
 - b. Of what witness would prove.
 - c. By counsel.
 - d. Of fact during settlement.
4. Affidavits.
5. Agency.
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7. Alternative claims.
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9. Best and secondary evidence.
 - a. In general.
 - b. Notice to produce; sufficiency.
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 - d. Where original is lost or destroyed.
 - e. Quality of secondary evidence.
 - f. Secondary evidence not rebuttable.
10. Bill of particulars.
 - a. As limiting evidence.
 - b. Amending.
11. Books of science.
 - a. Inductive science.
 - b. Exact science.
 - c. Of history, etc.
12. Burden of proof.
 - a. In general.
 - b. As to negative.
 - c. As to fact peculiarly within the knowledge of one party.
 - d. Legal presumption shifts the burden.
13. Corporate agent's declarations.
14. Corporate deed.
15. Date.
16. Depositions.
 - a. Right to read.
 - b. Reading part.
17. Document.

- a. In general.
- b. Referred to.
- c. Producing on notice.
- d. Refusal to produce.
- e. Inspecting on notice to produce; admissibility.
- 18. Entire conversation or writing.
- 19. Examination before trial.
- 20. Explaining omission of evidence.
- 21. Fact after suit brought.
 - a. Receipt.
 - b. Precautions after accident.
- 22. Family Bible.
- 23. Feelings.
- 24. Fraud.
- 25. Handwriting.
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- 27. Impression.
- 28. Intent; Right of one to testify as to his own intent.
 - a. The common-law rule.
 - b. Rule under statutes permitting parties to testify.
- 29. Intent of a transaction.
- 30. Interrogating to discover other witnesses.
- 31. Judges and justices of the peace as witnesses.
- 32. Judicial notice.
- 33. Jurisdictional facts.
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- 34. Law of other jurisdictions.
- 35. Letters.
- 36. Letter book.
- 37. Loss of earnings or income.
- 38. Mailing.
- 39. Memorandum.
- 40. Memory of one witness aided by another.
- 41. Mental Capacity.
- 42. Minutes.
- 43. Motive.
- 44. Notary's seal.
- 45. Official act.
- 46. Oral to vary.
- 47. Pedigree.
- 48. Phonographs.
- 49. Reason for positiveness.
- 50. Receipt.
- 51. Reference to a third person.
- 52. Relevancy.
- 53. Remote evidence.
- 54. *Res gestæ*.

- 55. Statute of frauds.
- 56. Stenographer's minutes.
- 57. Stipulation as to facts.
- 58. Subscribing witness to prove execution.
- 59. Tampering.
- 60. Telegrams.
- 61. Telephones.
- 62. Trust.
- 63. United States courts.
- 64. Usage.
- 65. Value and damages.
- 66. X-ray photographs.

[Under this heading, without undertaking to state the law fully, I have briefed a selection of what I deem the most useful authorities on those questions of evidence which are most frequently contested, and are not so trite but that ready reference to authority is often indispensable to correct practice at Circuit.]

1. Accounts.

Account books of a party, the entries in which are testified to be correct by the persons who made them, are competent in his own favor.¹

¹ *Ætna Ins. Co. v. Weide*, 9 Wall. 677, 19 L. ed. 810.

Entries made by private parties are not admissible in evidence, unless they were made contemporaneously with the facts to which they relate, by parties having personal knowledge of the facts, and are corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead, insane, or beyond reach.¹

¹ *Chaffee v. United States*, 18 Wall. 516, 21 L. ed. 908. And see *Maxwell v. Wilkinson* (*Parsons v. Wilkinson*) 113 U. S. 656, 28 L. ed. 1037, 5 Sup. Ct. Rep. 691, and cases cited; *Ocean Nat. Bank v. Carll*, 55 N. Y. 440, 9 Hun. 239.

When it is necessary to prove the results of voluminous facts or of the examination of many books and papers, and the examination cannot conveniently be made in court, the results may be proved by the person who made the examination.¹

¹ *Greenl. Ev.* § 93, applied in *Burton v. Driggs*, 20 Wall. 125, 22 L. ed. 299.

The state of the account and the balance due at a **given time**, when collaterally involved, are provable by the testimony of the person in whose books it was, without production of the books.¹

¹ *Lewis v. Palmer*, 28 N. Y. 271, 278.

When complex transactions are already in evidence, statements made by experts of the result of the account, upon the several theories of the law which the case may be subject to, are competent, not necessarily as evidence of the facts stated in them, but to assist the jury in calculation.¹

¹ *Home Ins. Co. v. Baltimore Warehouse Co.* 93 U. S. 527, 547, 23 L. ed. 868, 870.

It is not error to refuse to allow a witness with the books before him to give a summary of their contents.¹

¹ *Von Sachs v. Kretz*, 72 N. Y. 548, affirming 10 Hun, 95.

Entries in books are always explainable, and the truth of the transaction can be shown independently of them.¹

¹ *The Patapsco*, 13 Wall. 329, 20 L. ed. 696; s. p. *Foster v. Persch*, 68 N. Y. 400, reversing 6 Daly, 164.

For a fuller treatment of the subject of accounts, with a review of the authorities, see *Abbott's Brief on Mode of Proving the Facts*, and notes in 52 L.R.A. 546, 52 L.R.A. 689, 52 L.R.A. 833, and 53 L.R.A. 513.

2. Acknowledgment.

What defects in an acknowledgment preclude its admission in evidence.¹

¹ 15 Abb. N. C. 269, note; 14 Abb. N. C. 453, note. And see *Authentication of an Act*, *infra*, § 8.

3. Admissions.

a. In general.—The rule that what a party has said about his case may always be proved against him does not let in what

he has said merely in the way of repetition of the sayings of others.¹

¹ *Stephens v. Vroman*, 16 N. Y. 381.

b. Of what witness would prove.—An admission of the facts proposed to be proved by an absent witness is conclusive evidence against the party who prevented postponement thereby, if it be read to the jury as a part of the evidence on the trial; otherwise it cannot be considered by them.¹

But an admission that a witness, if present, would testify to specified statements, is not conclusive, either as to the competency of the witness, or the admissibility or the truth of the testimony.²

Nor is a consent of an adverse party, that such a statement be read to the jury, conclusive as to the truth of the statement.³

¹ *Pannell v. State*, 29 Ga. 681; *Lowrie v. Verner*, 3 Watts, 317.

As to admissibility on subsequent trial of admission made for purpose of defeating continuance, see note in 25 L.R.A.(N.S.) 169.

² *State v. Deddis*, 42 Iowa, 264; *Edmonds v. State*, 34 Ark. 720.

³ *Burton v. Brooks*, 25 Ark. 215.

c. By counsel.—A formal admission of a material fact,¹ made by counsel in the course of the trial of the issues,² for the purpose of influencing the course of the trial,³ is conclusive upon the client⁴ for the purposes of the trial⁵ and countervails a contrary allegation or denial in his pleading, but does not supply the lack of an essential allegation or denial in either his or his adversary's pleading.⁶

¹ For instance, the amount due. *Wilson v. Spring*, 64 Ill. 14. Or the fact of partnership. *Oliver v. Bennett*, 65 N. Y. 559. An admission of the law does not necessarily bind the client. *Mitchell v. Cotton*, 3 Fla. 134. Nor does an admission that a prima facie case exists. *Spaulding v. Hood*, 8 Cush. 602.

² An admission of what an absent witness would prove, made before swearing the jury, even though made in their presence, is not enough. It should be presented as part of the evidence. *Lowrie v. Verner*, 3 Watts, 317.

Admissions by attorney of record are conclusive in the case. *Frey v. Myers*, — Tex. Civ. App. —, 113 S. W. 592.

³ Usually, it must have been made for the purpose of dispensing with formal proof. *Treadway v. Sioux City & St. P. R. Co.* 40 Iowa, 526; *Starke v. Keenan*, 11 Ala. 818.

But an admission made even in the opening, not for the purpose of dispensing with proof by the adversary, but as an avowal of inability or a disavowal of intention to prove, is enough. *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 263, 26 L. ed. 541.

Admissions before trial may be proved (see *Smith v. Dixon*, 3 Met. [Ky.] 438), their effect depending on circumstances.

⁴ Even though she be a married woman. *Wilson v. Spring*, 64 Ill. 14. As to clients who are *non sui juris*, query. "When the rights of infants are in question, the facts cannot be established by admissions (Cooley, J., in partition). *Claxton v. Claxton*, 56 Mich. 557, 23 N. W. 310.

According to *Mitchell v. Cotton*, 3 Fla. 134, it is necessary that the client be present. The rule is qualified by the like intimation in *Colledge v. Horn*, 3 Bing. 119, 10 J. B. Moore, 431, 3 L. J. C. P. 184, 28 Revised Rep. 606; but according to Lord Ellenborough, in *Young v. Wright*, 1 Campb. 139, the authority of attorney or counsel is presumed, and this we take to be the generally recognized rule.

⁵ *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 263, 26 L. ed. 541; *Stanley v. Northwestern Mut. L. Ins. Co.* (Ind. Nov. 23, 1883), 13 Ins. L. J. 347, 353 (95 Ind. 254, appears to be a different decision); *Thompson v. Thompson*, 9 Ind. 323; *Boston & W. R. Co. v. Dana*, 1 Gray, 83. And see *Arthur v. Homestead F. Ins. Co.* 78 N. Y. 462, 34 Am. Rep. 550. It may affect other trials, if in writing. *Mullin v. Vermont Mut. F. Ins. Co.* 56 Vt. 39.

⁶ *Jackson v. Whedon*, 1 E. D. Smith, 141.

The court may relieve the party from an admission made by his attorney or counsel on the trial, if proper explanation be made.¹

¹ *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 263, 26 L. ed. 541; s. p. *Behr v. Connecticut Mut. L. Ins. Co.* 4 Fed. 357. But see *People v. Garcia*, 25 Cal. 531, where it was held not error to refuse to do so. Compare *Lewis v. Sumner*, 13 Met. 269.

d. Of fact during settlement.—Admission of distinct fact, though made in the course of a negotiation for settlement, is competent.¹

But it is not admissible if the statement cannot be separated from the offer and still convey the intended idea.²

¹ *Bartlett v. Tarbox*, 1 Abb. App. Dec. 120.

² *Home Ins. Co. v. Baltimore Warehouse Co.* 93 U. S. 527, 23 L. ed. 868.

4. Affidavits.

Affidavits used by the party in the same cause are not necessarily conclusive as evidence against him on the trial.¹

An affidavit made by the party is conclusive evidence against him in a matter founded upon the proceeding sought to be contradicted or growing out of the adjudication obtained in reliance upon the affidavit, or if it has been acted on by the other party so as to raise an estoppel; otherwise it does not necessarily conclude him.²

Affidavits which have been used against a party on a former motion are not made admissible in evidence on the trial by the mere fact that he did not make an affidavit in contradiction.³

An affidavit of a party in his own favor is not made admissible by the mere fact that he has put in evidence the counter affidavit of his adversary.⁴

¹ *Mather v. Parsons*, 32 Hun, 338.

² *Maybee v. Sniffen*, 2 E. D. Smith, 1, 12, 14.

³ *Wehrkamp v. Willet*, 4 Abb. App. Dec. 548, 555.

⁴ *Degraff v. Hovey*, 16 Abb. Pr. 120.

5. Agency.

The admissions and declarations of an agent are not evidence of his agency unless brought home to the alleged principal.¹ But the court may, in its discretion, admit the declarations, on assurance that evidence of the agency will afterward be given.²

¹ *Bacon v. Johnson*, 56 Mich. 182, 22 N. W. 276; *Stringham v. St. Nicholas Ins. Co.* 4 Abb. App. Dec. 315; *Omaha & G. Smelting & Ref. Co. v. Tabor*, 13 Colo. 41, 5 L.R.A. 236, 16 Am. St. Rep. 185, 21 Pac. 925, 16 Mor. Min. Rep. 184; *Pepper v. Cairns*, 133 Pa. 114, 7 L.R.A. 750, 19 Am. St. Rep. 625, 19 Atl. 336.

² *First Unitarian Soc. v. Faulkner*, 91 U. S. 415, 23 L. ed. 283.

Agency cannot be shown by appearances, except in favor of one who relied on them.¹

¹ *People v. Bank of North America*, 75 N. Y. 547.

Distinction between conditional authority and absolute authority, subject to limitations peculiarly within the agent's knowledge.¹

¹ *Merchants' Bank v. Griswold*, 72 N. Y. 472, 28 Am. Rep. 159.

The right to prove agency by evidence of similar acts by the alleged agent has arisen in a number of cases. While the language used by the courts in some of these cases tends to indicate the doctrine that agency may be established by proof of the ratification by the principal of similar acts of the agent, yet the language has been used in disposing of cases wherein there was other evidence of agency than the mere ratification by the principal of similar contracts or transactions of the agent in the name of the principal. If the purpose of such evidence is to aid in establishing a general agency, it is competent. But it is incompetent if it is sought thereby to show agency in another matter, with a view to infer such agency in the matter in controversy.¹

¹ As said by the court in *Reynolds v. Collins*, 78 Ala. 94: "As a general rule, the fact of agency cannot be established by proof of the acts of the professed agent, in the absence of evidence tending to show the principal's knowledge of such acts, or assent to them; yet where the acts are of such character, and so continuous, as to justify a reasonable inference that the principal had knowledge of them, and would not have permitted them if unauthorized, the acts themselves are competent evidence of agency."

This was also the doctrine enunciated in *Watson v. Race*, 46 Mo. App. 546; and *Forsyth v. Day*, 41 Me. 382, likewise seems to support the doctrine.

Broadstreet v. McKamey, 41 Ind. App. 272, 83 N. E. 773, probably goes as far as any case towards sustaining the right to establish agency by proof of similar acts by the alleged agent. That case involves an action on a note signed by a father in his name as principal and his son's name as surety. There was no showing that the father had any express authority to sign the note in suit, but evidence was offered that it was a business custom of the father and son for the father to sign both their names, the note so signed being honored by the son. This fact, together with the fact of the relationship of the parties, was held to be sufficient to establish the agency of the father for the son in reference to the transaction in question.

Evidence that a son had repeatedly signed his father's name to notes which the father had afterwards recognized and paid was held competent to prove agency of the son, in *Hammond v. Varian*, 54 N. Y. 398.

No inference, however, of agency to sign a written contract can arise from the fact that the alleged agent twice, in the presence of the principal, drew up and signed in the principal's name similar contracts. *Fadner v. Hibler*, 26 Ill. App. 639.

And evidence that one acted as agent for another in a single transaction is not competent to prove agency in another transaction of similar character. *Bartley v. Rhodes*, — Tex. Civ. App. —, 33 S. W. 604; *Woods v. Francklyn*, 46 N. Y. S. R. 396, 19 N. Y. Supp. 377; *North v. Metz*, 57 Mich. 612, 24 N. W. 759.

Ratification must also be of contracts of a similar nature, and under substantially similar conditions and circumstances. *Smith v. Georgia & A. R. Co.* 113 Ga. 625, 38 S. E. 956. And must be made by the principal, with a knowledge of all the facts. *Tebbetts v. Moore*, 19 N. H. 369.

As to presumption of husband's agency for wife from the fact of his acting for her in similar matters, see *Hawkins v. Windhorst*, 77 Kan. 674, 17 L.R.A.(N.S.) 219, 127 Am. St. Rep. 445, 96 Pac. 48; *Foster v. Jones*, 78 Ga. 150; *Maxcy Mfg. Co. v. Burnham*, 89 Me. 538, 56 Am. St. Rep. 436, 36 Atl. 1003; *McNichols v. Kettner*, 22 Ill. App. 493; *Anderson v. Armstead*, 69 Ill. 452; *Bodine v. Killeen*, 53 N. Y. 93; *Horr v. Hollis*, 20 Wash. 424, 55 Pac. 565; *Cunningham v. Mitchell*, 30 Ind. 362; *Lovell v. Williams*, 125 Mass. 439; *Molt v. Baumann*, 65 App. Div. 445, 72 N. Y. Supp. 832; *Ham v. Brown Bros.* 2 Ga. App. 71, 58 S. E. 316.

For a detailed review of the authorities on this question, see note in 17 L.R.A.(N.S.) 219.

6. Attorney's interest.

Evidence that plaintiff has agreed to give his attorney a part of the recovery is ordinarily incompetent.¹ But if the attorney is a witness such evidence is competent on his credibility, and he may be required to answer.²

¹ *Sussdorff v. Schmidt*, 55 N. Y. 319; *Courtright v. Burns*, 14 Cent. L. J. 89 (opinion by McCrary, J.)

² *Moats v. Rymer*, 18 W. Va. 642.

7. Alternative claims.

Where a party claims premises by two titles, either of which
Abbott, Civ. Jur. T.—27.

is good, if available, he should be permitted to introduce evidence of both.¹

¹ *Enders v. Sternbergh*, 2 Abb. App. Dec. 31 (holding that where a party, having proved title by deed, offered evidence of title to the same property by will, it was error to refuse to admit it, even though the title by deed was uncontroverted).

8. Authentication of an act.

An official authentication of an act, if not necessary to its validity, but simply to facilitate its proof, is not objectionable because made after the action was commenced.¹

Thus the formal entry of an order of court, as actually declared, may be made at any time when necessary for purposes of evidence.²

¹ For instance, an acknowledgment of a deed. *Holbrook v. New Jersey Zinc Co.* 57 N. Y. 616. Or the seal on letters of administration. *Maloney v. Woodin*, 11 Hun, 202.

² *People v. Myers*, 2 Hun, 6. In *Seeley v. Morgan*, 17 Jones & S. 346, this principle was extended to the case of a corporate resolution adopted pending the trial, to evidence a ratification claimed to have been given before the action (reviewing cases).

9. Best and secondary evidence.

a. In general.—The existence of an instrument and the existence of the relation under it may be proved by parol, without producing the instrument.¹

¹ *Sprague v. Hosmer*, 82 N. Y. 466, 471.

Contents of a notice may be proved by secondary evidence without giving notice to produce.¹

¹ *Eagle Bank v. Chapin*, 3 Pick. 180, 183.

Original papers are not made merely secondary evidence by record, pursuant to a statute requiring them to be filed or recorded.¹

¹ *Chapman v. Gates*, 54 N. Y. 132 (county judge's order in highway proceedings); *Haddow v. Lundy*, 59 N. Y. 320 (surrogate's minutes).

The rule excluding secondary evidence does not apply to an incidental and collateral matter drawn out on cross-examination to test the temper and credibility of the witness, and in no wise affecting the merits of the controversy between the parties.¹

¹ Klein v. Russell, 19 Wall. 439, 464, 22 L. ed. 116, 124; Kalk v. Fielding, 50 Wis. 339, 7 N. W. 296.

But a paper the contents of which are sought to be used to credit or contradict a witness, as containing his own statements contrary to his testimony, must be produced. A copy will not do.¹

¹ Newcomb v. Griswold, 24 N. Y. 298; Pratt v. Norton, 5 Thomp. & C. 8 (a certified copy assignment in bankruptcy); s. p. Nash v. Hunt, 116 Mass. 237, 248 (a copy pleading).

b. Notice to produce; sufficiency.—Where a writing is directly involved in the cause of action or defense, so that the nature of the action or the contents of the pleading in effect give notice that it will be required, no further notice to produce is necessary to permit secondary evidence of its contents to be given.¹

A notice to produce is to be deemed sufficient if it fairly apprise the party of the paper wanted, though it be informal and inaccurate in particulars.²

¹ Howell v. Huyck, 2 Abb. App. Dec. 423; Lawson v. Bachman, 81 N. Y. 616, reversing 12 Jones & S. 396.

² Frank v. Manny, 2 Daly, 92; Jones v. Parker, 20 N. H. 31; United States v. Duff, 6 Fed. 45.

c. Writings beyond jurisdiction of the court.—There is some conflict in the authorities as to how far a party may rely upon absence from the state of a writing as a basis for secondary evidence of its contents. Merely showing that the instrument is in another state is not enough to justify introduction of secondary evidence; reasonable effort to obtain the original must be made.¹ Where, however, reasonable effort has been made, without success, to obtain the original, it is well settled that secondary evidence may be admitted.²

¹ Threadgill v. White, 33 N. C. (11 Ired. L.) 591; Schillito v. Robbins, 7

Ohio L. J. 74, citing *Van Alstyne v. National Commercial Bank*, 4 Abb. App. Dec. 449; *Kearney v. New York*, 92 N. Y. 617; *Wiseman v. Northern P. R. Co.* 20 Or. 425, 23 Am. St. Rep. 135, 26 Pac. 272; *Bunch v. Hurst*, 3 Desauss. Eq. 273, 5 Am. Dec. 551; *Shaw v. Mason*, 10 Kan. 184.

In the latter case the court said: "While a contract is in a foreign state its production cannot be compelled. But the question as to how it happens to be in that state may become material. Was it placed there through the instrumentality of the party seeking to introduce the secondary evidence? Is it permanently or only temporarily there? Had the custodian been applied to for the instrument, or, if applied to, refused to deliver? . . . In this case . . . for aught that appears the custodian may have left the state the day before the trial, at the instance of the plaintiff, to avoid the production of the contract, and intending to return on the day succeeding."

² *United States v. Reyburn*, 6 Pet. 354, 8 L. ed. 425; *Burton v. Driggs*, 20 Wall. 125, 134, 22 L. ed. 299, 302; *Ware v. Morgan*, 67 Ala. 461; *Young v. East Alabama R. Co.* 80 Ala. 100; *Bozeman v. Browning*, 31 Ark. 364; *Gordon v. Scaring*, 8 Cal. 49; *Owers v. Olathe Silver Min. Co.* 6 Colo. App. 1, 39 Pac. 980; *Shepard v. Giddings*, 22 Conn. 282; *Jackson v. Clifford*, 5 App. D. C. 312; *Bowden v. Achor*, 95 Ga. 244, 22 S. E. 254; *Bishop v. American Preservers' Co.* 157 Ill. 284, 48 Am. St. Rep. 317, 41 N. E. 765; *German-American Bldg. Asso. v. Droge*, — Ind. App. —, 41 N. E. 397; *Montgomery v. Routh*, 10 La. Ann. 316; *Stevens v. Miles*, 142 Mass. 571, 8 N. E. 426; *Knickerbocker v. Wilcox*, 83 Mich. 200, 21 Am. St. Rep. 595, 47 N. W. 123; *Thomson-Houston Electric Co. v. Palmer*, 52 Minn. 174, 38 Am. St. Rep. 536, 53 N. W. 1137; *Brown v. Wood*, 19 Mo. 475; *Roll v. Rea*, 50 N. J. L. 264, 12 Atl. 905; *Maxwell v. Hofheimer*, 81 Hun. 551, 30 N. Y. Supp. 1090; *Reed v. State*, 15 Ohio, 217; *Vinal v. Gilman*, 21 W. Va. 301, 45 Am. Rep. 562; *Bonner v. Home Ins. Co.* 13 Wis. 677.

d. Where original is lost or destroyed.—It is well settled that secondary evidence of the contents of a written instrument is admissible where it appears that the original was lost or destroyed without any fault of the party.¹ But diligence in attempting to find the original, when lost, must be shown.²

¹ *Minor v. Tillotson*, 7 Pet. 99, 8 L. ed. 621; *Renner v. Bank of Columbia*, 9 Wheat. 581, 6 L. ed. 166; *Stebbins v. Duncan*, 108 U. S. 32, 27 L. ed. 641, 2 Sup. Ct. Rep. 313; *Davidson v. Kahn*, 119 Ala. 364, 24 So. 583; *Bank of United States v. Sill*, 5 Conn. 106, 13 Am. Dec. 44; *Sellar v. Clelland*, 2 Colo. 546; *Mayfield v. Turner*, 180 Ill. 332, 54 N. E. 418; *Grimes v. Talbot*, 1 A. K. Marsh. 205; *Cook v. Bertram*, 86 Mich. 356, 49 N. W. 42; *Church v. Hempstead*, 27 App. Div. 412, 50 N. Y. Supp. 325; *Gould v. Lee*, 55 Pa. 99; *Timberlake v. Jennings*,

1 Va. Dec. 741, 13 S. E. 28; *Goldberg v. Ahnapce & W. R. Co.* 105 Wis. 1, 47 L.R.A. 221, 76 Am. St. Rep. 899, 80 N. W. 920.

² *Minor v. Tillotson*, 7 Pet. 99, 8 L. ed. 321; *United States v. Doeblcr*, Baldw. 521, Fed. Cas. 14,977; *Mayfield v. Turner*, 180 Ill. 332, 54 N. E. 418; *Kearney v. New York*, 92 N. Y. 617.

The rule allowing secondary evidence of the contents of a writing on proof of the loss or destruction of the writing is applicable to the case of copies or transcripts taken from a party's books of original entry.¹ But the absence of the books themselves must, of course, first be accounted for.² And a copy is inadmissible where no explanation is given of the voluntary destruction of the original.³

¹ *Holmes v. Marden*, 12 Pick. 169; *Baldrige v. Penland*, 68 Tex. 441, 4 S. W. 565; *Moore v. Voss*, 1 Cranch, C. C. 179, Fed. Cas. No. 9,778; *Batre v. Simpson*, 4 Ala. 305; *Tucker v. Bradley*, 33 Vt. 324; *Mills v. Glennon*, 2 Idaho, 105, 6 Pac. 116; *Fielder v. Collier*, 13 Ga. 496; *Green v. Disbrow*, 7 Lans. 381.

Contra, *Higgs v. Shehee*, 4 Fla. 382; *Creamer v. Shannon*, 17 Ga. 65, 63 Am. Dec. 226.

² *Price v. State*, — Tex. Crim. Rep. —, 40 S. W. 596; *Phillips v. Trowbridge Furniture Co.* 86 Ga. 699, 13 S. E. 19; *Rouss v. McDowell*, 88 Hun, 532, 34 N. Y. Supp. 776.

³ *Palmer v. Goldsmith*, 15 Ill. App. 544.

To lay a foundation for secondary evidence of the contents of a lost paper, the person last known to have had possession of it must be examined as a witness to prove its loss; and even if he is out of the state his deposition must be taken or excuse shown.¹

¹ *Kearney v. New York*, 92 N. Y. 617.

And a party is precluded from proving the contents of a writing by the fact that he destroyed it voluntarily,¹ but this rule does not apply if it was destroyed by mistake² or according to his custom, without fraudulent intent, and before any difference had arisen respecting it.³

¹ *Blade v. Nolan*, 12 Wend. 173; *Renner v. Bank of Columbia*, 9 Wheat. 581, 6 L. ed. 166; *Broadwell v. Stiles*, 8 N. J. L. 58, 60; *Bank of United States v. Sill*, 5 Conn. 106, 13 Am. Dec. 44; *Joannes v. Ben-*

nett, 5 Allen, 173, 81 Am. Dec. 741; *Palmer v. Goldsmith*, 15 Ill. App. 544.

² *Riggs v. Tayloe*, 9 Wheat. 483, 6 L. ed. 140; *Bagley v. Eaton*, 10 Cal. 148.

³ *Steele v. Lord*, 70 N. Y. 280, 26 Am. Rep. 602.

e. Quality of secondary evidence.—In England¹ and in some of the states,² it is held that there are no degrees of secondary evidence; but in other states this rule is disapproved, and it is held that there are degrees of secondary evidence and that the best evidence possible under the circumstances of the case must be produced.³

¹ *Brown v. Woodman*, 6 Car. & P. 206; *Doe ex dem. Rowlandson v. Wainwright*, 1 Nev. & P. 8, 5 Ad. & El. 520, 2 Harr. & W. 391, 6 L. J. K. B. N. S. 35; *Doe ex dem. Coyle v. Cole*, 6 Car. & P. 359; *Rex v. Hunt*, 3 Barn. & Ald. 566, 22 Revised Rep. 485; *Whitfield v. Fausset*, 1 Ves. Sr. 389; *Doe ex dem. Gilbert v. Ross*, 7 Mees. & W. 102, 8 Dowl. P. C. 389, 4 Jur. 321, 10 L. J. Exch. N. S. 201.

² *Carpenter v. Dame*, 10 Ind. 125; *Rawlings v. Young Men's Christian Asso.* 48 Neb. 216, 66 N. W. 1124; *Allerkamp v. Gallagher*, — Tex. Civ. App. —, 24 S. W. 372.

³ *Tobin v. Roaring Creek & C. R. Co.* 86 Fed. 1020; *United States v. Long Hop*, 55 Fed. 58; *Philipson v. Barts*, 2 Mo. 116, 22 Am. Dec. 444; *Harvey v. Thorpe*, 28 Ala. 250, 65 Am. Dec. 344; *Palmer v. Logan*, 4 Ill. 56; *Conger v. Converse*, 9 Iowa, 554; *Belk v. Meagher*, 3 Mont. 65, 1 Mor. Min. Rep. 522; *Den ex dem. Popino v. M'Allister*, 7 N. J. L. 46; *Stevenson v. Hoy*, 43 Pa. 191; *Dennis v. Barber*, 6 Serg. & R. 420; *Ford v. Cunningham*, 87 Cal. 209, 25 Pac. 403.

In *Harvey v. Thorpe*, 28 Ala. 250, 65 Am. Dec. 344, the court, after declaring that the rule which requires a party to produce the best kind of secondary evidence that is in his power is more reasonable than the English rule, which recognize no degrees in secondary evidence, adds: "But wherever this rule is invoked against a party he is permitted to show that what appears to be, is not in fact, a higher degree of secondary evidence."

Parol evidence to establish the contents of a lost document should be clear and certain and such as to leave no reasonable doubt of the substantial parts of the paper.¹ In case of a lost deed, it should show that the deed was properly executed with all the formalities required by law, and should show all the contents, not literally, but substantially.²

¹ *Renner v. Bank of Columbia*, 9 Wheat. 581, 6 L. ed. 166.

² *Edwards v. Noyes*, 65 N. Y. 125.

Parol evidence to establish the contents of an instrument which the adverse party refuses to produce on notice is competent, although vague and indistinct.¹

¹ Benjamin v. Ellinger, 80 Ky. 472.

Where the instrument is a familiar legal form,—*e. g.*, a judgment roll or execution,—it may be presumed to have been adequate to sustain the official acts by which its existence is proved.¹

¹ Mandeville v. Reynolds, 68 N. Y. 528, 536, affirming 5 Hun, 338.

f. Secondary evidence not rebuttable.—He who, by refusing to produce, lets in secondary evidence, cannot contradict it by parol.¹

¹ Bogart v. Brown, 5 Pick. 18. Where, in an action between partners, the defendants, having the books, refused, on notice, to produce them and put plaintiff to secondary proof,—Held, that on rebuttal defendants could not contradict that proof, and the judgment was affirmed by the court of appeals after argument on this point. Mem. in Platt v. Platt, 58 N. Y. 646, 649.

10. Bill of particulars.

a. As limiting evidence.—A bill of particulars, even though voluntarily served,¹ has the effect to restrict the proof to the matters set forth in it.²

¹ Payne v. Smith, 19 Wend. 122.

² Bowman v. Earle, 3 Duer, 691.

An order to exclude proof for failure to serve a sufficient bill of particulars must be obtained before trial, to make exclusion a matter of right.¹

¹ Whitehall & P. R. Co. v. Myers, 16 Abb. Pr. N. S. 34; s. p. Chesapeake & O. Canal Co. v. Knapp, 9 Pet. 541, 564, 9 L. ed. 222, 231.

Without an order to exclude proof, the judge may, in his discretion, exclude proof for noncompliance with an order for a bill of particulars.¹

¹Bank of United States v. Lyman, 20 Vt. 666, 1 Blatchf. 297, Fed. Cas. No. 924.

b. Amending.—Bill of particulars, amendable like a pleading.¹

¹Babcock v. Thompson, 3 Pick. 446, 15 Am. Dec. 235; Melvin v. Wood, 4 Abb. Pr. N. S. 438.

11. Books of science.

a. Inductive science.—Statements made in books of inductive science, such as standard medical works, are not competent evidence for any purpose.¹

¹United States courts—Union P. R. Co. v. Yates, 40 L.R.A. 553, 25 C. C. A. 103, 49 U. S. App. 241, 79 Fed. 584 (where medical books are held not competent as independent evidence of the opinions and theories therein expressed or advocated).

California—Gallagher v. Market Street R. Co. 67 Cal. 13, 6 Pac. 869.

Illinois—North Chicago Rolling Mill Co. v. Monka, 107 Ill. 340 (book on mechanics); Gale v. Rector, 5 Ill. App. 481 (medical book).

Indiana—Cory v. Silcox, 6 Ind. 39 (sanctioning use as argument only).

Iowa—Brodhead v. Wiltse, 35 Iowa, 429 (special statute which may admit them).

Kentucky—Said to have been the practice in some lower courts to receive them. 2 Ky. L. Rep. & J. 64.

Maine—Ware v. Ware, 8 Me. 42.

Maryland—Davis v. State, 38 Md. 15.

Massachusetts—Ashworth v. Kittridge, 12 Cush. 193, 59 Am. Dec. 178 (leading case).

Michigan—Pinney v. Cahill, 48 Mich. 584, 12 N. W. 862; People v. Hall, 48 Mich. 482, 42 Am. Rep. 477, 12 N. W. 665, 669.

New York—Harris v. Panama R. Co. 3 Bosw. 7, 18.

North Carolina—Huffman v. Click, 77 N. C. 55.

Texas—Fowler v. Lewis, 25 Tex. Supp. 380; cited in 1 Meyer's Dig. 374. (The Texas case often cited to the contrary; Wade v. DeWitt, 20 Tex. 398, seems to rest on the fact reasonably inferable from the report, that counsel sought to use the extract as argument merely, not as stating facts).

Wisconsin—*Stilling v. Thorp*, 54 Wis. 528, 41 Am. Rep. 60, 11 N. W. 906;
Boyle v. State, 57 Wis. 472, 46 Am. Rep. 41, 15 N. W. 827.

Contra, *State v. Hoyt*, 46 Conn. 333 (but this case can best be sustained as exceptional and turning on surprise in excluding what had been before permitted).

The reason is, "they are statements wanting the sanction of an oath; and the statement thus proposed is made by one not present and not liable to cross-examination." *Ashworth v. Kittridge*, 12 Cush. 193 (Shaw, Ch. J.)

See also note to *Western Assur. Co. v. J. H. Mohlman Co.* 40 L.R.A. 561, for exhaustive collection of cases on this question.

A statute making books of science or art presumptive evidence of facts of general notoriety or interest does not include medical works so as to make them evidence of the opinions or theories therein expressed or advocated.¹

¹ *Union P. R. Co. v. Yates*, 40 L.R.A. 553, 25 C. C. A. 103, 49 U. S. App. 241, 79 Fed. 584.

A Federal court is not bound to follow the state court decision as to the admissibility in evidence at common law, of extracts from medical works.¹

¹ *Union P. R. Co. v. Yates*, 40 L.R.A. 553, 25 C. C. A. 103, 49 U. S. App. 241, 79 Fed. 584, and cases cited.

b. Exact science.—Books of exact science or mathematical calculations,—such as the Northampton tables and the like,—recognized by the court as such, or shown to be such by the testimony of a qualified witness, may be read in evidence.¹

¹ *Abbott, Tr. Ev.* 724, 22 Am. L. Reg. 105, note, 59 Am. Dec. 185 note; s. p. *Huffman v. Click*, 77 N. C. 55, 58.

The contrary held of a book on mechanics, in *North Chicago Rolling Mill v. Monka*, 107 Ill. 340.

See also note to *Union P. R. Co. v. Yates*, 40 L.R.A. 553.

c. Of history, etc.—A book published in this country by a private person is not competent evidence, against a stranger to

it, of facts stated therein of recent occurrence, and which might be proved by living witnesses or other better evidence.¹

¹ *Whiton v. Albany City Ins. Co.* 109 Mass. 24, 31; *Morris v. Harmer*, 7 Pet. 554, 8 L. ed. 781; *Fuller v. Princeton*, 2 Dane, abr. 334.

Otherwise by special statute. See *Gallagher v. Market Street R. Co.* 67 Cal. 13, 6 Pac. 869; *Kuhns v. Chicago, M. & St. P. R. Co.* 65 Iowa, 528, 22 N. W. 661.

Almanac admissible to show time of rising of moon.¹

¹ *Munshower v. State*, 55 Md. 11, 39 Am. Rep. 414; *State v. Morris*, 47 Conn. 179 (justifying it rather as refreshing memory in aid of judicial notice). See also note to *Union P. R. Co. v. Yates*, 40 L.R.A. 560.

12. Burden of proof.

a. In general.—The test as to “the burden of proof” as to any point, when the phrase is used respecting the order of proof in adducing evidence, is, Which party would be unsuccessful if no evidence at all, or no more than has already been received, were to be offered? ¹

¹ 1 Phil. Ev. 812; 1 Taylor, Ev. 369, § 338.

This subject is well discussed in *Abrath v. North Eastern R. Co.* (Eng. Ct. App. June, 1883), 32 Week. Rep. 50, 52 L. J. Q. B. N. S. 620, L. R. 11 Q. B. Div. 440, 49 L. T. N. S. 618, 47 J. P. 602. It is not usually safe to ask the court, under the same circumstances, to instruct the jury that the burden has shifted. See post, chap. XXIII. The Instructions. See also *Lamb v. Camden & A. R. & Transp. Co.* 46 N. Y. 271, 281, 7 Am. Rep. 327, reversing 2 Daly, 454; *Heinemann v. Heard*, 62 N. Y. 448; *Banker v. Banker*, 63 N. Y. 409.

As to effect of admissions to change burden of proof, see note in 61 L.R.A. 513.

b. As to negative.—In general, whichever party asserts a right must substantiate it and, if the right is dependent upon the existence of a negative, must establish the truth of the negative by a preponderance of proof, unless excused by the fact that the matter is peculiarly within the knowledge of the adverse party.¹ But a party is not required to prove the negative of any matter where the existence of the contrary affirmative is necessary to exempt or discharge the adversary from a duty or liability already proved upon him.² He who makes a

negative allegation involving a charge of illegality, against which there is a presumption of innocence, must prove the negative.³

¹ 1 Wharton, Ev. § 357; 1 Greenl. Ev. § 78; 1 Taylor, Ev. 379, § 347; Goodwin v. Smith, 72 Ind. 113, 37 Am. Rep. 144, with note, where the application of the rule to a great variety of cases is illustrated.

There are two classes of negatives: definite or specific, and indefinite and universal. An averment that the contract was not performed on a day specified is a definite negative, and it is not objectionable to require proof of a definite negative. An averment that the contract was never performed is indefinite or universal, and it is only of negatives of this class that it is unreasonable to require proof.

² 1 Starkie, Ev. 589; Elkin v. Jansen, 13 Mees. & W. 655, 662, 14 L. J. Exch. N. S. 201, 9 Jur. 353; Com. v. Thurlow, 24 Pick. 374, 381.

"The amount of proof required to support the negative proposition and to shift the burden will vary according to the circumstances of the case; and very slender evidence will often be sufficient to shift the burden to the party having the greatest opportunities of knowledge concerning the fact to be inquired into." Stephen, Dig. Ev. art. 96; United States v. Southern Col. Coal, etc., Co. 1 West. Coast Rep. 11.

³ People ex rel. Smith v. Pease, 27 N. Y. 45, 84 Am. Dec. 242, 25 How. Pr. 495, affirming 30 Barb. 588.

*c. As to fact peculiarly within the knowledge of one party—*Where the subject-matter of an allegation is such as to lie peculiarly within the knowledge of the adversary, the burden is on him to give evidence respecting it.¹

¹ Taylor, Ev. § 347, 1 Whart. Ev. § 367; Rugely v. Gill, 15 La. Ann. 509. And see Bowman v. McElroy, 15 La. Ann. 663; Corwin v. Shoup, 76 Ill. 246; Haley v. Lacy, 1 Swan, 498; Burton v. Blin, 23 Vt. 152.

In Smith v. New York C. R. Co. 43 Barb. 229, Johnson, J., states the rule thus: "If the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party." Citing 1 Greenl. Ev. § 79; 1 Stark. Ev. 362, 365; Wills, Circumstantial Ev. 183, 184. This applies, he says, in all civil cases. But if understood to justify instructing the jury as to the burden of proof, this statement of the rule is too broad. See reversal in 46 N. Y. 271, 281, 7 Am. Rep. 327, of the decision in Lamb v. Camden & A. R. & Transp. Co. 2 Daly, 454, where, at page 463, Judge Johnson's opinion was quoted and erroneously applied to sustain instructions to the jury.

d. Legal presumption shifts the burden.—A presumption of law arising from evidence already given, or from the pleadings, is sufficient to cast the burden of proof on the other party, to show (if the presumption be disputable) that the fact was otherwise than according to the presumption.¹

¹ But it will not do to ask the court to instruct the jury that the burden of proof is shifted, unless the presumption is one of law and the instruction is qualified by the condition that the evidence is believed by the jury. For when the burden of proof is said to shift, all that is meant is that the party from whom it is shifted has a right to go to the jury that they may say whether he has fulfilled his obligation to prove his case, unless the other party takes up the burden of adducing evidence and gives proofs.

13. Corporate agent's declarations.

The declarations made by an officer or agent of a corporation, in response to timely inquiries, properly addressed to him and relating to matters under his charge, in respect to which he is authorized in the usual course of business to give information, may be given in evidence against the corporation.¹

¹ Abbott, Trial, Ev. 44; Xenia Bank v. Stewart, 114 U. S. 224, 229, 29 L. ed. 101, 103, 5 Sup. Ct. Rep. 845. See also note to Ohio & M. R. Co. v. Stein, 19 L.R.A. 733.

14. Corporate deed.

Where the common seal of a corporation appears to be affixed to an instrument, and the signature of the proper officer is proved, there is a legal presumption that the officer did not exceed his authority, and the contrary must be proved by the objecting party.¹

¹ Canandaigua Academy v. McKechnie, 90 N. Y. 618; s. p. Belden v. Meeker, 47 N. Y. 307.

15. Date.

The date of a document is *prima facie* evidence of the time when it was written.¹

¹ Livingston v. Arnoux, 56 N. Y. 507, 519, affirming 15 Abb. Pr. N. S. 158.

The date of a private instrument unauthenticated is not alone presumptive evidence of the time the document was written, as against a stranger to it, when its competency depends on the time it was written.¹

¹ *Foster v. Beals*, 21 N. Y. 247, 250.

16. Depositions.

a. Right to read.—An objection to the reading of a deposition, on the ground of an irregularity or defect which might have been obviated by retaking it, cannot be raised at the trial, unless noted when the deposition is taken, or presented by a motion to suppress before the trial is begun.¹

¹ *Doane v. Glenn*, 21 Wall. 33, 22 L. ed. 476, and cases cited; *Hebbard v. Haughian*, 70 N. Y. 54; *Fassin v. Hubbard*, 55 N. Y. 465; *Wright v. Cabot*, 89 N. Y. 570.

So, also, of the refusal of a witness to answer proper questions. *Strum v. Atlantic Mut. Ins. Co.* 63 N. Y. 77.

As to documents annexed to deposition, see *Kelley v. Weber*, 9 Abb. N. C. 65, note. And as to right to read a deposition taken in another cause than the one on trial, see note to *Fearn v. West Jersey Ferry Co.* 13 L.R.A. 366.

A deposition taken conditionally within the state cannot be read if the personal attendance of the witness can be secured; one taken without the state can be read, notwithstanding the presence of the witness, unless it has been suppressed by order on special motion.¹

¹ *Hedges v. Williams*, 33 Hun, 546.

To show inability to have witness present, the fact of letters having been received from him from places without the state, shortly before the trial, is competent.¹ So are his declarations, in response to inquiry for the purpose, that he is too unwell to attend.²

¹ *Carman v. Kelly*, 5 Hun, 283.

² *McArthur v. Soule*, 5 Hun, 63.

b. Reading part.—He who causes a deposition to be taken, even though it be his own testimony, may read part; but what-

ever he omits that is relevant and competent may be read by the adverse party.¹

¹ Gellatly v. Lowery, 6 Bosw. 113. Contra, Southwark Ins. Co. v. Knight, 6 Whart. 327.

So, it was held in *Railway Passengers' Assur. Co. v. Warner*, 1 Thomp. & C. addenda, 21, that an adverse party who calls out, by a cross-interrogatory, material evidence, is entitled to have it read, so far as responsive.

17. Document.

a. In general.—Neither proving the signature of an instrument, nor marking it for identification, entitles the adverse party to see it or to cross-examine on it. It is the offer in evidence which has this effect.¹

¹ Stiles v. Allen, 5 Allen, 320.

Documents marked for identification cannot be considered as in evidence, unless formally introduced. *Shelton v. Holzwasser*, 46 Misc. 76, 91 N. Y. Supp. 328.

If the party proving its execution refuses to show it and allow cross-examination of the witness as to execution, its admission against objection is error.¹

¹ *Union Mfg. Co. v. Byington*, 1 Hun, 44, 3 Thomp. & C. 86.

b. Referred to.—A document having been properly received in evidence, another distinctly referred to and recognized in it may be received without further proof of execution.¹

¹ *Clark v. Mix*, 15 Conn. 152.

An oral contract having been proved, an instrument referred to in it as containing some of its terms may be received without further proof of its execution.¹

¹ *Smith v. New York C. R. Co.* 4 Abb. App. Dec. 262.

c. Producing on notice.—If a party produces a document on notice and offers to prove its genuineness, it is error to allow the party who gave the notice to give secondary evidence

of contents of the document called for until the one offered has been received in evidence and submitted to the jury.¹

¹ *Stitt v. Huidekoper*, 17 Wall. 384, 397, 21 L. ed. 644, 648.

d. Refusal to produce.—In the courts of the United States, if a party refuses to produce a document at the trial, pursuant to order made on motion before trial, he may be nonsuited, if plaintiff; and a verdict against him may be directed, if defendant.¹

¹ United States Rev. Stat. § 724, U. S. Comp. Stat. 1901, p. 583. As to the power in the state courts, see 82 N. Y. 260, and cases cited.

e. Inspecting on notice to produce; admissibility.—If a party obtains and inspects a paper by means of notice to produce, has the one who produced it a right to put it in evidence, if relevant? ¹

¹ Affirmative—*Clark v. Fletcher*, 1 Allen, 53, 57 (Bigelow, Ch. J.); *Lawrence v. Van Horne*, 1 Cai. 276, 285 (*dictum*); *Wallar v. Stewart*, 4 Cranch, C. C. 532, Fed. Cas. No. 17,108; *Wharam v. Routledge*, 5 Esp. 235; *Wilson v. Bowie*, 1 Car. & P. 10; *Stephen*, Dig. Ev. art. 138.

The reason assigned for this view is the same which prevents a party who puts a question from excluding from the record a responsive answer because it is not what he wants,—that otherwise a party could gain the advantage, if any, from the inquiry, without any corresponding obligation.

Negative—*Kenny v. Clarkson*, 1 Johns. 385, 394 (*dictum*); *Stalker v. Gaunt*, 12 N. Y. Legal Obs. 124 (*dictum*); *Carr v. Gale*, 3 Woodb. & M. 38, Fed. Cas. No. 2,435.

The negative is followed in the New York courts. See *Smith v. Rentz*, 131 N. Y. 169, 15 L.R.A. 138, 30 N. E. 54, and cases cited. See also cases cited in note, 15 L.R.A. 138.

The reason assigned in the reports, for the negative view, is that notice to produce is analogous to a bill of discovery where the answer is not evidence for him who makes it, and that to hold the document admissible would tend to drive parties into equity for discovery.

A better justification for it is that production on notice is not obligatory, and inspection by counsel is not a matter of evidence at all, but a mere preliminary.

A party obtaining an instrument from his adversary by notice to produce, and examining it, cannot examine a witness on it if he will not offer it in evidence.¹

¹ Hotchkiss v. Germania F. Ins. Co. 5 Hun, 91.

18. Entire conversation or writing.

The introduction of a part of a conversation¹ or writing² renders admissible as much of the remainder as tends to explain or qualify what has been received; and that is to be deemed a qualification which rebuts and destroys the inference to be derived from, or the use to be made of, the portion put in evidence.

¹ Rouse v. Whited, 25 N. Y. 170, 82 Am. Dec. 337; Gildersleeve v. Landon, 73 N. Y. 609.

² Grattan v. Metropolitan L. Ins. Co. 92 N. Y. 274, 284. Whether, under this rule, proving an interview or communication may let in a subsequent one, if thus connected,—compare (in affirmative) Nesbit v. Stringer, 2 Duer, 26; (negative) Downs v. New York C. R. Co. 47 N. Y. 83.

19. Examination before trial.

One who has examined his adversary before trial and read the examination at the trial is not entitled to examine him further as a witness on the same subject, unless excuse or reason therefor is given.¹

¹ Wilmont v. Meserole, 8 Jones & S. 321.

It is within the discretion of the judge to permit further oral examination at the trial.¹

¹ Misland v. Boynton, 14 Hun, 625, affirmed in 79 N. Y. 630.

If he has not read the examination at the trial he has a right to call him as a witness.¹

¹ Berdell v. Berdell, 27 Hun, 24, 63 How. Pr. 339.

One who has examined his adversary before trial may read a part of his examination as evidence, but cannot be required to read the whole.¹

¹ Brooks v. Baker (Per Van Hoesen, J.) 9 Daly, 398, 402, following Gelatly v. Lowery, 6 Bosw. 113.

When one has read at the trial part of his adversary's previous examination, his adversary is not entitled to put the whole examination in evidence, but only the answers which pertain to the same subject, or, rather, which tend to qualify what has been read.¹

¹ Lynde v. McGregor, 13 Allen, 172.

20. Explaining omission of evidence.

When a party's good faith in refraining from testifying in his own behalf,¹ or calling as a witness a person shown to be acquainted with the facts, is questioned, he has a right to give evidence explaining his course.

¹ Woodruff v. Hurson, 32 Barb. 557.

So, in reference to a Chinese certificate. Greene, Ch. J., said: "Nonproduction of a certificate is a circumstance which, if alone and unexplained, may properly be regarded as proof that the person lacking it is one who is prohibited. But its nonproduction is open to explanation, and the presumption arising from its nonproduction, to contradiction." Re Lee Yip, cited and followed in Re Ho King, 14 Fed. 724.

21. Fact after suit brought.

a. Receipt.—Under the general issue or any plea which puts the amounts of recovery in dispute, a receipt given after the suit was brought may be given in evidence to reduce the amount of recovery.¹

¹ Burdell v. Denig, 92 U. S. 716, 23 L. ed. 764.

b. Precautions after accident.—Precautions after an accident to prevent other accidents cannot be proved for the purpose.
Abbott, Civ. Jur. T.—28.

pose of showing that they were needed at the time of the accident, as an admission of negligence.¹

¹ *Shinners v. Locks & Canals*, 154 Mass. 168, 12 L.R.A. 554, 26 Am. St. Rep. 226, 28 N. E. 10, and cases cited; *Green v. Ashland Water Co.* 101 Wis. 258, 43 L.R.A. 117, 70 Am. St. Rep. 911, 77 N. W. 722; *Georgia S. & F. R. Co. v. Cartledge*, 116 Ga. 164, 59 L.R.A. 118, 42 S. E. 405; *Anderson v. Chicago, St. P. M. & O. R. Co.* 87 Wis. 195, 23 L.R.A. 203, 58 N. W. 79; *Standard Oil Co. v. Tierney*, 92 Ky. 367, 14 L.R.A. 677, 36 Am. St. Rep. 595, 17 S. W. 1025; *Terre Haute & I. R. Co. v. Clem*, 123 Ind. 15, 7 L.R.A. 588, 18 Am. St. Rep. 303, 23 N. E. 965; *McGarr v. National & P. Worsted Mills*, 24 R. I. 447, 60 L.R.A. 122, 96 Am. St. Rep. 749, 53 Atl. 320; *Limberg v. Glenwood Lumber Co.* 127 Cal. 598, 49 L.R.A. 33, 60 Pac. 176; *Diamond Rubber Co. v. Harryman*, 41 Colo. 415, 15 L.R.A.(N.S.) 775, 92 Pac. 922; *Stewart & Co. v. Harman*, 108 Md. 446, 20 L.R.A.(N.S.) 228, 70 Atl. 333.

But evidence of what was done after a fatal accident, to prevent danger, is admissible for the purpose of showing what could have been done to avoid the accident. *Willey v. Boston Electric Light Co.* 168 Mass. 40, 37 L.R.A. 723, 46 N. E. 395.

And evidence that the rules of a railroad company required turntables to be kept locked when not in use, and that immediately after an accident to a child playing upon a turntable the station agent locked it, was held in *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 65 Neb. 889, 59 L.R.A. 920, 91 N. W. 880, to be admissible in an action to recover for the injuries sustained by the child.

See also cases in note in 12 L.R.A. 559.

22. Family Bible.

See Pedigree, *infra*, § 47.

23. Feelings.

A review of the authorities shows that there is considerable conflict as to the admissibility of expressions or statements of pain made during sickness or subsequent to injury.¹ In some states a distinction is drawn between involuntary expressions of pain and mere complaints or statements; the former being admitted, and the latter excluded. Another distinction is recognized by some courts between statements and declarations made to physicians and those made to laymen. Neither of the distinctions mentioned is recognized by many of the courts. And the evidence is received indiscriminately for what it is

worth, the jury being allowed to decide as to the weight to be accorded it.²

¹ See full review of authorities in note in 24 L.R.A. (N.S.) 253.

² Alabama—The last rule stated prevails in Alabama. Postal Teleg. Cable Co. v. Jones, 133 Ala. 217, 32 So. 500; Birmingham R. Light & P. Co. v. Enslen, 144 Ala. 343, 39 So. 74; Louisville & N. R. Co. v. Davener, 162 Ala. 660, 50 So. 276; Helton v. Alabama Midland R. Co. 97 Ala. 275, 12 So. 276; Western Steel Car & Foundry Co. v. Bean, 163 Ala. 255, 50 So. 1012 (expressions of pain and complaints to laymen); Birmingham Union R. Co. v. Hale, 90 Ala. 8, 24 Am. St. Rep. 748, 8 So. 142; Gregory v. State, 148 Ala. 566, 42 So. 829; Birmingham R. Light & P. Co. v. Moore, 151 Ala. 327, 43 So. 841.

Arkansas—Complaint to a layman is admissible in Arkansas as original evidence. St. Louis & S. F. R. Co. v. Murray, 55 Ark. 248, 16 L.R.A. 787, 29 Am. St. Rep. 32, 18 S. W. 50.

California—In California complaints of present pain and suffering made to a nurse are admissible as original evidence. Green v. Pacific Lumber Co. 130 Cal. 435, 62 Pac. 747.

Connecticut—Complaints to laymen are admissible in Connecticut on the ground of necessity. Goodwin v. Harrison, 1 Root, 80.

So also complaints to physicians are admitted. Gilmore v. American Tube & Stamping Co. 79 Conn. 498, 66 Atl. 4; Martin v. Sherwood, 74 Conn. 475, 51 Atl. 526; Wilson v. Granby, 47 Conn. 59, 36 Am. Rep. 51.

Dakota—Complaints and declarations made to laymen are admissible as original evidence, although the declarant is a competent witness. Sanders v. Reister, 1 Dak. 151, 46 N. W. 680.

Delaware—Involuntary declarations made to a layman and indicating present pain are admissible, but an injured person's complaints are excluded. Wilkins v. Wilmington, 2 Marv. (Del.) 132, 42 Atl. 418.

District of Columbia—Statements made to physicians are admissible. Patterson v. Ocean Acci. & Guarantee Corp. 25 App. D. C. 46.

Georgia—The question as to complaints still appears to be somewhat unsettled in Georgia. Complaints of pain have been admitted in some cases, apparently as an exception to the hearsay rule, although made to persons other than physicians. Central R. Co. v. Smith, 76 Ga. 209, 2 Am. St. Rep. 31; Nashville, C. & St. L. R. Co. v. Miller, 120 Ga. 453, 67 L.R.A. 87, 47 S. E. 959, 1 A. & E. Ann. Cas. 210.

But since parties were constituted competent witnesses in their own behalf, such evidence has been excluded. Atlanta Street R. Co. v. Walker, 93 Ga. 462, 21 S. E. 48; Savannah, F. & W. R. Co. v. Wainwright, 99 Ga. 255, 25 S. E. 622; Atlanta, K. & N. R. Co. v. Gardner, 122 Ga. 82, 49 S. E. 818.

And no distinction is recognized between complaints made to a physician and those made to other persons. *East Tennessee, V. & G. R. Co. v. Smith*, 94 Ga. 580, 20 S. E. 127 (complaints admitted); *Goodwyn v. Central R. Co.* 2 Ga. App. 470, 58 S. E. 688; *Atlanta, K. & N. R. Co. v. Gardner*, 122 Ga. 82, 49 S. E. 818 (complaints excluded).

Illinois—A distinction is recognized in Illinois between natural manifestations of pain and mere complaints. The former are held admissible as original evidence, although made in the presence of persons other than physicians. *Cicero & P. Street R. Co. v. Priest*, 190 Ill. 592, 60 N. E. 814; *Chicago & A. R. Co. v. Johnson*, 128 Ill. App. 20; *Salem v. Webster*, 192 Ill. 369, 61 N. E. 323. *Contra, Donnelly v. Chicago City R. Co.* 131 Ill. App. 302.

But it is held that mere complaints and declarations made to persons other than physicians are inadmissible. *West Chicago Street R. Co. v. Kennelly*, 170 Ill. 508, 48 N. E. 996; *Chicago City R. Co. v. Bundy*, 210 Ill. 39, 71 N. E. 28; *Lake Street Elev. R. Co. v. Shaw*, 203 Ill. 39, 67 N. E. 374.

Statements as to patient's bodily condition made to a physician during treatment, however, are held admissible. *Chicago v. McNally*, 227 Ill. 14, 81 N. E. 23; *West Chicago Street R. Co. v. Carr*, 170 Ill. 478, 48 N. E. 992; *Globe Acci. Ins. Co. v. Gerisch*, 163 Ill. 625, 54 Am. St. Rep. 486, 45 N. E. 563; *Collins v. Waters*, 54 Ill. 485.

Indiana—No distinction is recognized in Indiana between statements or exclamations, and both are held admissible as original evidence, whether made to physicians or other persons. *Anderson v. Citizens' Street R. Co.* 12 Ind. App. 194, 38 N. E. 1109; *Cleveland, C. C. & St. L. R. Co. v. Carey*, 33 Ind. App. 275, 71 N. E. 244; *Chicago, St. L. & P. R. Co. v. Spiker*, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; *Louisville, N. A. & C. R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343; *Carthage Turnp. Co. v. Andrews*, 102 Ind. 138, 52 Am. Rep. 653, 1 N. E. 364; *Indianapolis Street R. Co. v. Haverstick*, 35 Ind. App. 281, 111 Am. St. Rep. 163, 74 N. E. 34; *Cleveland, C. C. & I. R. Co. v. Newell*, 104 Ind. 264, 54 Am. Rep. 312, 3 N. E. 836; *Indianapolis Street R. Co. v. Schmidt*, 163 Ind. 360, 71 N. E. 201 (statements and exclamations to laymen); *Wabash County v. Pearson*, 120 Ind. 426, 16 Am. St. Rep. 325, 22 N. E. 134; *Indiana Union Traction Co. v. Jacobs*, 167 Ind. 85, 78 N. E. 325; *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; *Indianapolis & M. R. Transit Co. v. Reeder*, 37 Ind. App. 262, 76 N. E. 816.

Iowa—The same rule that prevails in Indiana applies in Iowa. *McDonald v. Franchere Bros.* 102 Iowa, 496, 71 N. W. 427; *Hamilton v. Mendota Coal & Min. Co.* 120 Iowa, 147, 94 N. W. 282; *Crippen v. Des Moines*, — Iowa, —, 78 N. W. 688; *Johnston v. Cedar Rapids & M. R. Co.* 141 Iowa, 114, 119 N. W. 286; *Patton v. Sanborn*, 133 Iowa, 650, 110 N. W. 1032; *Duffey v. Consolidated Block Coal Co.* 147 Iowa, 225, 30 L.R.A.(N.S.) 1067, 124 N. W. 609; *Keyes v. Cedar Falls*, 107 Iowa, 509, 78 N. W. 227, overruling *Ferguson v. Davis County*, 57

Iowa, 601, 10 N. W. 906. Contra, *Battis v. Chicago*, R. I. & P. R. Co. 124 Iowa, 623, 100 N. W. 543 (statements and exclamations to laymen); *Townsend v. Des Moines*, 42 Iowa, 657; *Yeager v. Spirit Lake*, 115 Iowa, 593, 88 N. W. 1095; *Armstrong v. Ackley*, 71 Iowa, 76, 32 N. W. 180 (statements and exclamations to physicians).

Kansas—And the same rule has been applied in Kansas. *Atchison, T. & S. F. R. Co. v. Johns*, 36 Kan. 769, 59 Am. Rep. 609, 14 Pac. 237; *St. Louis & S. F. R. Co. v. Burrows*, 62 Kan. 89, 61 Pac. 439; *Federal Betterment Co. v. Reeves*, 77 Kan. 111, 93 Pac. 627, 15 A. & E. Ann. Cas. 796 (statements to laymen); *Atchison, T. & S. F. R. Co. v. Frazier*, 27 Kan. 463 (to physician).

But it was held in *St. Louis & S. F. R. Co. v. Chaney*, 77 Kan. 276, 94 Pac. 126, that, before the declarations are admitted for the purpose of proving an injury continuing or permanent, sufficient evidence of the appearance or conduct of the declarant, or the circumstances under which the statements were made, should be given to make it appear probable that they were natural and spontaneous, and not the result of a deliberate purpose.

Kentucky—Statements to laymen are admissible as original evidence. *Louisville & N. R. Co. v. Smith*, 27 Ky. L. Rep. 257, 84 S. W. 755.

And declarations made to an attending physician are also held admissible there. *Shade v. Covington-Cincinnati Elev. R. & Transfer & Bridge Co.* 119 Ky. 592, 84 S. W. 733.

Maine—Complaints made to laymen are held admissible on the ground of necessity. *Kennard v. Burton*, 25 Me. 39, 43 Am. Dec. 249. But a narrative of the sufferer's condition at a previous time is inadmissible. *Asbury L. Ins. Co. v. Warren*, 66 Me. 523, 22 Am. Rep. 590.

Maryland—Complaints to laymen are admissible, apparently as original evidence. *Geiselman v. Schmidt*, 106 Md. 580, 68 Atl. 202.

Massachusetts—The rule in Massachusetts admits as original evidence all natural expressions of pain, although made to laymen, but excludes mere statements of fact and narration made to such persons. *Bacon v. Charlton*, 7 Cush. 581; *Cashin v. New York, N. H. & H. R. Co.* 185 Mass. 543, 70 N. E. 930; *Hatch v. Fuller*, 131 Mass. 574; *Weeks v. Boston Elev. R. Co.* 190 Mass. 563, 77 N. E. 654.

And the fact that the statement or exclamation is made *post litem motam* does not render it incompetent. *Hatch v. Fuller*, 131 Mass. 574; *Fleming v. Springfield*, 154 Mass. 520, 26 Am. St. Rep. 268, 28 N. E. 910.

But statements by a patient to his physician as to his ailments and his sensations are held admissible on the ground of necessity. *Barber v. Merriam*, 11 Allen, 322; *Fay v. Harlan*, 128 Mass. 244, 35 Am. Rep. 372; *Fleming v. Springfield*, 154 Mass. 520, 26 Am. St. Rep. 268, 28 N. E. 910.

Michigan—Statements and exclamations concerning present sufferings and sensations are admissible as original evidence, although made to lay-

men. *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668; *Mulliken v. Corunna*, 110 Mich. 212, 68 N. W. 141; *O'Dea v. Michigan C. R. Co.* 142 Mich. 265, 105 N. W. 746; *Burleson v. Reading*, 110 Mich. 512, 68 N. W. 294; *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321.

And the rule is the same although the declarations are made *post litem motam*, if not made in contemplation that those present shall become witnesses at the trial. *Mott v. Detroit, G. H. & M. R. Co.* 120 Mich. 127, 79 N. W. 3; *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616.

And exclamations to an attending physician are admissible. *Heddle v. City Electric R. Co.* 112 Mich. 547, 70 N. W. 1096.

Minnesota—The rule as to nonexperts permits them to testify to such complaints and exclamations as indicate present pain. *Firkins v. Chicago G. W. R. Co.* 61 Minn. 31, 63 N. W. 172.

Statements of a patient to an attending physician are admissible when the physician is called to give an opinion based on such statements. But, in the absence of an expert opinion based on the statements, physicians stand on the same footing as nonexperts. *Williams v. Great Northern R. Co.* 68 Minn. 55, 37 L.R.A. 199, 70 N. W. 860.

In the following cases, statements as to suffering and symptoms, made to attending physician, were held admissible: *Johnson v. Northern P. R. Co.* 47 Minn. 430, 50 N. W. 473; *Brusch v. St. Paul City R. Co.* 52 Minn. 512, 55 N. W. 57; *Jones v. Chicago, St. P. M. & O. R. Co.* 43 Minn. 279, 45 N. W. 444; *Cooper v. St. Paul City R. Co.* 54 Minn. 379, 56 N. W. 42; *Edlund v. St. Paul City R. Co.* 78 Minn. 434, 81 N. W. 214.

Mississippi—Exclamations and statements, whether made to a physician or layman, are admissible (*Field v. State*, 57 Miss. 474, 34 Am. Rep. 476); even though made sometime after the injury (*Mississippi C. R. Co. v. Turnage*, 95 Miss. 854, 24 L.R.A.(N.S.) 253, 49 So. 840).

Missouri—Complaints and exclamations made to laymen are admissible as original evidence. *Squires v. Chillicothe*, 89 Mo. 226, 1 S. W. 23; *Lindsay v. Kansas City*, 195 Mo. 166, 93 S. W. 273; *Edmunds v. St. Louis R. Co.* 3 Mo. App. 603; *Estes v. Missouri P. R. Co.* 110 Mo. App. 725, 85 S. W. 627; *McHugh v. St. Louis Transit Co.* 190 Mo. 85, 88 S. W. 853; *Heiberger v. Missouri & K. Teleph. Co.* 133 Mo. App. 452, 113 S. W. 730.

Nebraska—Declarations and complaints to laymen are admissible on the ground of necessity, when made spontaneously. *Hewitt v. Eisenbart*, 36 Neb. 794, 55 N. W. 252; *Omaha Street R. Co. v. Emminger*, 57 Neb. 240, 77 N. W. 675; *Western Travelers' Acci. Asso. v. Munson*, 73 Neb. 858, 1 L.R.A.(N.S.) 1068, 103 N. W. 688; *Ward v. Aetna L. Ins. Co.* 82 Neb. 499, 118 N. W. 70.

New Hampshire—Representations as to the nature, symptoms, and effect of a disease or injury are admissible as original evidence, whether

made to physicians or laymen (Perkins v. Concord R. Co. 44 N. H. 223; Craig v. Gerrish, 58 N. H. 513; Howe v. Plainfield, 41 N. H. 135; Plummer v. Ossipee, 59 N. H. 55; Towle v. Blake, 48 N. H. 92; Chamberlin v. Ossipee, 60 N. H. 212; Norris v. Haverhill, 65 N. H. 89, 18 Atl. 85); even though made *post litem motam* (Towle v. Blake, 48 N. H. 92).

New Jersey—Declarations to an attending physician are admissible on the ground of necessity. *State v. Gedicke*, 43 N. J. L. 86, 4 Am. Crim. Rep. 6.

New York—Involuntary exclamations and like indications of pain are admissible as original evidence, although made to laymen. *Hagenlocher v. Coney Island & B. R. Co.* 99 N. Y. 136, 1 N. E. 536; *Kelly v. Cohoes Knitting Co.* 8 App. Div. 156, 40 N. Y. Supp. 477; *Smith v. Dittman*, 16 Daly, 427, 11 N. Y. Supp. 769; *Teachout v. People*, 41 N. Y. 13.

Whether declarations and complaints to laymen are admissible in this state seems to be still open to question. In the following cases such evidence was held admissible as original evidence: *Werely v. Persons*, 28 N. Y. 344, 84 Am. Dec. 346; *Caldwell v. Murphy*, 11 N. Y. 416; *Baker v. Griffin*, 10 Bosw. 140; *Nichols v. Brooklyn City R. Co.* 30 Hun, 437, affirmed in 100 N. Y. 635; *Reed v. New York C. R. Co.* 45 N. Y. 578; *Lewke v. Dry Dock, E. B. & B. R. Co.* 46 Hun, 283, 11 N. Y. S. R. 510; *Kennedy v. Rochester City & B. R. Co.* 130 N. Y. 654, 29 N. E. 141; *De Long v. Delaware, L. & W. R. Co.* 37 Hun, 282; *Uransky v. Dry Dock, E. B. & B. R. Co.* 44 Hun, 119, 7 N. Y. S. R. 395.

But a contrary conclusion was reached in the following cases: *Donohue v. Brooklyn, Q. C. & S. R. Co.* 53 App. Div. 348, 65 N. Y. Supp. 634; *Roche v. Brooklyn City & N. R. Co.* 105 N. Y. 294, 59 Am. Rep. 506, 11 N. E. 630; *Reed v. New York C. R. Co.* 45 N. Y. 574; *Olp v. Gardner*, 48 Hun, 169; *Ryan v. Porter Mfg. Co.* 57 Hun, 253, 32 N. Y. S. R. 621, 10 N. Y. Supp. 774; *Grant v. Groton*, 77 Hun, 497, 28 N. Y. Supp. 1014; *Barrelle v. Pennsylvania R. Co.* 21 N. Y. S. R. 109, 4 N. Y. Supp. 127.

After the passage of the statute allowing parties to testify in their own behalf, some of the cases mentioned this as a reason for excluding such complaints. But there seems to be no line drawn from that time.

It is clear, however, that complaints and statements to attending physicians are admissible. *Jones v. Niagara Junction R. Co.* 63 App. Div. 607, 71 N. Y. Supp. 647; *Murphy v. New York C. R. Co.* 66 Barb. 125; *Orlando v. Syracuse Rapid T. R. Co.* 109 App. Div. 356, 95 N. Y. Supp. 898; *Schuler v. Third Ave. R. Co.* 1 Misc. 351, 20 N. Y. Supp. 683; *Tobin v. Fairport*, 12 N. Y. Supp. 224; *Cleveland v. New Jersey S. B. Co.* 5 Hun, 523, reversed on other grounds in 68 N. Y. 306; *Meigs v. Buffalo*, 7 N. Y. S. R. 855; *Mattheson v. New York C. R. Co.* 62 Barb. 364; *Matteson v. New York C. R. Co.* 35 N. Y. 487, 91 Am. Dec. 67. *Contra*, *Mosher v. Russell*, 44 Hun, 12.

North Carolina—Declarations of slaves were held admissible from necessity, whether made to laymen or physicians. *Roulhac v. White*, 31 N. C. (9 Ired. L.) 63; *Biles v. Holmes*, 33 N. C. (11 Ired. L. 16); *Wallace v. McIntosh*, 49 N. C. (4 Jones, L.) 434.

North Dakota—Exclamations of pain are admissible as original evidence, although made to laymen. *Bennett v. Northern P. R. Co.* 2 N. D. 112, 13 L.R.A. 465, 49 N. W. 408.

Ohio—A nonexpert may testify to spontaneous manifestations of pain, but he cannot testify to statements. *Lake Shore & M. S. R. Co. v. Yokes*, 12 Ohio C. C. 499, 5 Ohio C. D. 599; *Cleveland City R. Co. v. Roebuck*, 22 Ohio C. C. 99, 12 Ohio C. D. 262.

Oregon—Complaints and exclamations are admissible as original evidence, although made to laymen, but narration is excluded. *Thomas v. Herrall*, 18 Or. 546, 23 Pac. 497; *State v. Mackey*, 12 Or. 154, 6 Pac. 648, 5 Am. Crim. Rep. 532.

And statements made to physicians are admissible. *Vuilleumier v. Oregon Water Power Co.* 55 Or. 129, 105 Pac. 706.

Pennsylvania—Statements of pain and sensation made to physicians are admissible as original evidence. *Lake Shore & M. S. R. Co. v. Rosenzweig*, 113 Pa. 519, 6 Atl. 545.

South Dakota—Mere complaints and statements to laymen are not admissible. *Klingaman v. Fish & H. Co.* 19 S. D. 139, 102 N. W. 601.

Tennessee—Statements and complaints of a slave to laymen were held admissible as *res gestæ* (*Jones v. White*, 11 Humph. 268; *Lewis v. Moses*, 6 Coldw. 193); and such statements made to physicians were also admitted (*Yeatman v. Hart*, 6 Humph. 375; *Looper v. Bell*, 1 Head, 373).

Texas—Complaints and exclamations which are the usual and natural expressions of bodily feelings are admissible as *res gestæ* and as original evidence, although made to laymen. *International & G. N. R. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. 58; *Texas & P. R. Co. v. Lee*, 21 Tex. Civ. App. 174, 51 S. W. 351, rehearing denied in 21 Tex. Civ. App. 176, 57 S. W. 573; *Missouri, K. & T. R. Co. v. Oslin*, 28 Tex. Civ. App. 379, 63 S. W. 1039; *St. Louis Southwestern R. Co. v. Martin*, 26 Tex. Civ. App. 231, 63 S. W. 1089; *Texas C. R. Co. v. Wheeler*, 52 Tex. Civ. App. 603, 116 S. W. 83; *Houston & T. C. R. Co. v. Parnell*, — Tex. Civ. App. —, 120 S. W. 951; *Houston & T. C. R. Co. v. Shafer*, 54 Tex. 641; *Rogers v. Crain*, 30 Tex. 284; *St. Louis Southwestern R. Co. v. Haynes*, — Tex. Civ. App. —, 86 S. W. 934.

But declarations which are mere narratives are inadmissible. *Gulf, C. & S. F. R. Co. v. Ross*, 11 Tex. Civ. App. 201, 32 S. W. 730.

And mere descriptive statements are held inadmissible unless made to a medical attendant or nurse, for the purpose of treatment. *Runnells v. Pecos & N. T. R. Co.* 49 Tex. Civ. App. 150, 107 S. W. 647; *St. Louis Southwestern R. Co. v. Martin*, 26 Tex. Civ. App. 231, 63 S. W. 1089.

Exclamations of present pain to laymen have been admitted, although made after suit was contemplated or actually begun. *Jackson v. Missouri, K. & T. R. Co.* 23 Tex. Civ. App. 319, 55 S. W. 376. But there is *dicta* in *International & G. N. R. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. 58, to the contrary.

Complaints and exclamations to a physician are also, of course, admitted. *Texas State Fair v. Marti*, 30 Tex. Civ. App. 132, 69 S. W. 432; *Dublin Gas & Electric Co. v. Frazier*, 46 Tex. Civ. App. 288, 103 S. W. 197; *El Paso & S. W. R. Co. v. Polk*, 49 Tex. Civ. App. 269, 108 S. W. 761; *Wheeler v. Tyler Southeastern R. Co.* 91 Tex. 356, 43 S. W. 876; *Missouri, K. & T. R. Co. v. Dalton*, — Tex. Civ. App. —, 120 S. W. 240.

Vermont—Statements and complaints are admissible as original evidence, although made to laymen. *Brown v. Mt. Holly*, 69 Vt. 364, 38 Atl. 69; *Drew v. Sutton*, 55 Vt. 586, 45 Am. Rep. 644; *Bagley v. Mason*, 69 Vt. 175, 37 Atl. 287; *Sheldon v. Wright*, 80 Vt. 298, 67 Atl. 807.

And declarations to an attending physician are likewise admissible (*Earl v. Tupper*, 45 Vt. 275; *Knox v. Wheelock*, 54 Vt. 150), although the statements were made *post litem motam* (*Kent v. Lincoln*, 32 Vt. 591).

Virginia—Complaints and statements made to laymen or physicians are admissible from necessity and as being in the nature of *res gestæ*. *Livingston v. Com.* 14 Gratt. 592.

Washington—Complaints and exclamations are admissible as original evidence, although made to a layman. *Bothell v. Scattlè*, 17 Wash. 263, 49 Pac. 491; *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76.

West Virginia—Complaints made to laymen are admissible as original evidence. *Stevens v. Friedman*, 58 W. Va. 78, 51 S. E. 132.

Wisconsin—And the same rule prevails in Wisconsin. *McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. 298; *Keller v. Gilman*, 93 Wis. 9, 66 N. W. 800; *Hall v. American Masonic Acci. Asso.* 86 Wis. 518, 57 N. W. 366; *Bredlau v. York*, 115 Wis. 554, 92 N. W. 261; *Bridge v. Oshkosh*, 71 Wis. 363, 37 N. W. 409.

And statements and complaints to physicians are also admissible. *Bridge v. Oshkosh*, 71 Wis. 363, 37 N. W. 409; *Curran v. A. H. Stange Co.* 98 Wis. 598, 74 N. W. 377.

But statements constituting mere narration are inadmissible. *Keller v. Gilman*, 93 Wis. 9, 66 N. W. 800; *Tebo v. Augusta*, 90 Wis. 408, 63 N. W. 1045.

Federal Courts—Declarations when confined to complaints and exclamations showing present pain are admissible as original evidence, although made to laymen. *Travelers' Ins. Co. v. Mosley*, 8 Wall. 397, 19 L. ed. 437; *Armour & Co. v. Skene*, 82 C. C. A. 385, 153 Fed. 241; *Baltimore & O. R. Co. v. Rambo*, 8 C. C. A. 6, 16 U. S. App. 277, 59 Fed. 75.

And statements made to physicians while examining or attending a person are admitted as original evidence. *Union P. R. Co. v. Novak*, 9 C. C. A. 629, 15 U. S. App. 400, 61 Fed. 583; *Northern P. R. Co. v. Urlin*, 158 U. S. 273, 39 L. ed. 980, 15 Sup. Ct. Rep. 840; *Denver & R. G. R. Co. v. Roller*, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738. But it has been held that the declarations must be made during actual treatment, to be admissible. *Delaware, L. & W. R. Co. v. Roalefs*, 16 C. C. A. 601, 28 U. S. App. 569, 70 Fed. 21.

England—Declarations of a person as to the state of his health, made to a layman, are admissible as original evidence. *Reg. v. Johnson*, 2 Car. & K. 354; *Aveson v. Kinnaird*, 6 East, 188, 2 Smith, 286, 3 Revised Rep. 455.

Canada—And the same rule applies in Canada. *Reg. v. Bérubé*, 3 Lower Can. Rep. (Dec. Des Tribunaux) 212.

As to admissibility as *res gestæ* of statements or declarations made by injured person to physician while latter was examining him in order to qualify as a witness, see note in 21 L.R.A.(N.S.) 826.

24. Fraud.

Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character committed by the same parties at or near the same time is admissible.¹

¹ *Lincoln v. Claffin*, 7 Wall. 132, 139, 19 L. ed. 106, 109; *Olmsted v. Hotelling*, 1 Hill, 317.

As to evidence of other crimes in prosecution for fraud, see note in 62 L.R.A. 240.

25. Handwriting.

A person who has seen another write his name but once can testify to his handwriting, and he is equally competent if he has personally communicated with him by letter, although he has never seen him write at all.¹

¹ *Rogers v. Ritter*, 12 Wall. 317, 20 L. ed. 417.

For a full treatment of the question of proof of handwriting, see *Abbott's Brief on Mode of Proving the Facts*, and notes in 62 L.R.A. 818, 63 L.R.A. 964; 63 L.R.A. 428; 63 L.R.A. 937.

26. Illegality.

Not available as a defense unless pleaded.¹

¹ 13 Abb. N. C. 388, note.

27. Impression.

Witness may testify to an impression if it be memory, not if it be mere belief or inference.¹

¹ 3 Abb. N. C. 235, note.

28. Intent; right of one to testify as to his own intent.

a. The common-law rule.—Previous to the enactment of statutes making parties to an action competent witnesses therein, the intent of a party could be shown only by the acts of the party and the circumstances which occurred from which it might be inferred.¹ Alabama still clings to the common-law rule, it being there held that a statute making parties competent witnesses in their own favor does not enable them to testify to their own uncommunicated motives or intentions.² The rule of the Alabama cases is that motive or intention is an inferential fact to be drawn by the jury from the facts and circumstances in evidence.³ And an uncommunicated belief, motive, or intention cannot be testified to by a party to a civil suit, when examined as a witness.⁴ But an exception to this rule exists, permitting a witness who has testified to a particular act to be asked on cross-examination what motive prompted him to the act, or what intention actuated him.⁵

¹ Zimmerman v. Marchland, 23 Ind. 474.

² Burke v. State, 71 Ala. 377.

³ Alexander v. Alexander, 71 Ala. 295; Wheless v. Rhodes, 70 Ala. 419; McCormick v. Joseph, 77 Ala. 236; Baldwin v. Walker, 91 Ala. 428, 8 So. 364.

⁴ Herring v. Skaggs, 62 Ala. 180, 34 Am. Rep. 4; Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497; Ball v. Farley, 81 Ala. 288, 1 So. 253; East Tennessee, V. & G. R. Co. v. Davis, 91 Ala. 615, 8 So. 349; Richardson Bros. v. Stringfellow, 100 Ala. 416, 14 So. 283; Vest v. Speakman, 153 Ala. 393, 44 So. 1017.

⁵ Thomason v. Dill, 30 Ala. 444.

b. Rule under statutes permitting parties to testify.—The rule that the intent of a person must be inferred from his acts and words had its foundation in necessity created by the rule which excludes parties in interest from the witness stand; and it is modified, if not wholly abrogated, by innovations upon

the common law, under which parties are allowed to testify in their own behalf.¹ And when parties to a suit and parties interested in the transactions are permitted by statute to testify, they may testify what their intentions were, where intent is a material issue.² The test of the admissibility of evidence of the motive or intent with which an act was done is the materiality of the motive or intent in giving character to the act. And where the intention of a party is not an issue in a case, his undisclosed wishes are incompetent and immaterial.³

And the rule allowing a party to testify to his intent, either in civil or criminal cases, whenever his intent is material, is subject to the exception that the evidence is not admissible to vary the terms of a written instrument by which he is bound.⁴ Nor can a witness state his motive or intention for doing an act, when that motive or intent involves a legal conclusion.⁵

¹ *People v. Farrell*, 31 Cal. 576.

² *Wade v. Odle*, 21 Tex. Civ. App. 656, 54 S. W. 786; *Gimbel v. Gomprecht*. — Tex. Civ. App. —, 36 S. W. 781; *Peightal v. Cotton States Bldg. Co.* 25 Tex. Civ. App. 391, 61 S. W. 428; *Barnhart v. Fulkerth*, 93 Cal. 497, 29 Pac. 50; *Germania F. Ins. Co. v. Stone*, 21 Fla. 555; *Hale v. Robertson*, 100 Ga. 168, 27 S. E. 937; *Royce v. Gazan*, 76 Ga. 79; *Dunbar v. Armstrong*, 115 Ill. App. 549; *Pardridge v. Cutler*, 104 Ill. App. 89; *Odin Coal Co. v. Denman*, 84 Ill. App. 190, affirmed in 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192; *Walker v. Johnson*, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100; *Wilson v. Clark*, 1 Ind. App. 182, 27 N. E. 310; *Heap v. Parrish*, 104 Ind. 36, 3 N. E. 549; *Larson v. Thoma*, 143 Iowa, 338, 121 N. W. 1059; *Dorn v. Cooper*, 139 Iowa, 742, 117 N. W. 1, 118 N. W. 35, 16 A. & E. Ann. Cas. 744; *Chew v. O'Hara*, 110 Iowa, 81, 81 N. W. 157; *Cushing v. Friendship*, 89 Me. 525, 36 Atl. 1001; *Wheelden v. Wilson*, 44 Me. 18; *Jarrell v. Young, Smyth, Field Co.* 105 Md. 280, 23 L.R.A.(N.S.) 367, 66 Atl. 50, 12 A. & E. Ann. Cas. 1; *Faxon v. Jones*, 176 Mass. 206, 57 N. E. 359; *Snow v. Paine*, 114 Mass. 520; *Spalding v. Lowe*, 56 Mich. 366, 23 N. W. 46; *Berkey v. Judd*, 22 Minn. 287; *Grout v. Stewart*, 96 Minn. 230, 104 N. W. 966; *Vansickle v. Brown*, 68 Mo. 627; *Hackney v. Raymond Bros. Clarke Co.* 68 Neb. 624, 94 N. W. 822; *McCormick Harvesting Mach. Co. v. Hiatt*, 4 Neb. (Unof.) 587, 95 N. W. 627; *Norris v. Morrill*, 40 N. H. 395; *Hale v. Taylor*, 45 N. H. 405; *Lewis v. Rogers*, 2 Jones & S. 64; *Lally v. Emery*, 54 Hun, 517, 8 N. Y. Supp. 135; *Learned v. Ryder*, 61 Barb. 552; *Fiedler v. Darrin*, 50 N. Y. 437; *Cortland County v. Herkimer County*, 44 N. Y. 22; *Thurston v. Cornell*, 38 N. Y. 281; *Nixon v. McKinney*, 105 N. C. 23, 11 S. E. 154; *Tucker v. Hendricks*, 25 Ohio C. C. 426; *Ohio Coal Co. v. Davenport*, 37 Ohio St. 194; *Mahon v. Rankin*, 54 Or. 328, 102 Pac.

- 608, 103 Pac. 53; *Juniata Bldg. & L. Asso. v. Hetzel*, 103 Pa. 507; *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. Dec. 574; *Barker v. Western U. Teleg. Co.* 134 Wis. 147, 14 L.R.A.(N.S.) 533, 126 Am. St. Rep. 1017, 114 N. W. 439; *Conway v. Clinton*, 1 Utah, 215.
- But in *Los Angeles v. McCollum*, 156 Cal. 148, 23 L.R.A.(N.S.) 378, 103 Pac. 914, it was held that where the acts of one filing an addition to a municipality manifest an intention to dedicate to public use streets shown on the plat, he will not be permitted to testify that he did not intend to make the dedication.
- ³ *Leland v. Converse*, 181 Mass. 487, 63 N. E. 939; *Hankins v. Watkins*, 77 Hun, 360, 28 N. Y. Supp. 867; *Weis v. Morris Bros.* 102 Iowa, 327, 71 N. W. 208; *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257.
- ⁴ *Nixon v. McKinney*, 105 N. C. 23, 11 S. E. 154; *Russell v. Haltom*, 76 Ark. 506, 89 S. W. 471; *Green v. Akers*, 55 Ga. 159; *Merriam v. Pine City Lumber Co.* 23 Minn. 314; *Raymond v. Richmond*, 88 N. Y. 671; *Thomas v. Loose*, 114 Pa. 35, 6 Atl. 326; *Cornelius v. Atchison, T. & S. F. R. Co.* 74 Kan. 599, 87 Pac. 751; *Ecker v. McAllister*, 45 Md. 290; *Zimmerman v. Brannon*, 103 Iowa, 144, 72 N. W. 439; *Haywood v. Foster*, 16 Ohio, 88; *Spencer v. Colt*, 89 Pa. 314.
- But see *Hard v. Ashley*, 117 N. Y. 606, 23 N. E. 177; *Bertelsen v. Bertelsen*, 7 Cal. App. 258, 94 Pac. 80; *Delano v. Goodwin*, 48 N. H. 203, 97 Am. Dec. 601; *Perry v. Porter*, 121 Mass. 522; *National Bank v. Kennedy*, 17 Wall. 19, 21 L. ed. 554; *Merchants' Nat. Bank v. Great Falls Opera House Co.* 23 Mont. 33, 45 L.R.A. 285, 75 Am. St. Rep. 499, 57 Pac. 445; *Pitt v. Elser*, 7 Tex. Civ. App. 47, 32 S. W. 146; *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150.
- ⁵ *Hamburg v. Wood*, 66 Tex. 168, 18 S. W. 623; *Gimbel v. Gomprecht*, — Tex. Civ. App. —, 36 S. W. 781; *Burlingame v. Rowland*, 77 Cal. 315, 1 L.R.A. 829, 19 Pac. 526.
- For a full review of all the authorities on this subject, see note in 23 L.R.A.(N.S.) 367.

Where it is necessary to prove concurrence of intent,—as in an illegal agreement,—the intent of each person may be proved by independent evidence; and evidence which shows the intent of one person is not incompetent, merely because it is no evidence of the intent of the other, provided appropriate evidence of the intent of the other be given in due course.

¹ *Abbott*, Trial Ev. 739, note 5; *Yerkes v. Salomon*, 11 Hun, 471.

29. Intent of a transaction.

The purpose or policy of an act may be stated by a witness who was present and cognizant of the whole transaction,—as

whether the delivery of money by one man to another was by way of payment or otherwise.¹

¹ *National Bank of the Metropolis v. Kennedy*, 17 Wall. 19, 29, 21 L. ed. 554, 557.

30. Interrogating to discover other witnesses.

Counsel has not an absolute right to interrogate his own witness merely for the sake of ascertaining the name of the person whom he may wish to call as a witness, when the name is not relevant to the issue, but is merely sought by way of discovery to enable him to make inquiry out of court or to subpoena a person as a witness. But in strict cross-examination, where great latitude is allowed without being limited to matters relevant to the issue, questions which may have this object are not improper if not improper on other grounds.¹

¹ 14 Abb. N. C. 470, note.

31. Judges and justices of the peace as witnesses.

As to their competency as witnesses to testify in a cause on trial before them, see—

Note to *Rodgers v. State*, 31 L.R.A. 465.

32. Judicial notice.

No proof is necessary in support of a motion where the facts are within the knowledge of the judge in proceedings before him.¹

¹ *Secrist v. Petty*, 109 Ill. 188.

Courts will take judicial notice of facts stated in the almanac¹ and of the days of the week as shown by the almanac.²

¹ *Reed v. Wilson*, 41 N. J. L. 29.

² *Alman v. Owen*, 31 Ala. 167.

See, further, as to what may be judicially noticed in respect of time, note to *Olive v. State*, 4 L.R.A. 35.

The court may take judicial notice of the ordinary course and usages of business of corporations,¹ also of the ordinary way

of doing business in exchanges or boards of trade throughout the country.²

¹ *Isaacson v. New York C. & H. R. R. Co.* 94 N. Y. 278, 46 Am. Rep. 142, reversing 25 Hun, 350 (carrier's usage as to checking through baggage) *Slater v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627 (supervising trains by telegraph); *Eaton, C. & B. Co. v. Avery*, 83 N. Y. 31, 38 Am. Rep. 389, affirming 18 Hun, 44; *Merchants' Nat. Bank v. Hall*, 83 N. Y. 338, 38 Am. Rep. 434, affirming 18 Hun, 176; *Beal v. Somerville*, 17 L.R.A. 291, 1 C. C. A. 598, 5 U. S. App. 14, 50 Fed. 647; *Munn v. Burch*, 25 Ill. 35; *McDonald v. Chemical Nat. Bank*, 174 U. S. 610, 43 L. ed. 1106, 19 Sup. Ct. Rep. 787; *White v. Cushing*, 88 Me. 339, 32 L.R.A. 590, 51 Am. St. Rep. 402, 34 Atl. 164 (practice of banks). But see *Planters' Bank v. Farmers' & N. Bank*, 8 Gill. & J. 449; and *Ward v. Everett*, 1 Dana, 429; *Macullar v. McKinley*, 17 Jones & S. 5 (business and functions of mercantile agencies). See also note to *Olive v. State*, 4 L.R.A. 36.

² *Nicol v. Ames*, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522.

For a fuller treatment of judicial notice, see *Abbott's Brief on Mode of Proving the Facts*.

33. Jurisdictional facts.

a. Inferior court or statutory proceeding.—Recitals of the necessary jurisdictional facts in a judgment of a court of inferior jurisdiction or in a special statutory proceeding are sufficient prima facie evidence of jurisdiction.¹

If jurisdictional facts do not appear in such a record, extrinsic evidence is competent to supply the defect,² but the presumption that public officers have discharged their duty³ does not supply the defect.⁴

¹ *Agricultural Ins. Co. v. Barnard*, 14 Abb. N. C. 502, 96 N. Y. 526, reversing 26 Hun, 302; *Wright v. Nostrand*, 94 N. Y. 31, reversing 15 Jones & S. 441.

² *Van Deusen v. Sweet*, 51 N. Y. 378.

³ See, in support of this presumption, *Mandeville v. Reynolds*, 68 N. Y. 528, affirming 5 Hun, 338; *Miller v. Brown*, 56 N. Y. 383.

⁴ *Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959; *Settlemier v. Sullivan*, 97 U. S. 447, 24 L. ed. 1111.

b. Court of general jurisdiction.—In support of the judgment of a superior court of general jurisdiction, proceeding according to the due course of common law, the jurisdictional

facts are presumed, in respect to parties within the territorial limits of the jurisdiction, if the record is silent. But if the record states an insufficient fact it is not aided by presumption.¹

¹ *Dayton v. Johnson*, 69 N. Y. 419.

And this presumption applies as against infants as well as others. *Bosworth v. Vandewalker*, 53 N. Y. 597.

34. Law of other jurisdictions.

The rule that foreign law must be averred and proved as matter of fact applies to the laws of sister states, when involved in a cause in a state court; ¹ and, in the absence of averment or proof, the presumption is that, in a state or nation where the common law prevails, the common-law rules are the same as those of the forum,² but not that the statutes are.³

¹ See *People ex rel. Lawrence v. Brady*, 56 N. Y. 182; also note to *State v. Behrman*, 25 L.R.A. 449.

² *Savage v. O'Neil*, 44 N. Y. 298; *People ex rel. Lawrence v. Brady*, 56 N. Y. 182; *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618, reversing 16 Hun, 332. And see *Waldron v. Ritchings*, 9 Abb. Pr. N. S. 359, 3 Daly, 288. See also 19 Cent. L. J. 242, and note to *State v. Behrman*, 25 L.R.A. 449.

³ *Graves v. Cameron*, 9 Daly, 152; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48, 38 Am. Rep. 491.

The common law is not presumed to exist in another state, except in the absence of statutory provisions on the subject.¹

¹ *Moore v. Hegeman*, 92 N. Y. 521, 44 Am. Rep. 408, affirming 27 Hun, 68; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538.

As to mode of proof of foreign law, see *Abbott*, Trial Ev. 22, 23; *Ennis v. Smith*, 14 L. ed. 473, and note, 14 How. 400.

The United States courts are bound to take judicial notice of the jurisprudence and public laws of the several states,¹ and of those formerly prevailing in acquired states or territories.²

¹ *Owings v. Hull*, 9 Pet. 607, 9 L. ed. 246 (notarial acts); *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 15 L. ed. 896 (public statutes). See also note to *Olive v. State*, 4 L.R.A. 33.

² *United States v. Perot*, 98 U. S. 428, 25 L. ed. 251

They may take judicial notice even of a private act, if the state court can.¹

¹ *Junction R. Co. v. Bank of Ashland*, 12 Wall. 226, 20 L. ed. 385. See note to *Olive v. State*, 4 L.R.A. 33.

35. Letters.

A party may put in evidence a letter containing admissions material to the case without putting in the whole correspondence.¹

¹ *Barrymore v. Taylor*, 1 Esp. 326; *Stone v. Sanborn*, 104 Mass. 319, 6 Am. Rep. 238. Contra, *Simmons v. Haas*, 56 Md. 153.

When a document is properly in evidence, the envelope in which it was delivered, and any other paper which accompanied and was delivered in the envelope is competent as part of the *res gestæ*, not as proof of statements in it, but to show under what cover its contents reached the party.¹

¹ *United States v. Noelke*, 1 Fed. 426; *Darling v. Miller*, 54 Barb. 149.

Letters of an agent through whom business was transacted may be received as part of the *res gestæ*.¹

¹ *Beaver v. Taylor*, 1 Wall. 637, 17 L. ed. 601; *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125.

36. Letter book.

A press copy of a letter is not primary evidence against the writer.¹

¹ *Marsh v. Hand*, 35 Md. 123; *King v. Worthington*, 73 Ill. 161; *Watkins v. Paine*, 57 Ga. 50.

37. Loss of earnings or income.

Annual earnings from professional or other personal services may be proved as a basis for damages in an action for personal injury; ¹ but not annual income which includes that arising from capital invested in business and the co-operation of a partner.²

¹ *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622, reversing 66 How. Abbott, Civ. Jur. T.—29.

Pr. 161; *Wade v. Leroy*, 20 How. 34, 43, 15 L. ed. 813, 815; *Nebraska City v. Campbell*, 2 Black, 590, 17 L. ed. 271. And see *Bierbach v. Goodyear Rubber Co.* 54 Wis. 208, 41 Am. Rep. 19, 11 N. W. 514.

² *Masterton v. Mt. Vernon*, 58 N. Y. 391.

38. Mailing.

Evidence that a postpaid notice of protest was duly mailed, by deposit either in the postoffice, a government letter box,¹ or the hand of the official letter carrier on his round,² and addressed to another town, is conclusive evidence of its receipt.

¹ *Wynen v. Schappert*, 6 Daly, 558.

² *Pearce v. Langfit*, 101 Pa. 507, 47 Am. Rep. 737.

So, also, evidence that it was put in due course for mailing is competent.¹

¹ *Abbott*, Trial Ev. 434.

Evidence that a letter other than notice of protest was so duly mailed; or that it was deposited where in due course of business it should have been mailed or received, with evidence of such course of business, is competent to go to the jury, and will sustain a finding of actual receipt, but does not raise a legal presumption thereof.¹

¹ *Rosenthal v. Walker*, 111 U. S. 185, 193, 28 L. ed. 395, 398, 4 Sup. Ct. Rep. 382 (holding this presumption sufficient to let in letter-press copies); *Austin v. Holland*, 69 N. Y. 571, 25 Am. Rep. 246, with note; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285 (deposit in private letter box); *United States v. Babcock*, 3 Dill. 566, 571, Fed. Cas. Nos. 14,484, 14,485; *Sullivan v. Kuykendall*, 82 Ky. 483; *Abbott*, Trial Ev. 291.

30. Memorandum.

Papers, not evidence *per se*, but proved to have been true statements of fact at the time they were made, are admissible in connection with the testimony of the witness who made them.¹

¹ *Insurance Companies v. Weide*, 14 Wall. 375, sub nom. *Republic F. Ins. Co. v. Weide*, 20 L. ed. 394, and cases cited.

A memorandum shown to be correct, taken from lost papers, is evidence of their contents.¹

¹Ætna Ins. Co. v. Weide, 9 Wall. 677, 19 L. ed. 810.

40. Memory of one witness aided by another.

Amount allowed to be proved by testimony of a witness that he once knew it and told it correctly to plaintiff, and testimony of plaintiff to what amount the witness told him.¹

¹Shear v. Van Dyke, 10 Hun, 528.

41. Mental capacity.

Whether a witness may give an opinion on the exact issue to be tried in respect of mental capacity or sanity is contested.¹

¹Affirmative—Re Pinney, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144 (testator's capacity to make a disposition of his property); Beller v. Jones, 22 Ark. 92 (capacity of a party to make a contract or deed).

Negative—Brown v. Mitchell, 88 Tex. 350, 36 L.R.A. 64, 31 S. W. 621 (capacity to make a will).

See, further, for an exhaustive and classified collection of cases on this question, note to 36 L.R.A. 64.

And for a comprehensive treatment of the admissibility or opinion evidence, both expert and nonexpert, as to sanity or insanity, see notes to Ryder v. State, 38 L.R.A. 721; Burt v. State, 39 L.R.A. 305; and Re Statson, 39 L.R.A. 715.

42. Minutes.

The minutes of a judge or referee on a former trial cannot be read as evidence of what was there testified, if he be living but testifies that he cannot say they contain the testimony accurately, but may have omitted some things.¹

¹Huff v. Bennett, 6 N. Y. 337, affirming 4 Sandf. 120.

43. Motive.

When the motive of a party or witness in performing a particular act or in making a particular declaration becomes material in a cause, he may himself testify in regard to it.¹

¹Tracy v. McManus, 58 N. Y. 257; Kerrains v. People, 60 N. Y. 221, 19 Am. Rep. 158. And see Intent, *supra*, § 28.

44. Notary's seal.

The court will take judicial notice of the seals of notaries public.¹

¹ *Pierce v. Indseth*, 106 U. S. 546, 27 L. ed. 254, 1 Sup. Ct. Rep. 418.

45. Official act.

The presumption is that no official person, acting under oath of office, will do aught against his official duty, or will omit to do aught which his official duty requires to be done.¹

¹ *Mandeville v. Reynolds*, 68 N. Y. 528, affirming 5 Hun, 338. See also note to *Douglass v. Bishop*, 10 L.R.A. 857.

This presumption does not supply proof of a substantive fact.¹

¹ *United States v. Ross*, 92 U. S. 281, 23 L. ed. 707.

46. Oral to vary.

For the numerous exceptions to the rule excluding oral evidence offered to vary or explain a writing, see—¹

¹ *Abbott*, Tr. Ev. 295; 3 Abb. N. C. 372, note (statutes); *Juilliard v. Chaffee*, 92 N. Y. 529 (negotiable paper); *Baldwin v. Bank of Newbury*, 1 Wall. 234, 17 L. ed. 534; *Davis v. Brown*, 94 U. S. 423, 24 L. ed. 204; *White v. Miner's Nat. Bank*, 102 U. S. 658, 26 L. ed. 250; *Van Brunt v. Day*, 8 Abb. N. C. 336, 81 N. Y. 251, reversing 17 Hun. 166 (collateral stipulation); *Stone v. Harmon*, 31 Minn. 512, 19 N. W. 83 (contract); *West v. Smith*, 101 U. S. 263, 25 L. ed. 809 (correspondence); *Rhodes v. Cleveland Rolling-Mill Co.* 17 Fed. 426 (meaning of expressions); *Hitz v. National Metropolitan Bank*, 111 U. S. 722, 28 L. ed. 577, 4 Sup. Ct. Rep. 613 (true amount of consideration in deed); *Union R. Co. v. Durant*, 95 U. S. 576, 24 L. ed. 391 (object of deed "in trust"); *Clafin v. Fletcher*, 7 Fed. 851 (real property in interest in judgment); *Nash v. Towne*, 5 Wall. 689, 18 L. ed. 527 (surrounding circumstances); *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 591, 28 L. ed. 527, 530, 4 Sup. Ct. Rep. 566 (allowing evidence: that writing did not express the parol agreement, and was not authoritatively delivered).

See also notes in 6 L.R.A. 33, 164 (consideration of contract); 20 L.R.A. 101, 25 L.R.A.(N.S.) 1194 (consideration of deed); 6 L.R.A. 321, and 17 L.R.A. 270; 9 L.R.A.(N.S.) 967; 13 L.R.A.(N.S.) 1203; 13 L.R.A.(N.S.) 780; 28 L.R.A.(N.S.) 417 (evidence of intention); 13 L.R.A.

52; 17 L.R.A.(N.S.) 838; 28 L.R.A.(N.S.) 530 (as affecting indorsement); 4 L.R.A.427, 6 L.R.A. 45, and 17 L.R.A. 273 (fraudulent intent); 1 L.R.A. 594, 816, 3 L.R.A. 836, and 13 L.R.A. 649, 18 L.R.A.(N.S.) 288; 18 L.R.A.(N.S.) 434; 19 L.R.A.(N.S.) 136; 28 L.R.A.(N.S.) 1045 (as between parties to promissory note); 20 L.R.A. 705 (to show who liable as maker of note); 19 L.R.A. 302 (warehouse receipts); 6 L.R.A. 323 (to identify beneficiary); 6 L.R.A. 43 (to identify person); 1 L.R.A. 838, 3 L.R.A. 805, and 6 L.R.A. 41, 322 (to explain ambiguity); 25 L.R.A. 265 (real party in interest in a contract).

47. Pedigree.

As to when and under what conditions entries in a family Bible are admissible as evidence in matters of pedigree, see—

Note to Supreme Council of the G. S. F. v. Conklin, 41 L.R.A. 449.

And for declarations or acts of others as evidence of marriage or pedigree, see—

Notes to *White v. White*, 7 L.R.A. 799, and *Eisenlord v. Clum*, 12 L.R.A. 838; also *Champion v. McCarthy*, 228 Ill. 87, 11 L.R.A.(N.S.) 1052, 81 N. E. 808, 10 A. & E. Ann. Cas. 517; *Orthwein v. Thomas*, 127 Ill. 554, 4 L.R.A. 434, 11 Am. St. Rep. 159, 21 N. E. 430; *Picken's Estate*, 163 Pa. 14, 25 L.R.A. 477, 29 Atl. 875.

48. Phonographs.

On the authority of cases holding communications through the medium of the telephone admissible, it has been held that evidence by phonograph is also admissible.¹

¹ *Boyne City, G. & A. R. Co. v. Anderson*, 146 Mich. 328, 8 L.R.A.(N.S.) 306, 117 Am. St. Rep. 642, 109 N. W. 429, 10 A. & E. Ann. Cas. 283.

49. Reason for positiveness.

A witness may be asked why he is confident he is correct; for a reason for the positiveness of relevant knowledge is relevant.¹

¹ *Blackwell v. Hamilton*, 47 Ala. 472; *Angell v. Rosenbury*, 12 Mich. 241, 256; *Cole v. Lake Shore & M. S. R. Co.* 105 Mich. 549, 63 N. W. 647; *Dikeman v. Arnold*, 83 Mich. 218, 47 N. W. 113; *Thomas v. State*, 27 Ga. 287.

But he cannot, under pretense of giving reasons for his recollection, state facts material to the issue, but inadmissible by the rules of evidence. *McBride v. Cicotte*, 4 Mich. 478.

Nor can a party bolster up testimony of his own witness by asking for the reasons which induced the conclusions to which he had just testified. *Sprenger v. Tacoma Traction Co.* 15 Wash. 660, 43 L.R.A. 706, 47 Pac. 17.

50. Receipt.

Any terms in a receipt which import a binding contract or stipulation between the parties are within the rule excluding parol evidence to vary a contract,¹ but that which is a mere receipt is not.²

¹ *The Lady Franklin*, 8 Wall. 325, sub nom. *King v. The Lady Franklin*, 19 L. ed. 455 and note (words agreeing to account on demand for the thing receipted held not a contract within the rule: so held as between third persons); *Eaton v. Alger*, 2 Abb. App. Dec. 5. Compare *Knoblauch v. Kronschnabel*, 18 Minn. 300, Gil. 272.

² *The Lady Franklin*, 8 Wall. 325, sub nom. *King v. The Lady Franklin*, 19 L. ed. 455 and note. So held of a bill of lading. *Ibid.*

A mere receipt, if not sufficiently explained or contradicted, is conclusive.¹

¹ *Riley v. New York*, 96 N. Y. 331.

Oral evidence to vary, see *supra*, § 46.

51. Reference to a third person.

When a person refers to another for an answer on a particular subject, the answer is, in general, evidence against him.¹

¹ *Duval v. Covenhoven*, 4 Wend. 564.

This rule does not let in statements on a different subject, such as information given to one who was sent for money¹ or for instructions,² not for information.

¹ *Allen v. Killinger*, 8 Wall. 480, sub nom. *Murphy v. Killinger*, 19 L. ed. 470.

² *Duval v. Covenhoven*, 4 Wend. 564.

It does not let in the results of inquiries made by the third person in consequence of the reference, such as what was entered in the books in his charge.¹

¹ Lambert v. People, 6 Abb. N. C. 181, 76 N. Y. 220, 32 Am. Rep. 293.

52. Relevancy.

Whatever testimony will assist in showing which party speaks the truth as to any of the issues is relevant.¹

¹ Platner v. Platner, 78 N. Y. 90.

53. Remote evidence.

Evidence may be rejected as too remote.¹

¹ Xenia Bank v. Stewart, 114 U. S. 224, 231, 29 L. ed. 101, 103, 5 Sup. Ct. Rep. 845, and cases cited; Nicholson v. Waful, 70 N. Y. 604, reversing 6 Hun, 655.

54. Res gestæ.

The rule of the *res gestæ* admits declarations made under the impulse of the occasion, though somewhat separated in time and place, if so woven into it by the circumstances as to receive credit from it.¹

¹ Com. v. Hackett, 2 Allen, 136; Travelers' Ins. Co. v. Mosley, 8 Wall. 397, 19 L. ed. 437 (a leading case, but carrying the rule to the extreme of its usual limits, and not followed to that extent in all the states).

Conversation preceding the act may be admitted.¹

¹ Ahern v. Goodspeed, 72 N. Y. 108, affirming 9 Hun, 263; Schnicker v. People, 88 N. Y. 192.

So may acts and declarations of third persons strangers to the action, as, for instance, fellow passengers in a railroad collision.¹

¹ Twomley v. Central Park, N. & E. River R. Co. 69 N. Y. 158, 25 Am. Rep. 162; Norwich Transp. Co. v. Flint, 13 Wall. 3, 20 L. ed. 556.

The rule of the *res gestæ* does not admit declarations so separated from the occasion as not to gain credit from the impulse

of the exigency, or as to admit the influence of intervening motives.¹

¹ Abbott, Tr. Ev. 588, and cases cited; 14 Am. L. Rev. 817, 15 Am. L. Rev. 71; Waldele v. New York C. & H. R. R. Co. 95 N. Y. 274, 47 Am. Rep. 41, 52 (declaration half an hour after the occurrence); McDermott v. Hannibal & St. J. R. Co. 73 Mo. 516, 39 Am. Rep. 526.

It does not admit a narrative of a past fact.¹

¹ First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181.

And for further cases as to how near the main transaction declarations must be made in order to constitute part of the *res gestæ*, see notes to Ohio & M. R. Co. v. Stein, 19 L.R.A. 733, and Barker v. St. Louis, I. M. & S. R. Co. 26 L.R.A. 843.

55. Statute of frauds.

Where several papers are relied on they must be connected physically or by reference.¹

¹ Tallman v. Franklin, 14 N. Y. 584, 588, reversing 3 Duer, 395; Grafton v. Cummings, 99 U. S. 100, 25 L. ed. 366. Exceptions to this rule—Beckwith v. Talbot, 95 U. S. 289, 24 L. ed. 496.

Whether the law of the forum or of the place of contract applies depends on whether the question is one of title to realty or, if not, on whether the statute is so expressed as to go to the validity of the contract, or as only forbidding an action.¹

¹ Marie v. Garrison, 13 Abb. N. C. 214, 299.

56. Stenographer's minutes.

Testimony given on a former trial of the same cause by a witness now deceased or beyond the jurisdiction¹ may be proved by the stenographer's minutes.²

¹ For cases on the general rule, see 3 Abbott, N. Y. Dig. new ed. 109.

² Stewart v. First Nat. Bank, 43 Mich. 257, 5 N. W. 302 (no question as to mode of authentication seems to have been made). So of a deceased witness.

The minutes, though certified by the stenographer, are not competent without further authentication.¹ Otherwise, where the statute makes them evidence.²

¹ *Phares v. Barber*, 61 Ill. 271 (minor point and facts not stated); s. p. *Golden Terra Min. Co. v. Smith*, 2 Dak. 377, 11 N. W. 98.

² *State v. Frederic*, 69 Me. 400. They may be admissible after his death as entries in the course of duty.

Where the stenographer who transcribed the minutes testified that his transcript was absolutely correct, but that he had not compared it,—Held, not error to exclude for want of comparison. *People v. McKinney*, 49 Mich. 334 (Cooley, J., criminal case).

57. Stipulation as to facts.

A stipulation admitting the facts for the purposes of the trial does not exclude further evidence unless so expressed.¹

¹ *Dillon v. Cockcroft*, 90 N. Y. 649.

An application to relieve against a stipulation, on the ground that the allegations admitted by it were false, must be by special motion. It is not error to refuse to consider the motion at the trial.¹

¹ *Frisbee v. Fitzsimons*, 3 Hun, 674.

The party should ask leave to withdraw a juror.¹

¹ *Dillon v. Cockcroft*, 90 N. Y. 649.

58. Subscribing witness to prove execution.

The general rule is, that the attesting witness to a written instrument is regarded as the person properly to be called to prove its execution, when he can be had,¹ though there are, of course, exceptions to this rule.²

And the statutes allowing parties to testify has not changed the rule requiring the production of the attesting witnesses where they can be had.³

¹ *Stone v. Metcalfe*, 1 Starkie, 53, 4 Campb. 217; *Berney v. Read*, 7 Q. B. 79, 14 L. J. Q. B. N. S. 247, 9 Jur. 620; *Leigh v. Lloyd*, 35 Beav. 455; *Jenks v. Terrell*, 73 Ala. 238; *Barron v. Walker*, 80 Ga. 121, 7 S. E. 272; *Foye v. Leighton*, 24 N. H. 29; *Pullen v. Hutchinson*,

25 Me. 249; *Smith v. Myler*, 22 Pa. 36; *Williams v. Davis*, 2 N. J. L. 277; *McMillan v. Larned*, 41 Mich. 521, 2 N. W. 662; *Barry v. Ryan*, 4 Gray, 523; *Whitaker v. Salisbury*, 15 Pick. 534; *Eichelberger v. Sifford*, 27 Md. 320; *Stevens v. Irwin*, 12 Cal. 306; *M'Murtry v. Frank*, 2 T. B. Mon. 113; *Sims v. Sims*, 5 Humph. 370; *Craddock v. Merrill*, 2 Tex. 495; *Weigand v. Sichel*, 4 Abb. App. Dec. 592; *Mariner v. Saunders*, 10 Ill. 113; *Boyer v. Norris*, 1 Harr. (Del.) 22; *Pearl v. Allen*, 1 Tyler (Vt.) 4; *Glasgow v. Ridgeley*, 11 Mo. 34; *Sampson v. Grimes*, 7 Blackf. 176; *Willson v. Betts*, 4 Denio, 201; *Jones v. Underwood*, 28 Barb. 481; *Van Dyne v. Thayre*, 19 Wend. 162; *Story v. Lovett*, 1 E. D. Smith, 153. *Contra*, *Garrett v. Hanshue*, 53 Ohio St. 482, 35 L.R.A. 321, 42 N. E. 256.

² For a comprehensive treatment of the rule and its exceptions, see note to *Garrett v. Hanshue*, 35 L.R.A. 321 et seq.

³ *Brigham v. Palmer*, 3 Allen, 450; *Kalmes v. Gerrish*, 7 Nev. 31; *Jones v. Underwood*, 28 Barb. 481; *Hodnett v. Smith*, 41 How. Pr. 190.

Contra, *Bowling v. Hax*, 55 Mo. 446; *Garrett v. Hanshue*, 53 Ohio St. 482, 35 L.R.A. 321, 42 N. E. 256.

Temporary absence or sickness of witness will not authorize other evidence to establish the execution of an instrument.¹ But where a witness cannot be had by reason of his death, or because he is beyond the jurisdiction of the court, or his whereabouts cannot be ascertained by diligence, secondary evidence is allowed.² And where witness is interested³ or incompetent⁴ the rule seems to be that secondary evidence is admissible. In some cases the deposition of the witness has been received to prove the execution of the instrument.⁵ And evidence of one of two attesting witnesses establishes *prima facie* the execution of the instrument, and it is not necessary to call the other.⁶ And an instrument over thirty years old need not be established by proof of the subscribing witnesses, the instrument being said to prove itself.⁷

¹ *Brown v. Hicks*, 1 Ark. 232; *Harrel v. Ward*, 2 Sneed, 610; *Gordon v. Payne*, 1 N. C. pt. 1, p. 74 (1 Martin, pt. 1, p. 72); *Harvey v. Jones*, 1 N. C. pt. 1, p. 33 (1 Martin, pt. 1, p. 41); *Jones v. Brewer*, 4 Taunt. 46; *McCord v. Johnson*, 4 Bibb, 531; *Creighton v. Johnson*, Litt. Sel. Cas. (Ky.) 240.

² *Foot v. Cobb*, 18 Ala. 585; *Thomas v. Wallace*, 5 Ala. 268; *Tatum v. Mohr*, 21 Ark. 349; *Nicks v. Rector*, 4 Ark. 252; *McGarrity v. Byington*, 12 Cal. 426, 2 Mor. Min. Rep. 311; *Harris v. Cannon*, 6 Ga. 382; *Doe v. Roe*, 31 Ga. 593; *Groover v. Coffee*, 19 Fla. 61; *Jones v. Coopridge*, 1 Blackf. 47; *Gordon v. Miller*, 1 Ind. 531; *Bennett v.*

Runyon, 4 Dana, 422; McGowan v. Laughlan, 12 La. Ann. 242; Reed v. Wilson, 39 Me. 585; Parker v. Fassitt, 1 Harr. & J. 337; Troeder v. Hyams, 153 Mass. 536, 27 N. E. 775; Dudley v. Sumner, 5 Mass. 438; Little v. Chauvin, 1 Mo. 626; Waldo v. Russell, 5 Mo. 387; Gould v. Kelley, 16 N. H. 551; Armstrong v. Den, 15 N. J. L. 186; Jackson ex dem. Woodruff v. Cody, 9 Cow. 149; Jackson ex dem. Boyd v. Lewis, 13 Johns. 504; Lush v. Druse, 4 Wend. 313; Borst v. Empie, 5 N. Y. 33; Van Rensselaer v. Jones, 2 Barb. 643; Teall v. Van Wyck, 10 Barb. 376; Baker v. Blount, 3 N. C. (2 Hayw.) 404; Edwards v. Sullivan, 30 N. C. (8 Ired. L.) 302; Clark v. Boyd, 2 Ohio, 56; Richards v. Skiff, 8 Ohio St. 586; Gallagher v. London Assur. Corp. 149 Pa. 25, 24 Atl. 115; Harris v. Hoskins, 2 Tex. Civ. App. 486, 22 S. W. 251; Sanborn v. Cole, 63 Vt. 590, 14 L.R.A. 208, 22 Atl. 716; Bogle v. Sullivant, 1 Call (Va.) 561; Currie v. Donald, 2 Wash. (Va.) 58; United States v. Boyd, 8 App. D. C. 440; Barnes v. Trompowsky, 7 T. R. 265.

As to what is the next best evidence to the subscribing witness, there is some conflict of authority; some courts holding that the best evidence is proof of his handwriting, while other courts hold that evidence of the party or his handwriting is equal to that of the attesting witness. As to this conflict, see note in 35 L.R.A. 326.

3 Keefer v. Zimmerman, 22 Md. 274; Godfrey v. Norris, 1 Strange, 34; Mitchell v. Johnson, Moody & M. 176; Cunliff v. Sefton, 2 East, 183; Goss v. Tracy, 1 P. Wms. 289, 2 Vern. 699; Henarie v. Maxwell, 10 N. J. L. 297 (where witness became interested as executor or administrator); Swire v. Bell, 5 T. R. 371; Amherst Bank v. Root, 2 Met. 522; Umphreys v. Hendricks, 28 Ga. 157; Dudley v. Sumner, 5 Mass. 438; Nichols v. Hayes, 13 Conn. 155 (where witness was interested at time of attestation).

Where witness becomes interested after attestation, there is some conflict of authority, some courts holding that in such case handwriting of witness cannot be proved (Johnston v. Knight, 5 N. C. [1 Murph.] 293; Edwards v. Perry, 21 Barb. 600; Hovill v. Stephenson, 5 Bing. 493; Bennet v. Robinson, 3 Stew. & P. [Ala.] 227; McKinley v. Irvine, 13 Ala. 681; Paterson v. Schenck, 15 N. J. L. 434; Jones v. Phelps, 5 Mich. 218; Davison v. Bloomer, 1 Dall. 123, 1 L. ed. 64); but other cases hold that in such case execution of the instrument may be proved by evidence of his handwriting (Hamilton v. Marsden, 6 Binn. 45; Lautermilch v. Kneagy, 3 Serg. & R. 202; Tinnin v. Price, 31 Miss. 422; Bell v. Cowgell, 1 Ashm. [Pa.] 7; Watts v. Kilburn, 7 Ga. 356).

4 Buckley v. Smith, 2 Esp. 697 (incompetent because of marriage); Jones v. Jones, 12 Rich. L. 116; Gilliam v. Perkinson, 4 Rand. (Va.) 325 (incompetent because of color); Bennet v. Robinson, 3 Stew. & P. (Ala.) 227; Jones v. Mason, 2 Strange, 833; Watts v. Kilburn, 7 Ga. 356; Ellis v. Smith, 10 Ga. 253 (incompetent because of conviction of crime).

- ⁵ *Hamilton v. M'Guire*, 2 Serg. & R. 478; *Smith v. Asbell*, 2 Strobb. L. 141; *Rich v. Trimble*, 2 Tyler (Vt.) 349; *Love v. Payton*, 1 Overt. 255; *Charles v. Scott*, 1 Serg. & R. 294; *Oliphant v. Taggart*, 1 Bay, 255; *Clark v. Houghton*, 12 Gray, 38; *Mushrow v. Graham*, 2 N. C. (1 Hayw.) 361.
- ⁶ *Youngs v. Sunderland*, 15 N. J. L. 32; *McAdams v. Stilwell*, 13 Pa. 90; *Jackson v. Sheldon*, 22 Me. 569; *McGowan v. Reid*, 27 S. C. 262, 3 S. E. 337; *Eichelberger v. Sifford*, 27 Md. 320; *Shirley v. Fearne*, 33 Miss. 653, 69 Am. Dec. 375; *Melcher v. Flanders*, 40 N. H. 139; *Russell v. Coffin*, 8 Pick. 143; *O'Sullivan v. Overton*, 56 Conn. 102, 14 Atl. 300; *Frink v. Pond*, 46 N. H. 125; *Smith v. Chamberlain*, 2 N. H. 440; *Green v. Maloney*, 7 Houst. (Del.) 22, 30 Atl. 672; *Teviss v. Collier*, 84 Tex. 638, 19 S. W. 801; *Re Romero*, 43 La. Ann. 975, 9 So. 919; *Burke v. Miller*, 7 Cush. 547; *White v. Wood*, 8 Cush. 413.
- ⁷ *Pendleton v. Robertson*, — Tex. Civ. App. —, 32 S. W. 442; *Healy v. Moul*, 5 Serg. & R. 181; *Nixon v. Porter*, 34 Miss. 697, 69 Am. Dec. 408; *Carter v. Doe*, 21 Ala. 73; *Jackson ex dem. Van Schaick v. Davis*, 5 Cow. 123, 15 Am. Dec. 451; *King v. Sears*, 91 Ga. 577, 18 S. E. 830; *Stockbridge v. West Stockbridge*, 14 Mass. 257; *Bennett v. Runyon*, 4 Dana, 422; *National Commercial Bank v. Gray*, 71 Hun, 295, 24 N. Y. Supp. 997; *Hewlett v. Cock*, 7 Wend. 371; *Crane v. Marshall*, 16 Me. 27, 33 Am. Dec. 631; *Waldron v. Tuttle*, 4 N. H. 377.

59. Tampering.

It is competent to prove that the adverse party has tampered with witnesses¹ or a juror.²

But that plaintiff's agent tampered with evidence is not enough, unless shown to have been done in the course of employment.³

And a party charged with tampering has a right to testify in explanation.⁴

¹ *Gulerette v. McKinley*, 27 Hun, 320 (offer to bribe); *Chicago City R. Co. v. McMahon*, 103 Ill. 485, 42 Am. Rep. 29; *Egan v. Bowker*, 5 Allen, 449 (subornation of a deposition competent though deposition be not used); *Brown v. Byam*, 65 Iowa, 374, 21 N. W. 684; *Snell v. Bray*, 56 Wis. 156, 14 N. W. 14 (letters urging testimony in specified way, or warning against aiding adversary); *People v. Marion*, 29 Mich. 31 (unnecessary to cross-examine the witness first); *Martin v. Barnes*, 7 Wis. 239.

² *People v. Marion*, 29 Mich. 31.

³ *Green v. Woodbury*, 48 Vt. 5; *Chicago City R. Co. v. McMahon*, 103 Ill. 485, 42 Am. Rep. 29.

- ¹ *Homer v. Everett*, 91 N. Y. 641; *Donohue v. People*, 56 N. Y. 208; *Lynch v. Coffin*, 131 Mass. 311 (saying the judge may, in his discretion, allow explanation).

60. Telegrams.

In general, where the course of communication is such that the message as delivered to the telegraph company binds either party, that paper is primary evidence as against such party. Where such that the message as received binds either party, that paper is primary evidence against him.¹

Relevant letters and telegrams which the party, on testifying as a witness, does not deny that he received or sent, may be received if they are a connected part of a correspondence otherwise already in evidence.²

¹ *Oregon S. S. Co. v. Otis*, 14 Abb. N. C. 388 and 394, with note, and cases there collected on all the various aspects of offering telegrams as evidence.

² *Oregon S. S. Co. v. Otis*, 14 Abb. N. C. 388 and 394, with note and cases there collected on all the various aspects of offering telegrams as evidence.

61. Telephones.

When a person places himself in connection with the telephone system, through an instrument in his office, he thereby invites communication, in relation to his business, through that channel; and conversations so held are as admissible in evidence, as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on.¹ And such a conversation is admissible, although the parties were unable to communicate directly with each other, and did so through the medium of an operator.²

And when a person asks for connection with an office or place of business which is connected with the telephone system, and, when the connection is made, someone claiming to represent the office answers, the conversation is admissible without further identification of the office or place of business.³ Otherwise, however, when the communication is of such a nature as to require identification of the particular individual with whom the conversation is carried on.⁴ When identifica-

tion of the individual is necessary the voice is a proper, though not necessarily the exclusive, means of identification.⁵

¹ *Wolfe v. Missouri P. R. Co.* 97 Mo. 473, 3 L.R.A. 539, 10 Am. St. Rep. 331, 11 S. W. 49; *Globe Printing Co. v. Stahl*, 23 Mo. App. 451; *Rock Island & P. R. Co. v. Potter*, 36 Ill. App. 590.

And as to the validity of an acknowledgment through a telephone, it was held that the certificate of the notary in due form was conclusive, in the absence of fraud, duress, accident, or mistake. *Banning v. Banning*, 80 Cal. 271, 13 Am. St. Rep. 156, 22 Pac. 210.

² *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901; *Oskamp v. Gadsden*, 35 Neb. 7, 17 L.R.A. 440, 37 Am. St. Rep. 428, 52 N. W. 718.

³ *Wolfe v. Missouri P. R. Co.* 97 Mo. 473, 3 L.R.A. 539, 10 Am. St. Rep. 331, 11 S. W. 49; *Rock Island & P. R. Co. v. Potter*, 36 Ill. App. 590; *Missouri P. R. Co. v. Heidenheimer*, 82 Tex. 195, 27 Am. St. Rep. 861, 17 S. W. 608; *Guest v. Hannibal & St. J. R. Co.* 77 Mo. App. 258. *Contra*, *Planters' Cotton Oil Co. v. Western U. Teleg. Co.* 126 Ga. 621, 6 L.R.A.(N.S.) 1180, 55 S. E. 495.

⁴ *J. Oberman Brewing Co. v. Adams*, 35 Ill. App. 540; *Kimbark v. Illinois Car & Equipment Co.* 103 Ill. App. 632; *C. C. Thompson & W. Co. v. Appleby*, 5 Kan. App. 680, 48 Pac. 933; *Murphy v. Jack*, 142 N. Y. 215, 40 Am. St. Rep. 590, 36 N. E. 882; *Swing v. Walker*, 27 Pa. Super. Ct. 366.

But see *Guest v. Hannibal & St. J. R. Co.* 77 Mo. App. 258, and *Globe Printing Co. v. Stahl*, 23 Mo. App. 451, holding that when one is connected with the place of business of one with whom he desires to converse, and is answered by someone assuming to be such person, it will be presumed that he is such person.

⁵ *People v. Ward*, 3 N. Y. Crim. Rep. 483; *Galt v. Woliver*, 103 Ill. App. 71; *Shawyer v. Chamberlain*, 113 Iowa, 742, 86 Am. St. Rep. 411, 84 N. W. 661; *Deering v. Shumpik*, 67 Minn. 348, 69 N. W. 1088; *Stepp v. State*, 31 Tex. Crim. Rep. 349, 20 S. W. 753; *People v. Willett*, 92 N. Y. 29; *State v. Howard*, 92 N. C. 772; *Davis v. State*, 15 Tex. App. 594.

For a detailed review of the cases on the question of necessity and sufficiency of identification as a foundation for the admission of a conversation by telephone, see note in 6 L.R.A.(N.S.) 1180.

Whether the utterance of voice as heard through the telephone is alone sufficient evidence of identity, see also 28 Alb. L. J. 422.

62. Trust.

Oral evidence is competent to establish a trust, notwithstanding the statute of frauds, where its exclusion would work a fraud.¹

¹ 13 Abb. N. C. 334, 338, note; Wood v. Rabe, 96 N. Y. 414, 48 Am. Rep. 640.

As to tracing records, see Knatchbull v. Hallett, L. R. 13 Ch. Div. 696. 49 L. J. Ch. N. S. 415, 42 L. T. N. S. 421, 28 Week. Rep. 732: 9 Abb. N. C. 41, note.

As to oral evidence of trust in partnership land, see note to Robinson Bank v. Miller, 27 L.R.A. 404; to vary trust, note to Collar v. Collar, 13 L.R.A. 622; to establish trust, notes to Ferguson v. Rafferty, 6 L.R.A. 47, and Durkin v. Cobleigh, 17 L.R.A. 270.

63. United States courts.

*"The mode of proof, in the trial of actions at common law, shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided."*¹

¹ United States Rev. Stat. § 861, U. S. Comp. Stat. 1901, p. 661.

The provisions referred to as "hereinafter" relate to taking depositions, and do not sanction examinations before trial, such as allowed by recent state statutes.¹

¹ Ex parte Fisk, 113 U. S. 713, 726, 28 L. ed. 1117, 1122, 5 Sup. Ct. Rep. 724.

Every action at law in a court of the United States must be governed by the rule or by the exceptions which U. S. Rev. Stat. § 861, *supra*, provides. There is no place for exceptions made by state statutes.¹

¹ Ex parte Fisk, *supra*.

"In the courts of the United States, no witnesses shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: Provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court."¹

¹ United States Rev. Stat. § 858, U. S. Comp. Stat. 1901, p. 659.

This provision (U. S. Rev. Stat. § 858, U. S. Comp. Stat. 1901, p. 659), wherever it differs from the state statutes, controls the United States courts.¹

¹ King v. Worthington, 104 U. S. 44, 51, 26 L. ed. 652, 655.

In other respects than as above provided, the law of evidence prevailing in the state courts controls the courts of the United States.¹

¹ United States Rev. Stat. § 858, U. S. Comp. Stat. 1901, p. 659, last clause; Vance v. Campbell, 1 Black, 427, and note in 17 L. ed. 168; King v. Worthington, 104 U. S. 44, 50, 26 L. ed. 652, 654; Connecticut Mut. L. Ins. Co. v. Union Trust Co. 112 U. S. 250, 255, 28 L. ed. 708, 710, 5 Sup. Ct. Rep. 119.

See also on this question, note to Re Secretary of the Treasury, 11 L.R.A. 275.

64. Usage.

In the interpretation of a contract, a uniform, continuous, and well-settled usage pertaining to its subject may be proved, if not opposed to the law and not unreasonable.¹

¹ Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407; Barnard v. Kellogg, 10 Wall. 383, 19 L. ed. 987; Fuller v. Robinson, 86 N. Y. 306, 40 Am. Rep. 540.

Evidence of custom to compel consignee to pay freight and deduct it from price of goods, not admissible in action against guarantor of price of lumber to be shipped f. o. b. Chandler Lumber Co. v. Radke, 136 Wis. 495, 22 L.R.A.(N.S.) 713, 118 N. W. 185.

For the general rule and its exceptions, see 1 Abb. N. C. 470, note, and Abbott, Trial Ev. 296.

As to the admissibility of oral evidence of a custom or usage, see note to Conestoga Cigar Co. v. Finke, 13 L.R.A. 440.

That evidence of usage or custom is not admissible on a question of negligence, see note to MacCulsky v. Klosterman, 10 L.R.A. 786.

Usage cannot be proved to contradict a rule of law;¹ or contradict unambiguous terms in the contract;² or its legal effect.³

¹ Corn Exch. Bank v. Nassau Bank, 91 N. Y. 74, and cases cited; Barnard v. Kellogg, 10 Wall. 383, 19 L. ed. 987. See also note to Conestoga Cigar Co. v. Finke, 13 L.R.A. 438.

- ² *Farmers' & M. Nat. Bank v. Logan*, 74 N. Y. 568. See also note to *Conestoga Cigar Co. v. Finke*, 13 L.R.A. 440.
- ³ *Barnard v. Kellogg*, 10 Wall. 383, 19 L. ed. 987.

Usage of language may be proved to show the meaning of words otherwise unambiguous.¹

- ¹ *Myers v. Sarl*, 30 L. J. Q. B. N. S. 9, 7 Jur. N. S. 97, 9 Week. Rep. 96. Evidence to prove prevailing custom as to system of reckoning time is admissible in determining meaning of word "noon" in contract. *Rochester German Ins. Co. v. Peaslee-Gaulbert Co.* 120 Ky. 752, 1 L.R.A. (N.S.) 364, 87 S. W. 1115, 89 S. W. 3, 9 A. & E. Ann. Cas. 324.

If a usage of a particular trade or locality is proved, the adverse party, if not of such trade, may rebut its effect by proving his ignorance of it.¹

- ¹ *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407; *Johnson v. DePeyster*, 50 N. Y. 666.

The good faith of a transaction being impugned, conformity to usage may be shown.¹

- ¹ *Dutchess County Mut. Ins. Co. v. Hachfield*, 73 N. Y. 226.

65. Value and damages.

Where the witness is competent and states the facts, his conclusion as to the amount of pecuniary injury to property having a market value—*i. e.*, the value before and after the injury—is generally deemed admissible, although it may be identical with the question on which the jury are to find.¹

- ¹ *Abbott*, Trial Ev. 598; 3 *Abbott*, N. Y. Dig. 79; 7 *Abbott*, N. Y. Dig. 755-757.

As to opinion evidence on a question of the value of land, taken in a condemnation proceeding, see note to *San Diego Land & Town Co. v. Neale*, 3 L.R.A. 83.

As to opinion evidence on the question of the value of legal services, see *Louisville, N. A. & C. R. Co. v. Wallace*, 136 Ill. 87, 26 N. E. 493, and note to same case, 11 L.R.A. 787.

66. X-ray photographs.

The same rules which govern the introduction in evidence of
Abbott, Civ. Jur. T.—30.

ordinary photographs are applicable to X-ray photographs, and the courts have unanimously held that when properly verified such photographs are admissible.¹ The proper foundation for the admission of such evidence must, however, be laid.² Whether a photograph is sufficiently verified, whether it appears to be fairly representative of the object portrayed, and whether it may be useful to the jury, are preliminary questions addressed to the trial judge, and his determination thereon is not open to exception.³ But the discretion of the trial judge as to the admission of such evidence is not unlimited.⁴ And it has been held that it is not necessary to render notice of the taking of such a photograph to be used by one party on the trial of a cause to the adverse party, so that the latter may be represented at the time of the taking.⁵ Such a photograph, even when properly admitted, however, is not conclusive, but is to be weighed like other competent evidence.⁶

¹ Underhill, *Crim. Ev.* 2d ed. § 50; *Miller v. Mintun*, 73 Ark. 183, 83 S. W. 918; *Haywood v. Dering Coal Co.* 145 Ill. App. 506; *Chicago & J. Electric R. Co. v. Spence*, 213 Ill. 220, 104 Am. St. Rep. 213, 72 N. E. 796; *Smith v. Grant*, 29 Chicago Leg. News, 145; *State v. Matheson*, 130 Iowa, 440, 114 Am. St. Rep. 427, 103 N. W. 137, 3 A. & E. Ann. Cas. 430; *Geneva v. Burnett*, 65 Neb. 464, 58 L.R.A. 287, 101 Am. St. Rep. 628, 91 N. W. 275; *Deforge v. New York, N. H. & H. R. Co.* 178 Mass. 59, 86 Am. St. Rep. 464, 59 N. E. 669; *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. 445; *Miller v. Dumon*, 24 Wash. 648, 64 Pac. 804; *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816. In the last case the court said: "It is the duty of courts to use every means for discovering the truth reasonably calculated to aid in that regard. In the performance of that duty, every new discovery, when it shall have passed beyond the experimental stage, must necessarily be treated as a new aid in the administration of justice in the field covered by it. In that view, courts have shown no hesitation, in proper cases, in availing themselves of the art of photography by the X-ray process."

And that a sciagraph of an injured hip was taken five years after the injury does not render it inadmissible in evidence upon the question of the character of the injury. *Bonnet v. Foote*, 47 Colo. 282, 28 L.R.A. (N.S.) 136, 107 Pac. 252.

But where plaintiff had offered X-ray pictures in evidence, it was held in *Deforge v. New York, N. H. & H. R. Co.* 178 Mass. 59, 86 Am. St. Rep. 464, 59 N. E. 669, that the defendant should be permitted to introduce the glass plate from which the plaintiff's pictures were taken, and also pictures made for the defendant from the same plate;

and the refusal to admit such evidence on behalf of the defendant was held to be a violation of defendant's rights.

² In *Bruce v. Beall*, 99 Tenn. 203, 41 S. W. 445, it was held that the competency of the photograph depends upon the science, skill, experience, and intelligence of the party taking the picture and testifying with regard to it, and that, lacking these important qualifications, it should not be admitted.

In *Carlson v. Benton*, 66 Neb. 486, 92 N. W. 600, 1 A. & E. Ann. Cas. 159, however, the court says that the rule announced in *Bruce v. Beall*, though doubtless applicable to the facts of that case, is too narrow to be regarded as a general rule; that maps, photographs, drawings, and models are admissible in evidence when it is shown that they fairly represent the object or objects under investigation, and that there is no good reason why the same rule should not apply to radiographs. It was therefore held that it was not essential to prove the competency of the person taking the photograph, the condition of the apparatus with which it was taken, or that the circumstances under which it was taken were such as to insure an accurate picture, it being sufficient where the doctor who took the picture, after showing his competency as an expert, testified that the photograph was a true representation of the injured member.

And failure to show that the doctors taking the radiograph were experts in such matters is held in *Kimball v. Northern Electric Co.* — Cal. —, 113 Pac. 156, not to constitute reversible error, where the witnesses were qualified surgeons, the court saying that it is well-known that the X-ray is almost universally understood and used by surgeons of the present day in examining injuries.

And testimony of the person taking the picture, that he was an X-ray expert and regularly engaged in taking such photographs for physicians, and that the photograph was an accurate and correct representation, was held in *Chicago & J. Electric R. Co. v. Spence*, 213 Ill. 220, 104 Am. St. Rep. 213, 72 N. E. 796, to be sufficient to justify the admission of the picture.

And where the doctor taking the photographs testified that he was a post-graduate physician and surgeon, and had had twelve years' experience in the matter of making X-ray photographs, and that he was competent to make correct X-ray views, and that the negatives and the prints therefrom were correct representations of what they purported to be,—this preliminary proof was held in *Chicago City R. Co. v. Smith*, 226 Ill. 178, 80 N. E. 716, to be sufficient to authorize the reception of the photographs in evidence.

³ *Jameson v. Weld*, 93 Me. 345, 45 Atl. 299.

⁴ *Carlson v. Benton*, 66 Neb. 486, 92 N. W. 600, 1 A. & E. Ann. Cas. 159.

⁵ *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816.

⁶ *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. 445.

XVII.—ABSENCE OF JUDGE AND PROCEEDINGS OUTSIDE OF THE COURT ROOM.

1. Absence during trial or argument.
2. Absence at reception of verdict.
3. Proceedings outside of the court room.

1. Absence during trial or argument.

According to the weight of authority, in the trial of criminal cases the presence of the judge at all stages of the trial is absolutely necessary.¹ The authorities differ as to the rule in civil cases, though their tendency seems to be toward a less strict rule. While they all recognize that it is the judge's duty to be present at all stages of the trial, and some few hold that his presence is absolutely necessary, the majority of the cases seem to regard the mere fact of absence for a short time as not sufficient to require a reversal or a new trial, unless the party complaining shows that some harm resulted to him.²

The argument of a cause is as much a part of the trial as the hearing of evidence, and the judge cannot properly absent himself from the courtroom during the course of counsel's discussion.³

¹ See note in 41 L.R.A. 569, reviewing all authorities.

² Thus, in *Dehogue v. Western U. Teleg. Co.* — Tex. Civ. App. —, 84 S. W. 1066, the court says that the approved rule is that the mere absence of the judge during the progress of the trial, when no objection is made, will not necessarily require the granting of a new trial, when the absence is only for a few moments and for a necessary purpose; and that in order for such absence to become reversible error it must appear not only that objection was made to the judge's failure to suspend the trial, but that the absence of the judge resulted in some harm to the losing party. In this case it appeared that the parties consented to the trial proceeding during the absence of the judge, and it was therefore held that such absence did not constitute reversible error, though the court said: "We are decidedly of the opinion that the judge cannot properly absent himself from the court room, where he cannot see or hear what is taking place therein, for any considerable length of time during a trial; and that, should he do so without

the consent of the parties, the party interested in the proceeding is entitled to a new trial, where he shows that, by reason of such absence, harm has resulted to him.

So in *Horne v. Rodgers*, 110 Ga. 362, 49 L.R.A. 176, 35 S. E. 715, the absence of a judge from a court room while a trial is in progress for a brief space of time was held not to be ground for reversal of the judgment, where the evidence demanded the verdict rendered, and his absence was known to counsel, who made no objection, and no request to suspend the trial, and no motion for a mistrial, upon the judge's return. But the court expressed its reluctance to follow this rule, and only did so because it felt constrained thereto by previous decisions of the Georgia courts in criminal cases. The court said: "If it were an open question, we would hold that the presence of the judge at all stages of the trial is absolutely necessary to its validity, and that the absence of a judge from the trial without suspending the same, for any length of time, no matter how short, for any purpose, however urgent, would vitiate the whole proceeding, whether objection was made by the parties interested or not, and whether an injury resulted to anyone or not."

So, in *Gorham v. Sioux City Stock Yards Co.* 118 Iowa, 749, 92 N. W. 698, it is said that in civil cases, in the absence of any showing to the contrary, it will be presumed that the judge was absent with the consent of the parties, and that where this is the case, his absence is not alone ground for reversal.

And the temporary absence of the judge during the progress of a jury trial is not reversible error where the question asked during his absence, by the party complaining, was repeated and allowed by the judge on his return. *Chicago City R. Co. v. Anderson*, 93 Ill. App. 419.

But in *Smith v. Sherwood*, 95 Wis. 558, 70 N. W. 682, it was held that the absence of a judge from the court room for any considerable length of time, without the consent of the parties to the suit, was reversible error.

And that judicial functions cannot be delegated to be exercised by an agent or deputy, and that it is error for a circuit judge to call an attorney to occupy the bench in a civil case before it is determined, without the consent of the parties appearing of record, is declared in *Davis v. Wilson*, 65 Ill. 525.

And in *Wight v. Wallbaum*, 39 Ill. 554, it is held that the validity of the proceedings in a circuit court depends upon the presence of the judge, and that he cannot authorize any ministerial officer of the court to exercise his judicial duties.

So, the appellate court will not presume, on appeal, that the judgment appealed from was rendered upon a proper trial of the issue, where the record shows that during the trial the judge of the court below left the bench, and his place was assumed by a member of the bar who

was not a judge, but who tried the cause. It will treat the proceedings as *coram non judice* and the judgment as void. *Van Slyke v. Trempealeau County Farmers' Mut. F. Ins. Co.* 39 Wis. 390, 20 Am. Rep. 50.

³ *Smith v. Sherwood*, 95 Wis. 558, 70 N. W. 682. To the same effect are *Palin v. State*, 38 Neb. 867, 57 Neb. 743; *Meredeth v. People*, 84 Ill. 479 (criminal cases). In the latter case the court says: "The absence of the judge from the courtroom, engaged in other judicial labors for a part of two days, in a trial of this magnitude, cannot be justified on any principle or for any cause. It is not allowable in a trial involving only mere property interests, much less in a case where the life of a human being depends upon the issue."

But the absence of the judge during argument of the cause, although improper, is not ground for reversal if it satisfactorily appears that no prejudice resulted. *Allen v. Ames College R. Co.* 106 Iowa, 602, 76 N. W. 848; *Horne v. Rodgers*, 110 Ga. 362, 49 L.R.A. 176, 35 S. E. 715. See also *Turbeville v. State*, 56 Miss. 793 (a criminal case), in which it was held that to constitute reversible error there must be a relinquishment by the judge of the functions of his office, or such bodily absence as prevents their instant assertion when demanded. So, in a recent criminal case in Illinois, the absence of the judge from the courtroom during argument, although improper, was held not to be ground for reversal where he could still hear the argument and was in a position to pass upon any question which might properly arise. *Schintz v. People*, 178 Ill. 320, 52 N. E. 903.

So, where the judge, while counsel was summing up, retired to an adjoining room to examine requests to charge, the door between the rooms being open so that the judge could see and hear what was going on,—this was held not reversible error. *Chicago City R. Co. v. Creech*, 207 Ill. 400, 69 N. E. 919.

It seems to be a practice with some courts in Missouri to send the jury out of the court room with counsel for the purpose of hearing the argument while the court proceeds to the trial of another cause. But this practice has been severely criticized. *Brownlee v. Hewitt*, 1 Mo. App. 360; *State ex rel. Gehring v. Claudius*, 1 Mo. App. 557. In the latter case the court says: "We will not say that in no case must a court send the parties and the jury to another room to argue a cause after the evidence is closed, or that in no case must the judge absent himself from the court room while the argument is in progress, but we have no hesitation in saying that the practice is full of risk; that it imposes upon counsel on both sides the obligation of the most scrupulous observance of professional propriety; and that any disregard of this obligation will incur extreme hazard of a reversal if the party charged with it has profited by such disregard." The two cases last cited are also authority for the proposition that neither party is bound by his consent to such a proceeding, since counsel are in such a position that they cannot well refuse to adopt the court's suggestion.

A similar custom seems to be upheld in Iowa as a consequence of the prohibition against any limitation by a nisi prius judge upon the time to be used by counsel in their arguments to the jury. *Hall v. Wolff*, 61 Iowa, 559, 16 N. W. 710.

Complaint that a jury was sent into another room to hear the arguments of counsel while the court proceeded with other business in the court room cannot be first made upon appeal, where no objection was offered at the time and it does not appear that any unfairness resulted. *Burns v. Wilson*, 1 Mo. App. 179.

2. Absence at reception of verdict.

The reception of a verdict is a judicial act which cannot be delegated to be exercised by agent or deputy.¹

¹ **An attorney** cannot be authorized by the court to receive a verdict even with the consent of the parties. *Britton v. Fox*, 39 Ind. 369. Nor can the parties by consenting to the court's suggestion authorize the clerk to receive a verdict and discharge the jury in the absence of the judge. *Baltimore & O. R. Co. v. Polly*, 14 Gratt. 447; *Willett v. Porter*, 42 Ind. 250. Contra, *Ferrell v. Hales*, 119 N. C. 199, 25 S. E. 821. See also *Davis v. Wilson*, 65 Ill. 525, in which the putting of a verdict in form and the discharging of the jury are held to be judicial functions which cannot be delegated to an attorney without the consent of the parties appearing of record. Whether such consent would authorize the proceeding the court expressly refrained from deciding.

The judge presiding at the jury trial has no power, after submitting the case to the jury, to withdraw and authorize the clerk to receive the verdict. Such a verdict and the judgment entered thereon are void if no objection is made by the parties. *Morris v. Harburger*, 100 Abb. Div. 357, 91 N. Y. Supp. 409.

Nor does the fact that the judge who conducted the trial was weary authorize him to appoint someone else to take his place; and, where the jury retired to deliberate in the afternoon, and subsequently the judge asked an attorney to receive the verdict, and left the court room, and did not return until the next morning, during which time the jury came in and the verdict was taken by such attorney and the jury discharged,—the verdict is invalid, and a new trial should be granted; and the fact that the attorneys for the parties were present, and did not object, does not make the appointment effective. *Britton v. Fox*, 39 Ind. 369.

But in *Dubuc v. Lazell, D. & Co.* 182 N. Y. 482, 75 N. E. 401, it is held that counsel may stipulate in open court that the verdict be entered by the clerk in the absence of the judge, and such a verdict will be valid.

And in *Terreberry v. Mathot*, 111 App. Div. 235, 97 N. Y. Supp. 21, it is held that the verdict may be received by another than the judge, that such reception is only an irregularity, and, if not objected to, is waived by making a motion relative to it before the judge who received the verdict.

3. Proceedings outside of the court room.

As has been already noted, the jury are sometimes permitted to take a view of premises outside the court room.¹ To permit other proceedings to be had outside the court room is irregular, but is generally no ground for reversal where no prejudice has resulted.²

¹ See ante, chapter xv., Exhibition and View.

² Taking the testimony of the plaintiff at her own house to which the presiding judge and the jurors go for that purpose against defendant's objection, although it cannot be regarded as done in open court, does not deprive the court of jurisdiction or nullify the judgment, but is at most an irregularity. *Selleck v. Janesville*, 100 Wis. 157, 41 L.R.A. 563, 75 N. W. 975. But see *Funk v. Carroll County*, 96 Iowa, 158, 64 N. W. 768, in which it was held that the court has no authority, unless by consent of the parties, to adjourn to a private house for the purpose of taking the testimony of a sick witness who is unable to attend the courthouse, and that the court so sitting is without jurisdiction. It is to be observed that this case was decided under a statute providing that courts must be held at the place provided by law, except for the determination of certain specified matters, when they may, by consent of parties, be held at some other place.

The fact that a trial is begun in one room and finished in another across the hall from the first is not ground for setting aside the verdict. *Christie v. Bowne*, 76 Hun, 42, 27 N. Y. Supp. 657. So the adjournment of the county court by the presiding judge to the house of an assistant judge who was ill and unable to leave his residence, situated in the same village as the courthouse, and the rendition of judgment at that place, are within the power of the court, under statutes providing that the county court for that county shall be held in that village, and that, where the state of business requires, it may adjourn within the county to any day previous to the next stated term. *Bates v. Sabin*, 64 Vt. 511, 24 Atl. 1013. And the proceedings of the court in which the judge, after calling the case, directed the jury, officers, parties, and witnesses to repair to a neighboring law office while arguments in the preceding trial were being made, where the judge called and swore the jury and witnesses, heard the testimony and received the verdict, discharged the jury and delivered the proceedings to the clerk, after which he returned to the bench and conducted the business of the court as usual, though ir-

regular, do not render the judgment void or authorize its reversal, where the complaining party took part in all proceedings, and there was nothing to show that he did not have a fair trial or that a different judgment should have been rendered. *Mohon v. Harkreader*, 18 Kan. 383. And see post, chapter xxv. § 2.

For a further discussion of this question, see note to *Selleck v. Janesville*, 41 L.R.A. 563.

XVIII.—IMPROPER CONDUCT OF JUDGE.

1. Comments on witnesses or their testimony.
2. Complaint of consumption of time.
3. Remarks to counsel.
4. Exceptions to incidental remarks.
5. Effect of judge entering jury room or communicating with jury not in open court.
 - a. In general.
 - b. Consent; waiver of objection.

1. Comments on witnesses or their testimony.

Each party is entitled to have the jury pass upon the evidence without having its effect or importance altered, either as to credibility or value, by the indulgence of the court in remarks to witnesses or comments upon them or their testimony, which may tend to either magnify or diminish it in the jury's estimation.¹

¹ *McMinn v. Whelan*, 27 Cal. 300; *Ruppert v. Wolf*, 4 App. D. C. 556; *Hudson v. Hudson*, 90 Ga. 581, 16 S. E. 349; *Kane v. Kinnare*, 69 Ill. App. 81; *McDuff v. Detroit Evening Journal Co.* 84 Mich. 1, 47 N. W. 671; *Schmidt v. St. Louis R. Co.* 149 Mo. 269, 59 S. W. 921.

A remark of the court to counsel who is seeking to shield a witness from more fully answering a question that the witness has not yet answered the question "fairly," is not such a reflection upon the credibility of the witness as will justify a reversal of the judgment. *Chicago City R. Co. v. McLaughlin*, 146 Ill. 353, 34 N. E. 796. And a reprehensible remark by the court concerning the testimony of a witness will not require a reversal where it cannot be deemed to have affected the result. *Connor v. Wilkie*, 1 Kan. App. 492, 41 Pac. 71.

The discretion of the trial court in addressing remarks to a witness who, in the court's opinion, is purposely trying to avoid disclosing facts within his knowledge, will not be disturbed except for a clear abuse. *State v. Eldred*, 8 Kan. App. 625, 56 Pac. 153. The court does not necessarily abuse its discretion by interrupting a witness to ask him, "How do you know?" "Tell what you know," "Don't tell what you suppose," etc. (*Ferguson v. Hirsch*, 54 Ind. 337). Nor by stating to a witness that his answer, "I don't remember," will not do. *State v. Atkinson*, 33 S. C. 100, 11 S. E. 693. So the court may, where a witness is consuming time by evasive answers to a question on cross-

examination as to whether a matter to which he has testified on his direct examination is true, state to the witness that he must know whether or not such is the fact. *Sanders v. Bagwell*, 37 S. C. 145, 15 S. C. 714, 16 S. E. 770.

And judges may often appropriately even express their opinion on the facts to the jury in civil causes, providing they fairly leave the decision of the questions of fact to the jury. *Finan v. New York C. & H. R. R. Co.* 111 App. Div. 383, 97 N. Y. Supp. 859.

So, the judge may comment on the evidence and state claims of parties. *Sackett v. Carroll*, 80 Conn. 374, 68 Atl. 442.

And the court may instruct the jury to take into consideration the professional standing and experience of experts. *Cosgrove v. Burton*, 104 Mo. App. 698, 78 S. W. 667.

In considering a motion for nonsuit, the judge may comment on the force and effect of the evidence. *Continental Ins. Co. v. Wickham*, 110 Ga. 129, 35 S. E. 287.

And suggestions of the judge that, if he were a juror he would rely on books introduced, rather than on the memory of a witness as to a transaction which occurred seven years before, are not error. *Lee v. Williams*, 20 Pa. Super. Ct. 349.

If a judge's remarks during the trial are deemed improper, there must be a proper objection and exception. *Belt R. Co. v. Confrey*, 111 Ill. App. 473.

But the judge should not manifest any bias for or against either party (*Schwanz v. Wujek*, 163 Mich. 492, 128 N. W. 731); nor by comment direct attention to supposed contradiction in a witness's testimony (*Merritt v. Bush*, 122 Ill. App. 189); nor express his opinion as to the truthfulness of witnesses (*Newkirk v. Dimmers*, 17 Okla. 525, 87 Pac. 603); nor suggest his opinion as to boundaries of certain lands (*Thompson v. Kelly*, 47 Tex. Civ. App. 180, 97 S. W. 326); nor express his opinion as to the existence or nonexistence of any fact (*United R. & Electric Co. v. Carneal*, 110 Md. 211, 72 Atl. 771); nor suggest that testimony of certain witnesses should be given greater weight because of their vocation or superior opportunities (*Simons v. Mason City & Ft. D. R. Co.* 128 Iowa, 139, 103 N. W. 129); nor instruct jury to give greater weight to the testimony of credible eyewitnesses than to that of experts (*Nelson v. McLellan*, 31 Wash. 208, 60 L.R.A. 793, 96 Am. St. Rep. 902, 71 Pac. 747); nor express his opinion, on conflicting evidence, as to the amount of recovery (*Darien & W. R. Co. v. McKay*, 132 Ga. 672, 64 S. E. 785); nor by a question to a witness intimate an opinion as to the truth of a material issue (*Bryant v. Anderson*, 5 Ga. App. 517, 63 S. E. 638); nor suggest that defendant might have waived the statutory bar against plaintiff's testimony, thereby making it available (*Laird v. Laird*, 127 Mich. 24, 86 N. W. 436); nor state that the case was trivial and ought not to have been

brought in that court (*McMahon v. Metropolitan Street R. Co.* 97 App. Div. 466, 89 N. Y. Supp. 1062).

And under the Texas statute prohibiting comments by the judge, it is error for him to say that the fact that a man's reputation had not been discussed was the very best evidence that it was good. *Howorth v. Carter*, 23 Tex. Civ. App. 469, 56 S. W. 539.

And the error of a judge in making a remark tending to discredit a witness is not cured by an instruction not to be influenced by remarks of the court relative to the credibility of witnesses. *Swenson v. Erickson*, 90 Ill. App. 358.

The following cases present a variety of remarks on the evidence, by the trial judge, with the decisions thereon: *Central R. Co. v. Duffey*, 116 Ga. 346, 42 S. E. 510 (illustrating use of mortality and annuity table, not error); *Belt R. Co. v. Confrey*, 111 Ill. App. 473 (minimizing the testimony of a witness and stating a disputed fact, error); *Pace v. Roberts, J. & R. Shoe Co.* 103 Mo. App. 662, 78 S. W. 52 (suggesting a maximum of damages above plaintiff's claim, error); *Wells v. Missouri-Edison Electric Co.* 108 Mo. App. 607, 84 S. W. 204 (suggesting as a basis of damages for personal injuries, plaintiff's physical pain and mental anguish, and also whether the injury was temporary or permanent, not error); *Lownsdale v. Grays Harbor Boom Co.* 36 Wash. 198, 78 Pac. 904 (stating plaintiff's reasons for withdrawing a cause of action, not error); *Winklebleck v. Winklebleck*, 160 Ind. 570, 67 N. E. 451 (commenting on weight and credit to be given to witnesses apparently equally credible, as depending on opportunities for acquiring information, and manner of giving testimony, error); *Treschman v. Treschman*, 28 Ind. App. 206, 61 N. E. 961 (standard by which jury should determine reputation of witness for truthfulness, opinion or silence of neighbors, not error); *Petrich v. Union* 117 Wis. 46, 93 N. W. 819 (conflicting testimony, suggesting reasons by which apparent mistake may be accounted for, error); *Renaud v. Bay City*, 124 Mich. 29, 82 N. W. 617 (remarks on conduct of city officers in relation to alleged defective sidewalks, error).

2. Complaint of consumption of time.

A natural impatience manifested by the trial judge at the length of time consumed by counsel in examination or argument is not ground for reversal,¹ though an unjust characterization of a cause as trivial and unworthy the time spent upon it may furnish ground for exception.²

¹ *Anglo-American Pkg. & Provision Co. v. Baier*, 31 Ill. App. 653; *McMahon v. Eau Claire Waterworks Co.* 95 Wis. 640, 70 N. W. 829; *Polhill v. Brown*, 84 Ga. 338, 10 S. E. 921.

But for the court to accompany an abrupt dismissal of a witness from the stand with the remark, "I am not going to stay here any longer and have a witness asked questions for the mere purpose of taking up time," is reversible error, where the court has taken nearly as much time as counsel in the examination of the witness and at the time counsel was endeavoring to elicit material testimony. *Darrow v. Pierce*, 91 Mich. 63, 51 N. W. 813.

² It is error for the court to characterize a suit brought to redress for the maltreatment of a mother and her infant child without legal right or excuse as "trivial" and unworthy of the time spent upon it, where no unusual amount of time was consumed on trial and no desire to procrastinate was apparent on either side. *Zube v. Weber*, 67 Mich. 52, 34 N. W. 264.

3. Remarks to counsel.

Misconduct of counsel is a proper subject for comment by the trial judge,¹ but an unwarranted intimation that counsel is pursuing an unfair course in his conduct of the trial will justify a reversal.² And it is improper for the court to address remarks to counsel to whom clients have intrusted their interests which reflect upon his want of capacity or comprehension and tend to disparage him in the eyes of the jury.³

¹ *Whitney v. Swensen*, 43 Minn. 337, 45 N. W. 609; *Krapp v. Hauer*, 38 Kan. 430, 16 Pac. 702; *Tuller v. Ginsburg*, 99 Mich. 137, 57 N. W. 1099.

² *McIntosh v. McIntosh*, 79 Mich. 198, 44 N. W. 592.

But the remark of the judge when requested to charge the jury in writing that such requests were never made except when counsel were angry with court and that there was no excuse therefor when there was a stenographer to report the case, though improper, will not require a reversal where no prejudice affirmatively appears. *McLeod v. Wilson*, 108 Ga. 790, 33 S. E. 851.

³ *Williams v. West Bay City*, 119 Mich. 395, 78 N. W. 328; *Wheeler v. Wallace*, 53 Mich. 355; *Walker v. Coleman*, 55 Kan. 381, 40 Pac. 640.

It is error for the court to hold up to ridicule one of the counsel for making proper objections, and threatening him with fine and imprisonment. *Bennett v. Harris*, 68 Misc. 503, 124 N. Y. Supp. 797.

And counsel has the right to present his theory of the case without being charged with duplicity, ignorance, or bad faith; and if the court violates this rule, and, during the progress of the trial, persistently charges counsel with lack of preparation and failure to prove his case,—such comments by the judge constitute reversible error. *Kleinert v. Federal Brewing Co.* 107 App. Div. 485, 95 N. Y. Supp. 406.

But caustic remarks addressed to counsel in criticism of his mode of cross-

examining witnesses are not ground for complaint unless prejudice affirmatively appears. *McMahon v. Eau Claire Waterworks Co.* 95 Wis. 640, 70 N. W. 829.

4. Exceptions to incidental remarks.

An exception lies to remarks of the judge which are in the nature of instructions to the jury or calculated to be so understood by them.¹

¹ *Daly v. Byrne*, 77 N. Y. 182, affirming 11 Jones & S. 261; *Caldwell v. New Jersey S. B. Co.* 47 N. Y. 282.

The rule in New York seems to have been that improper remarks by the judge in the presence of the jury could only be reviewed by a motion to set aside the verdict unless they announced an erroneous rule of law. *Ibid.*; *Conners v. Walsh*, 131 N. Y. 590, 30 N. E. 59. But in the recent case of *Klinker v. Third Ave. R. Co.* 26 App. Div. 322, 49 N. Y. Supp. 703, it is said that improper remarks and comments by the trial judge during the trial may be reviewed upon an exception under a Code amendment which provides that the stenographer at a jury trial shall fully note each and every ruling, remark, or comment of the judge during the trial when requested to do so by either party "together with each and every exception taken to any such ruling, decision, remark, or comment."

5. Effect of judge entering jury room or communicating with jury not in open court.

a. In general.—That any communication between the judge and jury after they have retired to deliberate upon the verdict, except in open court, is improper, is well established.¹ And in many cases it has been held to be error for the court to send additional instructions to the jury room without the consent of, or notice to, parties or counsel.² It is also held to be error for the judge to answer questions sent by the jury without the consent of counsel, without regard to the nature of the communication.³ And for the judge to enter the jury room has also been held to be reversible error in a number of cases.⁴ In some cases, however, the courts, while not encouraging the practice of the judge communicating with the jury or entering the jury room for any purpose, refused to grant a new trial, it appearing that no prejudice resulted or could have resulted.⁵ Other cases seem to indulge a presumption in favor of the propriety of the trial court's action, and sustain the verdict unless prejudice is shown, or is, at least, probable.⁶

- ¹ *Sargent v. Roberts*, 1 Pick. 337, 11 Am. Dec. 185, a leading case. This case is expressly disapproved, however, in *Goldsmith v. Solomons*, 2 Strobh. L. 296, in which the court says that the doctrine of *Sargent v. Roberts* is "pushing judicial coyness to the very verge of mere prudery." And the doctrine is also expressly repudiated in *New Hampshire. Shapley v. White*, 6 N. H. 172; *School Dist. No. 1 v. Bragdon*, 23 N. H. 507; *Bassett v. Salisbury Mfg. Co.* 28 N. H. 438; *Allen v. Aldrich*, 29 N. H. 63.
- ² *Sommer v. Huber*, 183 Pa. 162, 38 Atl. 595; *Read v. Cambridge*, 121 Mass. 567, 26 Am. Rep. 690 (though answer to jury admitted to be correct); *Chicago & A. R. Co. v. Robbins*, 159 Ill. 598, 43 N. E. 332; *Fish v. Smith*, 12 Ind. 563; *Fox v. Peninsular White Lead & Color Works*, 84 Mich. 676, 48 N. W. 203; *Norton v. Dorsey*, 65 Mo. 376; *Smith v. McMillen*, 19 Ind. 391.
- ³ *O'Connor v. Guthrie*, 11 Iowa, 80; *Hopkins v. Bishop*, 91 Mich. 328, 30 Am. St. Rep. 480, 51 N. W. 902; *Goode v. Campbell*, 14 Bush, 75; *Low v. Freeman*, 117 Ind. 341, 20 N. E. 242 (improper, though answer given was correct); *Kehrley v. Shafer*, 92 Hun, 196, 36 N. Y. Supp. 510 (giving amount of plaintiff's claim); *Chouteau v. Jupiter Iron Works*, 94 Mo. 388, 7 S. W. 467; *Bunn v. Croul*, 10 Johns, 239; *Neil v. Abel*, 24 Wend. 185 (justice sent minutes of trial to the jury at their request). The same result was reached in *Ruckersville Bank v. Hemphill*, 7 Ga. 396; *Chinn v. Davis*, 21 Mo. App. 363, when a juror left the jury room and held some conversation with the judge.
- ⁴ *Hurst v. Webster Mfg. Co.* 128 Wis. 342, 107 N. W. 666, in which the court said: "All court proceedings should be in open. There should be no opportunity for the doing of things in a corner, nor should a defeated party be required to show that such a communication as was here had was in fact prejudicial. He is entitled to have his case tried in open court from start to finish. There is safety in no other rule."
- To the same effect, see *Hudson v. Stearns*, 75 N. Y. Supp. 735, in which the justice answered, through the doorway, that costs must follow the judgment; *Benson v. Clark*, 1 Cow. 258, in which the justice went into the jury room, but did not answer the question asked, and shortly after sent a certain paper to the jury at their request, both acts being held reversible error; *Du Cate v. Brighton*, 133 Wis. 628, 114 N. W. 103, in which the judge went to the jury room, taking the stenographer to report all that was said, and announced that the sheriff would take the jurors to supper, and cautioned them as to their conduct while at the meal; *Gibbons v. Van Alstyne*, 29 N. Y. S. R. 461, 9 N. Y. Supp. 156, in which the justice entered the jury room, but nothing was shown as to there being any conversation with the jury; *Valentine v. Kelley*, 54 Hun, 78, 26 N. Y. S. R. 481, 7 N. Y. Supp. 184, in which a justice merely suggested to the jury that they try to agree on a verdict, no partiality or coercion being shown; *Crabtree v. Hagenbaugh*, 23 Ill. 349, 76 Am. Dec. 694, and *Stager v. Harrington*, 27 Kan. 414, in which it was held error for the judge

to enter the jury room, and that in such cases the court will not inquire into the effect of such entry.

In *Danes v. Pearson*, 6 Ind. App. 465, 33 N. E. 976, the court said: "An act, a sentence, or a word from the presiding judge may exert a controlling influence on the verdict. It is for these reasons that a communication by the judge to the jury stands on a different basis from that of another person; and for a like reason the law should throw a higher degree of circumspection around such communications."

⁵ *Moseley v. Washburn*, 165 Mass. 417, 43 N. E. 182, in which the judge answered a written question as to the date from which to compute interest, it having been covered in the original instruction; *Galloway v. Corbitt*, 52 Mich. 460, 18 N. W. 218, in which the judge entered the jury room and answered a question; while the court said the action was highly improper, it refused to reverse the case, because the error was harmless; *Smith v. Holcomb*, 99 Mass. 552, in which it was held that sending a paper to the jury which had accidentally been left behind was not such a communication as must be made in open court; *Mahoney v. Decker*, 18 Hun, 366, in which the judge answered a written communication from the jury, and later when the jury returned, unable to agree, informed counsel as to the former communication, no objection being made and the jury being sent back; *Martin v. Petty*, — Tex. Civ. App. —, 79 S. W. 878, in which the court entered the jury room and withdrew an improper charge; *Keeler v. Lockwood*, Hill & D. Supp. 137, in which the jury sent for the justice, who went into the jury room, supposing the parties would follow, but, on seeing that they did not, refused to give the instructions and asked the jury further to consider the case; *Kerr v. Hammer*, 39 N. Y. S. R. 708, 15 N. Y. Supp. 605, in which the judge went to the jury room to secure a paper, and, on being asked if the jury could have the evidence, answered, "No," and refused to answer other questions without the parties being present; *McCutchen v. Loggins*, 109 Ala. 457, 19 So. 810, in which the court said that an objection on the ground that the judge entered the jury room on the request of a juror, but told him that he would not discuss the case except in the presence of the whole jury and counsel, was frivolous; *Ayrhart v. Wilhelmy*, 135 Iowa, 290, 112 N. W. 782, in which the judge was called to the jury room and asked several questions, but did not answer them; *Horrman v. Neuman*, 15 Misc. 449, 72 N. Y. S. R. 670, 37 N. Y. Supp. 199, in which the jury sent two written questions regarding the case, on which the judge indorsed that he had no further charge to make; *Thayer v. Van Vleet*, 5 Johns. 111, in which the justice, on request of the jury, went to their room, and, on being asked if they could add to plaintiff's claim, answered, "No;" *Bowring v. Wabash R. Co.* 90 Mo. App. 324, in which the judge made inquiries of the jury as to whether they had or could agree on a verdict.

⁶ *Phillips v. Com.* 19 Gratt. 485; *Buntin v. Danville*, 93 Va. 200, 24 S. E. 830; *Helmbrecht v. Helmbrecht*, 31 Minn. 504, 18 N. W. 449; *Oswald v. Minneapolis & N. W. R. Co.* 29 Minn. 5, 11 N. W. 112; *Gillotte v. Jackson*, 9 Jones & S. 308; *Goldsmith v. Solomons*, 2 Strobb. L. 296;

disapproving *Sargent v. Roberts*, 1 Pick. 337, 11 Am. Dec. 185; *Hart v. Lindley*, 50 Mich. 20, 14 N. W. 682.

And, in New Hampshire, the doctrine of *Sargent v. Roberts*, 1 Pick. 337, 11 Am. Dec. 185, is expressly repudiated, the courts of that state holding that it is proper for the court to communicate with the jury at their request, and give them additional instructions on the law in the absence of counsel, though such communication should be in writing and returned into court with the papers in the case; *Shapley v. White*, 6 N. H. 172; *School Dist. No. 1 v. Bragdon*, 23 N. H. 507; *Bassett v. Salisbury Mfg. Co.* 28 N. H. 438; *Allen v. Aldrich*, 29 N. H. 63.

b. Consent; waiver of objection.—As to what will amount to consent on the part of the party or counsel to communications between judge and jury, some of the cases hold that no consent will be implied, but must be affirmatively shown.¹ Other cases, however, take a more liberal view, and have held that consent to communications complained of may be presumed from the action of the parties or counsel.²

¹ Thus, in *Danes v. Pearson*, 6 Ind. App. 465, 33 N. E. 976; *Plunkett v. Appleton*, 51 How. Pr. 469, 9 Jones & S. 159; *Moody v. Pomeroy*, 4 Denio, 115; and *Taylor v. Betsford*, 13 Johns. 487, it was held that the fact that counsel were present and knew communications were being made, but did not object, was not sufficient to amount to consent.

And in *Seeley v. Bisgrove*, 83 Hun, 293, 31 N. Y. Supp. 914, it was held that consent of the parties for the judge to enter the jury room at the request of the jury did not imply consent for him to read the original answer of the defendant, which had not been read to them before.

² *Henlow v. Leonard*, 7 Johns. 200; *Bateman v. Connor*, 6 N. J. L. 109; *Rogers v. Moulthrop*, 13 Wend. 274, 22 Am. Dec. 546; *Whitney v. Crim*, 1 Hill, 61; *Hancock v. Salmon*, 8 Barb. 564; *Joliet v. Looney*, 159 Ill. 471, 42 N. E. 854, affirming 56 Ill. App. 502.

And in *Zust v. Linthicum*, 26 Jones & S. 478, 34 N. Y. S. R. 583, 11 N. Y. Supp. 727, the jury sent an inquiry to the court, and plaintiff's counsel objected to any communication except in open court, the objection being overruled. After that, the question was answered, but no exception was taken thereto, and the court held that, in not excepting to the answer, plaintiff's counsel assented to the answer as given.

For a more elaborate discussion of the question of the effect of judge communicating with jury, not in open court, see note in 17 L.R.A. (N.S.) 609.

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XIX.—STOPPING THE CASE.

1. Voluntary nonsuit.

- a. Common-law rule.
- b. Statutory restrictions.
- c. Where defendant demands affirmative relief.

2. Withdrawal of juror.

- a. Power and discretion of court.
- b. Grounds and necessity.
- c. Effect of withdrawal, continuance, or nonsuit.
- d. Costs.

3. Sickness interrupting trial.

1. Voluntary nonsuit.

a. *Common-law rule*.—At common law plaintiff has a right voluntarily to submit to nonsuit at any time before the jury have rendered their verdict.¹

¹ *Wooster v. Burr*, 2 Wend. 295; *Graham*, Pr. 2d ed. 310; *Smith*, Action, 137; s. p. *Bell v. Gardner*, 77 Ill. 319; *Piedmont Mfg. Co. v. Buxton*, 105 N. C. 74, 11 S. E. 264; *Lawrin v. Hanks*, 3 McCord, L. 559.

Even after charge, and verdict made up, but not announced. *Peeples v. Root*, 48 Ga. 592; *Graham v. Tate*, 77 N. C. 120; *Tate v. Phillips*, 77 N. C. 126. Not allowed after verdict published (*Brown v. King*, 107 N. C. 313, 12 S. E. 137), or delivered to one allowed by the court to receive it. *Merchants' Bank v. Rawls*, 7 Ga. 191, 50 Am. Dec. 394.

Allowed even after motion for compulsory nonsuit made on sufficient ground. *Pescud v. Hawkins*, 71 N. C. 299; s. p. *Schafer v. Weaver*, 20 Kan. 294. Or to direct a verdict for defendant. *Jackson v. Merritt*, 21 D. C. 276.

Whether the jury leave their bench or not, plaintiff, by not answering when called, may preclude them from giving a verdict. *Cunningham v. Duncan*, Anthon, N. P. 61.

His silence is not assent to the reading of a verdict. *People ex rel. Stafford v. Mayor's Court*, 1 Wend. 36.

b. *Statutory restrictions*.—In New York,¹ Missouri,² Kansas,³ Iowa,⁴ Texas,⁵ New Jersey,⁶ Arkansas,⁷ Kentucky,⁸ Ne-

braska,⁹ and Washington¹⁰ this cannot be done after the case has been submitted to the jury to consider of their verdict.

¹ New York Code Civ. Proc. § 1182.

² *Fink v. Bruihl*, 47 Mo. 173; *Savoni v. Brashear*, 46 Mo. 345.

Nor after direction of entry of judgment, if opportunity was given plaintiff before such direction, and he then failed to take the nonsuit. *Pabst Brewing Co. v. Smith*, 59 Mo. App. 476.

³ *Schafer v. Weaver*, 20 Kan. 294; *New Hampshire Bkg. Co. v. Ball*, 57 Kan. 812, 48 Pac. 137.

And the Federal court sitting in Kansas will follow the state practice in this respect. *Ætna L. Ins. Co. v. Hamilton County*, 25 C. C. A. 94, 49 U. S. App. 122, 79 Fed. 575.

⁴ *Harris v. Beam*, 46 Iowa, 118 (holding that it may be done after the judge has directed a verdict, for the jury have not been then directed to retire nor to enter upon the consideration of the case without retiring); *Oppenheimer v. Elmore*, 109 Iowa, 196, 80 N. W. 307 (holding that it may be done after defendant has moved to direct a verdict in his favor on plaintiff's evidence, and the court has indicated its intention to sustain the motion).

⁵ *Frois v. Mayfield*, 31 Tex. 366; *Peck v. McKellar*, 33 Tex. 234.

But plaintiff may take a nonsuit where the court erroneously withdraws the case from the jury and directs a verdict for defendant. *Lockett v. Ft. Worth & R. G. R. Co.* 78 Tex. 211, 14 S. W. 564.

And in *Oakland Home Ins. Co. v. Davis*, — Tex. Civ. App. —, 33 S. W. 587, plaintiff was allowed to take a nonsuit after the court had announced that it had become convinced that the overruling of a demurrer to plaintiff's evidence was erroneous, and the demurrer well taken, and that it would set aside the judgment that had been entered in plaintiff's favor, as such an announcement was not an announcement of a judgment upon the demurrer, although the ruling if maintained would lead to such a judgment.

⁶ *Bauman v. Whiteley*, 57 N. J. L. 487, 31 Atl. 982.

⁷ *Sand. & H. Dig.* §§ 5102, 5103.

This statute is also in force in the Indian territory. *Davison v. Gibson*, 22 C. C. A. 511, 40 U. S. App. 463, 76 Fed. 717.

⁸ *Northwestern Mut. L. Ins. Co. v. Barbour*, 95 Ky. 7, 23 S. W. 584.

But it may, after the granting of a requested instruction to find for defendant, but before it is actually given. *Vertrees v. Newport News & M. Valley R. Co.* 95 Ky. 314, 25 S. W. 1.

⁹ *Beals v. Western U. Teleg. Co.* 53 Neb. 601, 74 N. W. 54.

¹⁰ It can be done at any time prior to a decision sustaining a motion by defendant to discharge the jury, and for judgment under Ball. Code, § 4994, but not after. *Dunkle v. Spokane Falls & N. R. Co.* 20 Wash. 254, 55 Pac. 51.

In Wisconsin, the plaintiff cannot submit to a voluntary nonsuit after the arguments to the jury have been concluded or waived.¹

¹ Sanb. & B. Wis. Stat. § 2856.

In Massachusetts, Maine, New Hampshire, and the United States circuit courts, submitting to a voluntary nonsuit after the trial has begun rests in the discretion of the court; allowing it as matter of right, without the exercise of discretion is error.¹

¹ *Truro v. Atkins*, 122 Mass. 418; *Washburn v. Allen*, 77 Me. 344; *Fulford v. Converse*, 54 N. H. 543, and cases cited; *Johnson v. Bailey*, 59 Fed. 670.

Before the cause is open to the jury it is matter of right. *Burbank v. Woodward*, 124 Mass. 357; *Farr v. Cate*, 58 N. H. 367.

But it should not be permitted after he has put in all his evidence, and is not surprised by any evidence put in by defendant. *Johnson v. Bailey*, 59 Fed. 670.

In Pennsylvania the statute terminates plaintiff's right to submit to a nonsuit at the point when the jury, in response to the usual inquiry, have finally announced to the court their readiness to give in their verdict.¹

¹ *McLughan v. Bovard*, 4 Watts, 308, 316; *Easton Bank v. Coryell*, 9 Watts & S. 153; *Kates v. Lewis*, 2 Clark (Pa.) 53.

In Indiana,¹ Virginia,² Alabama,³ and Florida,⁴ it cannot be done after the jury have retired.

¹ *Dunning v. Galloway*, 47 Ind. 182; *Helm v. First Nat. Bank*, 91 Ind. 44; 1 *Horner Ins. Stat.* § 333 (Code Civ. Proc.).

² *Minor*, Inst. part 1, p. 782, etc.

³ *Blackburn v. Minter*, 22 Ala. 613.

⁴ *National Broadway Bank v. Lesley*, 31 Fla. 56, 12 So. 525 (error to refuse an application made before the jury have retired).

In California it may be done at or before the close of the evidence on both sides.¹

¹ *Hancock Ditch Co. v. Bradford*, 13 Cal. 637.

c. Where defendant demands affirmative relief.—The right of plaintiff to take a nonsuit where the defendant has interposed a counterclaim entitling him to affirmative relief has arisen in a good many cases. In the states in which plaintiff's right to dismiss his action or submit to a nonsuit is defined by statute, these statutes usually provide that he may dismiss his action at any time unless the defendant has interposed a counterclaim and asked for affirmative relief. But where there is no statute defining plaintiff's right to dismiss, there is a great conflict of authority as to the effect, on his right to dismiss, of the fact that defendant has interposed a counterclaim. From a review of the cases involving the question, however, it would seem that the weight of authority, especially in the later decisions, is to the effect that the plaintiff, although he may take a nonsuit as to his action, cannot prejudice the defendant in his counterclaim.¹

¹ *Samaha v. Samaha*, 18 App. D. C. 76; *Lay v. Collins*, 74 Ark. 536, 86 S. W. 281; *Coxe v. Downs*, 9 Rob. (La.) 133; *Jones v. Jenkins*, 9 Rob. (La.) 180; *McDonogh v. Dutillet*, 3 La. Ann. 660; *Barrow v. Robicka*, 15 La. Ann. 70; *Davis v. Young*, 35 La. Ann. 739; *State ex rel. Gondran v. Rost*, 48 La. Ann. 455, 19 So. 256; *Griffin v. Jorgenson*, 22 Minn. 92; *Axiom Min. Co. v. Little*, 6 S. D. 438, 61 N. W. 441; *Schaetzel v. Huron*, 6 S. D. 134, 60 N. W. 741; *Cooke v. McQuaters*, 19 S. D. 361, 103 N. W. 385; *Riley v. Carter*, 3 Humph. 230; *Northwestern Mut. L. Ins. Co. v. Barbour*, 95 Ky. 7, 23 S. W. 584; *Bertschy v. McLeod*, 32 Wis. 205, rule affirmed in 33 Wis. 176, 14 Am. Rep. 755, and in 34 Wis. 244; followed in *Damp v. Dane*, 33 Wis. 430, and in *Grignon v. Black*, 76 Wis. 674, 45 N. W. 122, rehearing denied in 76 Wis. 686, 45 N. W. 938; *McKesson v. Mendenhall*, 64 N. C. 502; *Francis v. Edwards*, 77 N. C. 271; *Purnell v. Vaughan*, 80 N. C. 46; *Gatewood v. Leak*, 99 N. C. 363, 6 S. E. 706; *Piedmont Mfg. Co. v. Buxton*, 105 N. C. 74, 10 S. E. 264; *People's Bank v. Stewart*, 93 N. C. 402.

In *Whedbee v. Leggett*, 92 N. C. 465, the court distinguished between a counterclaim arising out of the contract or transaction set forth in the complaint and a counterclaim arising independently of the cause of action alleged in the complaint, which was allowed by the statute in that state, and held that, where the first kind of counterclaim is set up, the plaintiff cannot voluntarily submit to a nonsuit, as it is reasonable and just that the rights of the parties arising out of the same contract or transaction should be settled at the same time; but that it is otherwise as to the second kind, and that the plaintiff may submit to a voluntary nonsuit as to his own cause of action, but can-

not, by so doing, put an end to the defendant's right to litigate his own counterclaim. And to the same general effect are numerous other North Carolina cases. *McNeill v. Lawton*, 97 N. C. 16, 1 S. E. 493; *Bynum v. Powe*, 97 N. C. 374, 2 S. E. 170; *Wilkins v. Suttles*, 114 N. C. 550, 19 S. E. 606; *Union Bank v. Oxford*, 116 N. C. 339, 21 S. E. 410; *Rumbough v. Young*, 119 N. C. 567, 26 S. E. 143; *Sydnor Pump & Well Co. v. Rocky Mount Ice Co.* 125 N. C. 80, 34 S. E. 198; *Olmsted v. Smith*, 133 N. C. 584, 45 S. E. 953; *Tennessee River Land & Timber Co. v. Butler*, 134 N. C. 50, 45 S. E. 956; *Boyle v. Stallings*, 140 N. C. 524, 53 S. E. 346.

In several North Carolina cases the nonsuit was granted notwithstanding the fact that the defendant had set up a counterclaim; but these cases were decided upon the peculiar state of facts in the particular case, and are not necessarily opposed to the general rule prevailing in that state. *Mercantile Bank v. Pettigrew*, 74 N. C. 326; *Lee v. Eure*, 93 N. C. 5.

There appears to be some confusion in the decisions in New York, especially in the earlier ones, as to the right of the plaintiff to submit to a nonsuit where a counterclaim has been interposed. Some cases hold that plaintiff may take a nonsuit before the time for reply to the counterclaim has expired. *Seaboard & R. R. Co. v. Ward*, 18 Barb. 595; *Oaksmith v. Sutherland*, 1 Hilt. 265, 4 Abb. Pr. 15.

Others hold that the plaintiff cannot take a nonsuit if the time to reply has expired, unless some special grounds be stated which would justify the court in making such an order (*Cockle v. Underwood*, 3 Duer, 676; *Geenia v. Keah*, 66 Barb. 245); but that it will not be granted merely upon the ground of the defendant's insolvency (*Gwathney v. Cheatham*, 21 Hun, 576).

So it has been held that plaintiff may have a nonsuit, although a counterclaim has been interposed, but that it is within the power of the court to fix the terms. *Tubbs v. Hall*, 12 Abb. Pr. N. S. 237.

Since the passage of the amendment to § 412 of the Code of Civil Procedure, which stays the running of the statute of limitations against the defendant's counterclaim during the pendency of the action, the plaintiff may at any time discontinue his action on paying the defendant's taxable costs to the date of discontinuance. *Cohn v. Anathan*, 16 N. Y. Civ. Proc. Rep. 178, 4 N. Y. Supp. 97; *Felix v. Van Slooten*, 43 N. Y. S. R. 791, 17 N. Y. Supp. 844.

The court will reverse a judgment awarding a nonsuit, where the rights of the defendant are prejudiced, but not otherwise. *Pacific Mail S. S. Co. v. Leuling*, 7 Abb. Pr. N. S. 37; *Rees v. VanPatten*, 13 How. Pr. 258; *Van Alen v. Schermerhorn*, 14 How. Pr. 287; *Parker v. Commercial Telegram Co.* 3 N. Y. S. R. 174; *Iselin v. Smith*, 62 Hun, 221, 16 N. Y. Supp. 683.

In the later New York decisions, the rule seems to be that whether or not the plaintiff may dismiss his action where a counterclaim has been

interposed is within the discretion of the court; but this is a legal, and not an arbitrary, discretion, and the appellate court will reverse a judgment of nonsuit if the rights of the defendant are prejudiced. *Livermore v. Bainbridge*, 61 Barb. 358, affirmed in 49 N. Y. 125, *Wilder v. Boynton*, 63 Barb. 547; *Washington Glass Co. v. Benjamin*, 43 N. Y. S. R. 352, 17 N. Y. Supp. 135; *Walsh v. Walsh*, 33 App. Div. 579, 53 N. Y. Supp. 881; *Yellow Pine Co. v. Lehigh Valley Creosoting Co.* 32 App. Div. 51, 52 N. Y. Supp. 281; *Kruger v. Persons*, 52 App. Div. 50, 64 N. Y. Supp. 841; *Janssen v. Whitlock*, 58 App. Div. 367, 68 N. Y. Supp. 1086; *Wanamaker v. Megraw*, 27 Misc. 591, 59 N. Y. Supp. 81; *Fizburg v. Ramsey*, 49 Misc. 216, 97 N. Y. Supp. 359; *Block v. Ottenberg*, 53 Misc. 647, 103 N. Y. Supp. 739; *Carleton v. Darcy*, 75 N. Y. 375; *Re Lasak*, 131 N. Y. 624, 30 N. E. 112.

Under the civil law in Texas, numerous of the earlier decisions held that, where a defendant had pleaded in reconvention, the plaintiff could not deprive him of his right to an adjudication upon the matters embraced in his plea, by taking a nonsuit. *Thomas v. Hill*, 3 Tex. 270; *Egery v. Power*, 5 Tex. 501; *Bradford v. Hamilton*, 7 Tex. 55; *McCoy v. Jones*, 9 Tex. 363; *Peck v. McKellar*, 33 Tex. 234; *Midkiff v. Stephens*, 9 Tex. Civ. App. 411, 29 S. W. 54.

The following Texas cases, although admitting the general rule, hold that the facts of the particular case take it out of the rule. *Brown v. Pfouts*, 53 Tex. 221; *Block v. Weiller*, 61 Tex. 692.

By statute (Texas Rev. Stat. 1895, art. 1260) the defendant is now afforded the same protection formerly given him under the civil law.

For contrary decisions sustaining plaintiff's right to dismiss, see *Huffstutler v. Louisville Packing Co.* 154 Ala. 291, 15 L.R.A.(N.S.) 340, 129 Am. St. Rep. 57, 45 So. 418; *Buffington v. Quackenboss*, 5 Fla. 196; *Clarke v. Wall*, 5 Fla. 476; *Anderson v. Gregory*, 43 Conn. 62; *McCann v. Boyers*, 8 B. Mon. 285; *Fowler v. Lawson*, 15 Ark. 148; *Cummings v. Pruden*, 11 Mass. 206; *Merchants' Bank v. Schulenberg*, 54 Mich. 49, 19 N. W. 741; *M'Credy v. Fey*, 7 Watts, 496; *Shannon v. Truefit*, 1 W. N. C. 248; *Usher v. Sibley*, 2 Brev. 32; *Branham v. Brown*, 1 Bail. L. 262; *Sewall v. Tarbox*, 30 Me. 27; *Theobald v. Colby*, 35 Me. 179.

For a fuller review of the cases on this subject, see note in 15 L.R.A.(N.S.) 340.

2. Withdrawal of juror.

a. Power and discretion of court.—The power of the court, in the exercise of a sound discretion, to withdraw a juror in a criminal case, is well recognized,¹ and it is now generally held that even in civil cases the court has power in the exercise of its

discretion,² or by consent of both parties,³ to withdraw a juror and postpone the trial.

¹ See note in 48 L.R.A. 434.

² *Huntington v. Toledo, St. L. & W. R. Co.* 99 C. C. A. 154, 175 Fed. 532; *Crane v. Blackman*, 100 Ill. App. 565, declaring the granting of leave to withdraw a juror is in the sound discretion of the trial court, and will not be reviewed except in case of great abuse.

Where, before plaintiff had rested his case, he requested the court to withdraw a juror, and defendant moved to nonsuit plaintiff, it was not error to deny nonsuit and permit plaintiff to withdraw juror. *Yellow Pine Co. v. Gutwillig*, 20 Misc. 634, 46 N. Y. Supp. 251.

See *Benson v. Altoona & L. Valley Electric R. Co.* 228 Pa. 290, 77 Atl. 492, where the court's power was implied, the court saying that where counsel make no request for the withdrawal of a juror for improper remarks by counsel in the presence of the jury, it must be assumed that he was satisfied with a warning by the court to the jury to disregard the remarks.

request for leave to withdraw a juror is usually a favor, and not a right, and generally rests in the sound discretion of the trial court to decide whether or not such damage has been done by a question to a witness as to warrant a mistrial." *Adler v. Lesser*, 110 N. Y. Supp. 196. See also *Morrison v. Hedenberg*, 138 Ill. 22, 27 N. E. 460.

In *Strong v. District of Columbia*, 3 MacArth. 499, under a Maryland statute it was held that a juror might be withdrawn. But in *Schechter v. Denver, L. & G. R. Co.* 8 Colo. App. 25, 44 Pac. 761, the court refused to permit a juror to be withdrawn.

³ *Benedict v. Cozzens*, 4 Cal. 381; *Cook v. Ritter*, 4 E. D. Smith, 253; *Bohmann v. Chicago*, 15 Ill. App. 48.

The English practice requires consent.

b. Grounds and necessity.—A juror may be withdrawn where it is necessary to prevent the defeat of justice,¹ as in case of surprise,² bias of juror,³ misconduct of a juror,⁴ improper remarks to jury by counsel⁵ or by witness,⁶ or other improper conduct of witness,⁷ or other cause which would render the progress of the trial unjust⁸ or unfair to either party,⁹ or the verdict illegal.¹⁰

¹ *Wolcott v. Studcbaker*, 34 Fed. 8; *Schofield v. Settley*, 31 Ill. 515; *Miller v. Metzger*, 16 Ill. 390; *Morrison v. Hedenberg*, 138 Ill. 22, 27 N. E. 460; *Van Syckels v. Perry*, 3 Robt. 621; *Glendening v. Canary*, 5 Daly, 489, affirmed 64 N. Y. 636; *Messenger v. Fourth Nat. Bank*, 6 Daly, 190, affirming 48 How. Pr. 542; *People v. Marks*, 10

How. Pr. 261; *St. John v. Duncan*, 2 N. Y. Month. L. B. 20; *Planer v. Smith*, 40 Wis. 31; *Thomas v. Leonard*, 5 Ill. 556; *Sheldon v. Bahner*, 4 Pa. Co. Ct. 16; *People ex rel. Perkins v. Common Pleas Judges*, 8 Cow. 127.

² *Dillon v. Cockcroft*, 90 N. Y. 649 (*arguendo*), on right to apply for leave to withdraw juror because of unpreparedness to meet evidence in consequence of a stipulation of parties.

Where a party is surprised by the evidence given on the trial by his adversary's witnesses, and is not prepared with the evidence to rebut, his proper course is to apply for an adjournment in order to procure it or for leave to withdraw a juror, and if he neglects to do so, and allows the case to go to the jury on the evidence taken, the court will not grant him a new trial on the ground that the evidence was a surprise to him, and that the witnesses whose testimony was needed to rebut it were kept away from the trial by contrivance of persons acting in the interest of his adversary. *Messenger v. Fourth Nat. Bank*, 6 Daly, 190, affirming 48 How. Pr. 542.

See also *Smith v. Chicago Junction R. Co.* 127 Ill. App. 89, where a motion to withdraw a juror for inability to secure alleged material evidence was properly denied where moving affidavits did not show materiality of such evidence and diligence to obtain it before trial; *Chicago v. Bork*, 128 Ill. App. 357, affirmed in 227 Ill. 60, 81 N. E. 27, holding motion to withdraw juror to enable moving party to obtain additional evidence was properly denied when such party does not appear to have exercised diligence in seeking to obtain such evidence before trial; *Pirrung v. Supreme Council*, 104 App. Div. 571, 93 N. Y. Supp. 575, where it was held not a proper exercise of discretion to allow the withdrawal of a juror by defendant on the ground of surprise, where practically the only defense to an action on a mutual benefit certificate was ineligibility because of age of insured, and defendant had shown insured's age by admissions by him to his daughter, but the court had refused the introduction of foreign country records of vital statistics, because of failure to prove foreign law under which they were kept.

Where a continuance was asked to examine a map on file in the auditor's office, and to compare the same with one on file on the trial, and it was admitted that if the maps tallied the plaintiff could recover, the court properly entered a verdict for plaintiff and refused to allow the withdrawal of a juror, but gave the defendant time to move for a new trial in case he could show the maps differed, which he failed to do. *Morrison v. Hedenberg*, 138 Ill. 22, 27 N. E. 460.

But a plaintiff has no right to be surprised by evidence within the issues. If however, he is, he must find out his surprise at the trial, and he can then apply to the court for leave to withdraw a juror, or submit to a nonsuit. *People v. Marks*, 10 How. Pr. 261.

³ *Sebring v. Weaver*, 42 Pa. Super. Ct. 588, holding it not ground for

withdrawal that a juror and one party to the action belonged to the same fraternal society. *Chicago City R. Co. v. Shreve*, 128 Ill. App. 462, affirmed in 226 Ill. 530, 80 N. E. 1049, holding it not ground for withdrawal and continuance of case, that juror asked witness question and evinced doubt as to his testimony, after case had been on trial five days.

- ⁴*McKahan v. Baltimore & O. R. Co.* 223 Pa. 1, 72 Atl. 251, 16 A. & E. Ann. Cas. 173, where court made a misstatement of the law during the course of an argument by counsel for nonsuit, causing the audience to applaud, in which juror joined, for which court should have withdrawn juror and continued case.
- ⁵*Connelly v. Pittsburg R. Co.* 230 Pa. 366, 79 Atl. 635, holding an erroneous statement by counsel in an action for personal injuries, as to expectancy of life and loss of earning power amounting to twice the amount sued for, there being no proof as to life tables or life expectancy in the case, was ground for withdrawal of a juror. *Greenberg v. Shindel*, 71 Misc. 465, 128 N. Y. Supp. 661, holding it improper to deny motion to withdraw a juror where plaintiff's counsel, in action for conversion, being entitled to introduce summons and complaint in former action between the same parties concerning same subject-matter, introduces the entire judgment roll and reads to jury indorsement of court denying judgment and alleging party to be a confessed perjurer, which was not within the issues and was so read to prejudice jury.
- ⁶*Surface v. Bentz*, 228 Pa. 610, 77 Atl. 922, where it was held the court erred in refusing to withdraw a juror on account of improper remarks by witnesses while testifying, two of whom were parties to the action, and all of whom displayed more or less feeling while on the witness stand. The court says: "For any irrelevant or improper matter tending to prejudice or mislead the jurors and placed before them by a witness, especially by a witness who is also a party, the court should act promptly and protect the party whose cause is exposed to the improper influence upon the minds of the jury. It is quite as necessary to protect a party against the improper remarks to a jury made by a witness, as it is against such remarks when uttered by counsel. In either case it is inexcusable, and the only protection the injured party has must come from the court, and it should act promptly."
- ⁷*Hale v. Hale*, 32 Pa. Super. Ct. 37, where it was held error to refuse motion to withdraw a juror and continue case in action between brothers, where one persistently imputed crimes to the other that had no possible relevancy to the questions in issue, and constantly put in arguments and tried to throw slurs on persons connected with the case.
- ⁸The court on being satisfied that any real ground of surprise exists, such as the unexpected absence of witnesses who had been in attendance, or that have been kept out of the way, the sickness of a juror, party, or

counsel, or any other accident occasioned by substantial misapprehension or disappointment, which would render its further progress unjust or unfair to either party, may, in the exercise of a sound discretion, direct the withdrawal of a juror, or discharge the jury and postpone the trial. *Glendening v. Canary*, 5 Daly, 489, affirmed in 64 N. Y. 636.

⁹ The court did not err in refusing a motion to withdraw a juror, in ejectment, on offer of proof by plaintiff that defendant had bought with notice of fraud in his title, and had paid extra premiums to a title insurance company for indemnification against it, where court orders jury withdrawn, and argument proceeds in their absence, when motion is overruled, the offer is withdrawn, and jury is brought in. *Randal v. Gould*, 225 Pa. 42, 73 Atl. 986.

¹⁰ The court has the discretion to discharge a juror whenever it comes to the knowledge of the court that one who has inadvertently been sworn cannot render a legal verdict in the case. *Thomas v. Leonard*, 5 Ill. 556.

c. Effect of withdrawal, continuance, or nonsuit.—The practice of withdrawing a juror is adapted to work a continuance of the case by producing a technical mistrial. It is an indirect mode of accomplishing a postponement for causes arising during the trial and which would, but for postponement, defeat a just trial.¹

A nonsuit does not necessarily result.²

Courts may, in the exercise of a sound discretion, allow a juror to be withdrawn, and still retain the cause upon the calendar for trial, instead of nonsuiting the plaintiff for a defect in his proof, as in case of mistake or surprise on his part in the preparation of his cause for trial; and this even where the defendant has not wilfully misled the plaintiff.³

¹ *Usborne v. Stephenson*, 36 Or. 328, 48 L.R.A. 432, 78 Am. St. Rep. 778, 58 Pac. 1103, wherein the practice is denied as to Oregon. *Rosengarten v. Central R. Co.* 69 N. J. L. 220, 54 Atl. 564, holding withdrawal of juror by direction of the court produced a mistrial, and a new trial could not be directed.

And under the Maryland act 1785, chap. 80, providing that courts of law shall have full power to allow amendments before verdict, and that, if amendment is made after the jury is sworn, a juror shall be withdrawn, it is error to refuse a continuance. *Strong v. District of Columbia*, 3 MacArth. 499.

In the note to *Usborne v. Stephenson*, 48 L.R.A. 432, 441, the annotator's conclusion is that the practice, while still within the proprieties of

legal procedure, is giving way to the more direct mode of applying for a continuance and, if it be allowed, setting aside the swearing of the jury with an order for the continuance. As to those states where the result is to be sought by direct means, see ante, chapter I., Applications to Postpone, and compare ante this chapter.

- ² *Benedict v. Cozzens*, 4 Cal. 381; *Bohmann v. Chicago*, 15 Ill. App. 48; *Schofield v. Settlely*, 31 Ill. 515.

The power of the circuit court, in a proper case, to permit a juror to be withdrawn, or to order a nonsuit, is undoubted; but there is no necessary connection between the two processes. The withdrawal of a juror operates to continue the cause, and does not of itself entitle the defendant to a judgment of any kind. If a nonsuit be properly granted, the withdrawal of a juror as preliminary thereto is entirely superfluous and harmless. But if judgment of nonsuit be rendered merely because a juror has been withdrawn, such judgment is founded upon a misapprehension of the legal effect of withdrawal, and is erroneous. *Planer v. Smith*, 40 Wis. 31.

- The withdrawal of a juror without showing cause sufficient for a continuance amounts to a nonsuit. *Wabash R. Co. v. McCormick*, 23 Ind. App. 258, 55 N. E. 251.

Where a motion was made for a nonsuit, and, in order to defeat that motion, plaintiff moved to amend the complaint, the court declined to grant a nonsuit, but intimated that plaintiff's counsel might withdraw a juror and apply for such amendment at special term. A juror was accordingly withdrawn and the case went over, and thereafter the amendment was refused on the ground that it was a new and separate cause of action and was barred by limitation. *Van Syckels v. Perry*, 3 Robt. 621.

- ³ *People ex rel. Perkins v. Common Pleas Judges*, 8 Cow. 127, the court declaring it a convenient and necessary practice, in some instances, to prevent a failure of justice.

Where the court allowed the plaintiff on the trial to amend his declaration, and directed a juror to be withdrawn, and continued the case, it was held that the continuance was at the instance of the plaintiff in error, that it was necessary for that purpose that the jury be discharged, that a discretion is necessary to the administration of justice, and that when it is properly exercised no one can complain. *Miller v. Metzger*, 16 Ill. 390.

Where a party to a suit is surprised by an unlooked for construction of one of the rules of the court upon which he has relied in making out his case, the jury will be withdrawn and the cause continued. *Sheldon v. Bahner*, 4 Pa. Co. Ct. 16. But in *Wolcott v. Studebaker*, 34 Fed. 8, where the court was about to direct the verdict for the defendant, and the plaintiff asked for a nonsuit, it was held: "It is not our practice to grant what is technically known as a nonsuit. The proper practice would be for the plaintiff to ask to withdraw a juror

and discontinue the case." Under the Colorado Civil Code, providing that an involuntary nonsuit may be granted upon motion of the defendant, the court may *sua sponte*, or on motion of either party, grant a nonsuit in every case where there is such a failure of evidence that a verdict, if found, would be set aside. *Schechter v. Denver, L. & G. R. Co.* 8 Colo. App. 25, 44 Pac. 761.

d. Costs.—As condition of granting leave to withdraw juror, costs may be imposed on moving party;¹ and he will ordinarily be liable unless cause sufficient for continuance be shown.²

Where the parties *agree* to withdraw a juror, each party pays his own costs.³

¹ *Rawson v. Silo*, 105 App. Div. 278, 93 N. Y. Supp. 416, holding it is not an abuse of discretion, on motion to withdraw a juror and have the trial postponed, as condition of granting request, that party making request pay to his opponent a fee, a trial fee, and witnesses' fees of the term to be taxed. If party considers terms imposed as condition of grant of motion for withdrawal onerous and unsatisfactory, he should decline to accept the order and proceed with the trial.

² Costs are taxable against party withdrawing a juror, where cause sufficient for a continuance is not shown. *Wabash R. Co. v. McCormick*, 23 Ind. App. 258, 55 N. E. 251.

³ 2 Tidd, Pr. 2d Am. (from 8th Lond.) ed. 909.

See also *Stodhart v. Johnson*, 3 T. R. 657; *Burdon v. Flower*, 7 Dowl. P. C. 786; *Thomas v. Lewis*, 5 Dowl. P. C. 395, W. W. & D. 67, 1 Jur. 104; *Hammond v. Thorpe*, 2 Dowl. P. C. 721, 1 Crompt. M. & R. 64, 4 Tyrw. 838, 3 L. J. Exch. N. S. 358; *Seely v. Powers*, 3 Dowl. P. C. 372; *Seamour v. Bridge*, 8 T. R. 408.

For a full review of all the cases on the subject of withdrawing a juror, see note in 48 L.R.A. 432.

3. Sickness interrupting trial.

The mere disturbance of the trial by the sudden sickness of a party presents an occasion for the discretionary ruling of the court whether to proceed with the trial, or how to avoid prejudice; and the same is true as to emotional demonstrations by third persons present.¹ But if the judge fall ill, and is not able to conclude the trial, it cannot be done by a substitute.²

¹ It was not an abuse of discretion to continue the trial though plaintiff, whose epilepsy was attributed to the injury sued on, fell in a fit in court during the trial. *Galveston, H. & S. A. R. Co. v. Hitzfelder*, 24

Tex. Civ. App. 318, 66 S. W. 707. So, where, after the adjournment for the day but while some of the jury were yet present, the prostration of the plaintiff in the court room, presumably from the illness brought on by the injury sued on, presented a case for discretion of the judge as to whether the trial ought to continue. *McGloin v. Metropolitan Street R. Co.* 71 App. Div. 72, 75 N. Y. Supp. 593.

Dictum that conduct of parties and counsel are peculiarly within the discretionary control of the judge, sustaining refusal of new trial of action for breach of promise of marriage, where during trial plaintiff fell fainting, and exclaimed, "Oh, my baby darling!" *Poe v. Arch*, — S. D. —, 128 N. W. 166.

See also, as to the judge's discretion where a witness was overcome by emotions of grief while on the stand. *Western U. Teleg. Co. v. Shaw*, 40 Tex. Civ. App. 277, 90 S. W. 58; or where the mother of plaintiff fainted in court during the trial. *Graves v. Rivers*, 3 Ga. App. 510, 60 S. E. 274; and it was no ground for discharge of the jury that the father of deceased, while testifying in action for the wrongful death, shed tears. *Edwards v. Metropolitan Street R. Co.* 143 Mo. App. 371, 127 S. W. 605.

² Under statute authorizing substitution of judges in case of sickness, "except in the trial of cases where the trial has already commenced," it was error to conclude a trial where only the charge remained to be given, and one already prepared by the judge who fell sick was given. *Rossman v. Moffett*, 75 Minn. 289, 77 N. W. 960.

CHAPTER XX.—PROVINCE OF COURT AND JURY; QUESTIONS OF LAW AND FACT.

1. In general.
2. Weight of evidence and credibility of witnesses.
3. Sufficiency of evidence.
4. Inferences.
5. Miscellaneous questions.
6. Cause and effect; proximate cause.
7. Reasonableness; necessity; probable cause.
8. Diligence.
9. Probability.
10. Carriers; passengers.
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12. Partnership.
13. Personal status, relation, occupation, or capacity.
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19. Knowledge, belief or mental perception.
20. Contracts and writings; construction.
21. Libel or slander; malicious prosecution.
22. Negligence generally.
23. Carrier's negligence.
24. Negligence as to highways.
25. Negligence as to railroads and street railways.
26. Negligence as to condition of buildings or grounds.
27. Negligence as to fire, water, electricity or other dangerous thing.
28. Negligence as to servants.
29. Negligence of innkeepers, telegraph companies, and bailees or agents.
30. Negligence as to banks and commercial paper.

1. In general.

The function of deciding the law questions that arise during the trial belongs to the judge, while that of finding the facts from the evidence adduced is for the jury.¹

¹ The law of the case must be determined by the court, and should not be submitted to the jury. *Beggs v. First Nat. Bank*, 134 Ill. App. 403;

Tobler v. Pioneer Min. & Mfg. Co. 166 Ala. 482, 52 So. 86; *Livingston v. Taylor*, 132 Ga. 1, 63 S. E. 694; *Staunton v. Smith*, 6 Penn. (Del.) 193, 65 Atl. 593 (including construction of written instruments).

The judge should explain and interpret statutes, documents, and papers. *Schilansky v. Merchants' & M. F. Ins. Co.* 4 Penn. (Del.) 293, 55 Atl. 1014; *Berry v. Clark*, 117 Ga. 964, 44 S. E. 824; *Telfair County v. Webb*, 119 Ga. 916, 47 S. E. 218; *Libby v. Deake*, 97 Me. 377, 54 Atl. 856; *Bedenbaugh v. Southern R. Co.* 69 S. C. 1, 48 S. E. 53; *Blair v. Baird*, 43 Tex. Civ. App. 134, 94 S. W. 116.

If one reasonable mind might reach one conclusion, while another reasonable mind might reach a different conclusion, as to a controlling fact on the evidence presented, the question is for the jury. *Gordon v. Ashley*, 191 N. Y. 193, 83 N. E. 686; *Tousey v. Hastings*, 194 N. Y. 82, 86 N. E. 831, citing *Re Totten*, 179 N. Y. 112, 70 L.R.A. 711, 71 N. E. 743, 1 A. & E. Ann. Cas. 900. Whether evidence is competent on the question of damages is for the court, but its probative effect on that question is a jury question. *Jaynes v. Omaha Street R. Co.* 53 Neb. 631, 39 L.R.A. 751, 74 N. W. 67.

When there is a question of fact to be decided preliminary to a law question, such question is for the court as well as the law question.¹

¹ Competency of witness or of evidence is for court. *Worthington v. Mencer*, 96 Ala. 310, 17 L.R.A. 407, 11 So. 72 (sanity); *Pickett v. Wilmington & W. R. Co.* 117 N. C. 616, 30 L.R.A. 257, 53 Am. St. Rep. 611, 23 S. E. 264 (qualification to give opinion).

The fact question whether the nonexperts offered on an issue of sanity have had the requisite knowledge and observation to qualify them is addressed to the discretion of the trial judge, but the weight to be given to nonexpert testimony predicated on a state of facts detailed by the witness is for the jury. See note to 38 L.R.A. 733, 738.

Sufficiency of foundation for admission of note. *Patton v. Bank of Lafayette*, 124 Ga. 965, 5 L.R.A. (N.S.) 592, 53 S. E. 664, 4 A. & E. Ann. Cas. 639.

The admissibility of books of account is, in the first instance, a question for the court on the preliminary proof required by the common law or by statute, but, after they are admitted, the weight to be given them is for the jury, to be measured by their appearance and manner of keeping, as well as by all other *indicia* of truthfulness. See note to 52 L.R.A. 608, and cases there cited.

Whether a usage has been established and its binding force upon the parties, the facts being undisputed. *Runyan v. Central R. Co.* 64 N. J. L. 67, 48 L.R.A. 744, 44 Atl. 985.

A question is said to be mixed when it involves, primarily, the decision of a fact question, and, secondarily, the decision of a law question predicated on that fact.¹

¹ Domicil of person. *Stallings v. Stallings*, 127 Ga. 464, 9 L.R.A. (N.S.) 593, 56 S. E. 469.

As to reasonableness of ordinance, see *Houston & T. C. R. Co. v. Dallas*, 98 Tex. 396, 70 L.R.A. 850, 84 S. W. 648.

Monopolistic nature of a traffic agreement. *South Florida R. Co. v. Rhodes*, 25 Fla. 40, 3 L.R.A. 733, 23 Am. St. Rep. 506, 5 So. 633.

It is a mixed question whether servants are in a common employment so that they are "fellow servants." See note to 50 L.R.A. 421, and cases cited.

2. Weight of evidence and credibility of witnesses.

The weighing of the testimony or the evidence,¹ and the credibility of the evidence or of the particular witnesses,² involve the decision of facts, and is for the jury.

A question may be for the court if all the testimony on the one side is wholly unworthy of any credibility.³

¹ See, generally, chapter XXI.

² Credibility of witnesses is for jury. *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 10 L.R.A. 676, 25 N. E. 402; *Dobbins v. Dobbins*, 141 N. C. 210, 10 L.R.A. (N.S.) 185, 115 Am. St. Rep. 682, 53 S. E. 870; *Southern R. Co. v. Coursey*, 115 Ga. 602, 41 S. E. 1013; *Chicago Union Traction Co. v. O'Brien*, 219 Ill. 303, 76 N. E. 341; *Indianapolis Street R. Co. v. Johnson*, 163 Ind. 518, 72 N. E. 571; *Houston & T. C. R. Co. v. Bell*, 97 Tex. 71, 75 S. W. 484.

Effect of insanity on credibility is for jury. *Worthington v. Mencer*, 96 Ala. 310, 17 L.R.A. 407, 11 So. 72.

The question of credibility is for the jury to determine after seeing and hearing a witness; and it should be submitted to them without instructions as to the existence of any presumption as to truth or falsehood. *State v. Halverson*, 103 Minn. 265, 14 L.R.A. (N.S.) 947, 123 Am. St. Rep. 326, 114 N. W. 957.

So it is for the jury to say whether witnesses are contradicted by written statements proved at the trial, where statements were procured from them prior to the trial by one who took notes, and then dictated an elaboration thereof to his stenographer, whose transcript is the statement proved. *Chicago City R. Co. v. Tuohy*, 196 Ill. 410, 58 L.R.A. 270, 63 N. E. 997.

Credibility and value of the testimony of a lawyer from another state as to the rule upon a certain subject in that state. *Hancock v. Western U. Tele. Co.* 137 N. C. 497, 69 L.R.A. 403, 49 S. E. 952.

If the parties are the only witnesses, the question of their credibility is for the jury. *Massey v. Southern R. Co.* 106 Va. 515, 56 S. E. 275; *Murphy v. Hiltibridge*, 132 Iowa, 114, 109 N. W. 471.

³ *Blumenthal v. Boston & M. R. Co.* 97 Me. 255, 54 Atl. 747. Whether or not a business was legitimate ought not to have been submitted to the jury, where the only evidence to support the legitimacy was such as had no credibility in law. *Weltmer v. Bishop*, 171 Mo. 110, 65 L.R.A. 584, 71 S. W. 167.

The general rule is that the testimony of experts is not conclusive on the jury, which may determine its weight and credibility, and reject it if, on just and fair consideration, it does not seem reasonable and true.¹

The same is true as to nonexperts.²

¹ *The Conqueror*, 166 U. S. 110, 41 L. ed. 937, 17 Sup. Ct. Rep. 510; *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072; *Humphries v. Johnson*, 20 Ind. 190; *Wells v. Leek*, 151 Pa. 431, 25 Atl. 101; *Templeton v. People*, 3 Hun, 357; *Muller v. Ryan*, 19 N. Y. S. R. 109, 2 N. Y. Supp. 736; *Case v. Perew*, 46 Hun, 57, 10 N. Y. S. R. 811; *Laflin v. Chicago, W. & N. R. Co.* 33 Fed. 415. See also exhaustive note in 42 L.R.A. 764.

Testimony of attending physician that applicant for accident insurance had chronic bronchitis not conclusive of breach of warranty, where there was other evidence that his general health was good. *French v. Fidelity & C. Co.* 135 Wis. 259, 17 L.R.A.(N.S.) 1011, 115 N. W. 869.

² *Newhard v. Yundt*, 132 Pa. 324, 19 Atl. 288; *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253.

For other cases specifically applying this rule to the opinions of nonexperts on the question of sanity, see note to 38 L.R.A. 747.

In a criminal case it was held error for the court to charge the jury that the testimony of experts as to sanity was entitled to "great weight," and to add, in substance, that the testimony of the familiar associates of the person was entitled to similar weight. The reviewing court remarked that the whole question was to be left to the jury, under proper instructions, without intimation how they were to deal with particular classes of witnesses. *Ryder v. State*, 100 Ga. 528, 38 L.R.A. 721, 62 Am. St. Rep. 334, 28 S. E. 246.

When the testimony is so clearly opposed to natural laws that it cannot be true, the court may, as matter of law, refuse to let it be credited.¹

¹ *Chybowski v. Bucyrus Co.* 127 Wis. 332, 7 L.R.A.(N.S.) 357, 106 N. W. 833, and note 7 L.R.A.(N.S.) 357; *Fleming v. Northern Tissue Paper*

Mill, 135 Wis. 157, 15 L.R.A.(N.S.) 701, 114 N. W. 841, and note to 15 L.R.A.(N.S.) 701.

3. Sufficiency of evidence.

Whether the evidence suffices to prove a given fact is always for the jury, unless it could afford no support for a verdict for the party who adduced it and on whom is the burden of proof.¹

If the evidence is conflicting it is for the jury, but if not, and there are no diverse inferences permissible upon it, it is for the court;² and likewise when it is not disputed or contradicted.³

¹ *Gibbons v. Farwell*, 63 Mich. 344, 6 Am. St. Rep. 301, 29 N. W. 855. See also note to 2 L.R.A. 340.

It is for the court where the evidence is insufficient to sustain the necessary allegations. *Beisel v. Gerlach*, 221 Pa. 232, 18 L.R.A.(N.S.) 516, 70 Atl. 721.

² *Cetofonte v. Camden Coke Co.* 78 N. J. L. 662, 27 L.R.A.(N.S.) 1058, 75 Atl. 913; *Harris v. Norfolk & W. R. Co.* 153 N. C. 542, 31 L.R.A.(N.S.) 543, 138 Am. St. Rep. 686, 69 S. E. 623.

³ If the facts are not susceptible of dispute, it is for the court. *Bunting v. Hogsett*, 139 Pa. 363, 12 L.R.A. 268, 23 Am. St. Rep. 192, 21 Atl. 31, 33, 34; *Chattanooga Light & P. Co. v. Hodges*, 109 Tenn. 331, 69 L.R.A. 459, 97 Am. St. Rep. 844, 70 S. W. 616; *Stone v. Boston & A. R. Co.* 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1.

On any state of the evidence, though it be conflicting, it may become pure question of law by motion to direct the verdict or by other motion which reduces the question to one of whether there is any evidence which, in law, is sufficient to go to the jury.¹

¹ Sufficiency of evidence to go to jury is law question. *Bell v. Carter*, 19 L.R.A.(N.S.) 833, 90 C. C. A. 555, 164 Fed. 417; *Robinson v. Denver City Tramway Co.* 90 C. C. A. 160, 164 Fed. 174; *Brown v. W. T. Weaver Power Co.* 140 N. C. 333, 3 L.R.A.(N.S.) 912, 52 S. E. 954; *McIntyre v. Orner*, 166 Ind. 57, 4 L.R.A.(N.S.) 1130, 117 Am. St. Rep. 359, 76 N. E. 750, 8 A. & E. Ann. Cas. 1087.

As to the scintilla doctrine being abandoned by the later decisions, see note, 2 L.R.A. 340.

See chapter XXI., Taking Case from Jury.

On such a motion, the evidence of the opposite party is assumed to be true, and he is given the benefit of all inferences in his favor which may legitimately be drawn. See post, chapter XXI. § 8.

4. Inferences.

Since inferences are the logical means of arriving at the fact proved by the evidence, they constitute decisions of facts and therefore belong to the jury; but presumptions deducible by rule of law from given facts belong to the court, and under statutes there may be facts which are declared by law to have certain legal equivalents which the court only can declare.¹

¹ It is for the jury to say whether or not, on special facts, an inference may be drawn which will rebut a legal presumption. *Quimby v. Durgin*, 148 Mass. 104, 1 L.R.A. 514, 19 N. E. 14.

Where a cause was tried before jurors from another county whence it had been taken on a change of venue, it was error to submit to the jury matters which were of common knowledge only to residents of the vicinage where the cause arose. *Reedy v. St. Louis Brewing Asso.* 161 Mo. 523, 53 L.R.A. 805, 61 S. W. 859.

For the court, where the effect of the evidence is declared by law. *Patterson v. Hayden*, 17 Or. 238, 3 L.R.A. 529, 11 Am. St. Rep. 822, 21 Pac. 129.

The fact that the brand of fuse supplied by a mining company for the use of its miners was in general use and favorably known was not, in law, conclusive evidence that company was not negligent in furnishing that brand. *Wüta v. Interstate Iron Co.* 103 Minn. 303, 16 L.R.A. (N.S.) 128, 115 N. W. 169.

Issues raised by denial of receipt of notice alleged to have been sent by postal card. *Bonewell v. Jacobson*, 130 Iowa, 170, 5 L.R.A. (N.S.) 436, 106 N. W. 614.

Whether person presumably dead from long absence died before or after insurance was claimed to lapse by nonpayment of dues. *Butler v. Supreme Court*. I. O. F. 53 Wash. 118, 26 L.R.A. (N.S.) 293, 101 Pac. 481.

The court cannot rule that a man long absent, but of whose existence there were rumors eighteen years later, was dead at an intermediate date. *Turner v. Williams*, 202 Mass. 500, 24 L.R.A. (N.S.) 1199, 132 Am. St. Rep. 511, 89 N. E. 110.

See, generally, illustrations under later headings in this chapter.

5. Miscellaneous questions.

[In this section have been arranged decisions on particular questions of a concrete nature. They are collated according to subject-matter, it being thought to be the most serviceable arrangement for the practitioner. All of them will prove more or less illustrative of the general rules stated in the previous portion of this chapter.]

The court determines matters of public policy,¹ and public use or eminent domain,² but the particular necessity of a taking may rest in facts.³

On the condemnation of land for a railroad it is for the jury to decide whether compensation for consequent pollution of water on the land had been made when a former right of way was condemned for another road.⁴

¹Brush v. Carbondale, 229 Ill. 150, 82 N. E. 252, 11 A. & E. Ann. Cas. 121.

²Whether or not the use for which property is sought to be taken under the power of eminent domain is public. Albright v. Sussex County Light & Park Commission, 71 N. J. L. 303, 309, 69 L.R.A. 768, 108 Am. St. Rep. 749, 57 Atl. 398, 59 Atl. 146, 2 A. & E. Ann. Cas. 48; Rockingham County Light & P. Co. v. Hobbs, 72 N. H. 531, 66 L.R.A. 581, 58 Atl. 46.

³The location, number, and necessity of crossings sought to be condemned to carry the spur tracks of one railroad across those of another involve questions of fact properly submitted to a jury of freeholders. Kansas City, S. & G. R. Co. v. Louisiana Western R. Co. 116 La. 178, 5 L.R.A.(N.S.) 512, 40 So. 627, 7 A. & E. Ann. Cas. 831.

Whether highway laid out across a railroad track will interfere with operation of the railroad. New York, C. & St. L. R. Co. v. Rhodes, 171 Ind. 521, 24 L.R.A.(N.S.) 1225, 86 N. E. 840.

⁴Rudolph v. Pennsylvania Schuylkill Valley R. Co. 186 Pa. 541, 47 L.R.A. 782, 40 Atl. 1083.

It is not for the jury alone to say whether school authorities could separate white and colored children;¹ and the court may determine whether Bible reading in the public schools has taken the form of sectarian instruction.²

¹Power of authorities to assign white and colored children to different schools held not for jury alone. People ex rel. Bibb v. Alton, 193 Ill. 309, 56 L.R.A. 95, 61 N. E. 1077.

²State ex rel. Freeman v. Scheve, 65 Neb. 853, 59 L.R.A. 927, 91 N. W. 846, 93 N. W. 169.

Existence and effect of an alleged common error which has become a rule of property is for the court.¹

¹O'Donnell v. Glenn, 9 Mont. 452, 8 L.R.A. 629, 23 Pac. 1018.

It is a question of fact whether a nuisance or no nuisance exists, if the opinions of individuals might differ thereon.¹

¹ *Hart v. Albany*, 3 Paige, 213; *Bond v. Smith*, 44 Hun, 219; *Centerville v. Woods*, 57 Ind. 192; *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Dec. 522; *Rex v. Wright*, 3 Barn. & Ad. 683, 1 L. J. Mag. Cas. N. S. 74, 12 Eng. Rul. Cas. 560. See also note to 36 L.R.A. 595.

Whether the obstruction of a sidewalk by the uses made by the abutting owner is a nuisance is for the jury unless it is clear that it was or was not so. *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536. But see *Jochem v. Robinson*, 66 Wis. 638, 57 Am. Rep. 298, 29 N. W. 642.

The invalidity of foreign incorporation as a defense where the incorporation was evasively done is a law question.¹

¹ *Demarest v. Flack* (*Demarest v. Grant*), 128 N. Y. 205, 13 L.R.A. 854, 28 N. E. 645.

Whether a perfect title is proved is for the jury, unless it is connected with the public title, or all claims are cut off by adverse possession.¹

¹ *Beaufort Land & Invest. Co. v. New River Lumber Co.* 86 S. C. 358, 30 L.R.A.(N.S.) 243, 68 S. E. 637.

The rule or measure of damages or liability is for the court, and their amount for the jury.¹

¹ *Carpenter v. Red Cloud*, 64 Neb. 126, 89 N. W. 637; *Houston & T. C. R. Co. v. Buchanan*, 38 Tex. Civ. App. 165, 84 S. W. 1073; *Gulf, C. & S. F. R. Co. v. Phillips*, 35 Tex. Civ. App. 337, 80 S. W. 107; *Johnson v. Kahn*, 97 Mo. App. 628, 71 S. W. 725; *Snyder v. Lake Shore & M. S. R. Co.* 131 Mich. 418, 91 N. W. 643; *Van Camp Hardware & Iron Co. v. O'Brien*, 28 Ind. App. 152, 62 N. E. 464.

Amount of damages to be awarded a passenger negligently carried beyond his destination, where there is any evidence tending to establish the right to recover. *Dalton v. Kansas City, Ft. S. & M. R. Co.* 78 Kan. 232, 17 L.R.A.(N.S.) 1226, 96 Pac. 475, 16 A. & E. Ann. Cas. 185.

Where homesteader's premises are overflowed by reason of a wrongful obstruction of a natural water course, the court should define his rights in the homestead, and leave the jury to determine his interest and the consequent liability of the wrongdoer, from consideration of the improvements made, the length of time the homestead has existed, and all other facts. *McLeod v. Spencer*, 21 Okla. 165, 17 L.R.A.(N.S.) 958, 129 Am. St. Rep. 774, 95 Pac. 754.

6. Cause and effect; proximate cause.

The operations of cause and effect are for the jury if the decision rests in fact.¹

Which was the proximate one of several causes is ordinarily a fact question.²

¹ Whether loss was entirely caused by given injury. *Lord v. American Mut. Acci. Asso.* 89 Wis. 19, 26 L.R.A. 741, 46 Am. St. Rep. 815, 61 N. W. 293.

Whether a consignor of a horse which became ill because of exposure in transit contributed to its death by leading it, under the supervision of a competent veterinary surgeon, through a storm to a veterinary hospital 2 miles distant. *Wente v. Chicago, B. & Q. R. Co.* 79 Neb. 179, 15 L.R.A.(N.S.) 756, 112 N. W. 300, 115 N. W. 859.

Cause of settling of earth in sewer trench as between improper filling, natural causes, and subsidence by breaking of water pipe. *Updike v. Omaha*, 87 Neb. 228, 30 L.R.A.(N.S.) 589, 127 N. W. 229.

Whether landowner has, by construction of drainage ditches, so augmented the natural drainage as to affect the liability of a railroad which has obstructed its outlet. *Harvey v. Mason City & Ft. D. R. Co.* 129 Iowa, 465, 3 L.R.A.(N.S.) 973, 113 Am. St. Rep. 483, 105 N. W. 958.

² *Louisville, N. A. & C. R. Co. v. Nitsche*, 126 Ind. 229, 9 L.R.A. 750, 22 Am. St. Rep. 582, 26 N. E. 51; *Schumaker v. St. Paul & D. R. Co.* 46 Minn. 39, 12 L.R.A. 257, 48 N. W. 559; *Cole v. German Sav. & L. Soc.* 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113; *Coy v. Indianapolis Gas Co.* 146 Ind. 655, 36 L.R.A. 535, 46 N. E. 17.

As to proximate cause being for the jury, see also note in 2 L.R.A. 696.

Held to be a jury question.

Cause of death. *Travelers' Ins. Co. v. Melick*, 27 L.R.A. 629, 12 C. C. A. 544, 27 U. S. App. 547, 65 Fed. 178.

Riding on or boarding car in forbidden way as cause of accident. *Anthony v. Mercantile Mut. Acci. Asso.* 162 Mass. 354, 26 L.R.A. 406, 44 Am. St. Rep. 367, 38 N. E. 973.

Disease or injury as cause of hurt or accident. *Chicago City R. Co. v. Saxby*, 213 Ill. 274, 68 L.R.A. 164, 104 Am. St. Rep. 218, 72 N. E. 755; *Modern Woodman Acci. Asso. v. Shyrook*, 54 Neb. 250, 39 L.R.A. 826, 74 N. W. 607.

Use of heavy sledge as external, violent, and accidental means causing injury. *Atlanta Acci. Asso. v. Alexander*, 104 Ga. 709, 42 L.R.A. 188, 30 S. E. 939.

Whether injuries were accidental or self-inflicted, where insured was found unconscious in a burning building, to which he had gone to work. *Wilkinson v. Ætna L. Ins. Co.* 240 Ill. 205, 25 L.R.A.(N.S.) 1256, 130 Am. St. Rep. 269, 88 N. E. 550.

Whether one found dead had committed suicide, where he was lying as if a pistol had fallen from his hand, but had no known reason or disposition towards suicide, and his plans forbade that inference, though his wife was of opinion that he had taken his own life. *O'Connor v. Modern Woodmen*, 110 Minn. 18, 25 L.R.A.(N.S.) 1244, 124 N. W. 454.

Interference as cause of person's breaking his contract. *Doremus v. Hennessy*, 176 Ill. 608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924. 54 N. E. 524.

Roadmaster's or engineer's negligence in backing train while servant was in danger. *Harrison v. Detroit, L. & N. R. Co.* 79 Mich. 409, 7 L.R.A. 623, 19 Am. St. Rep. 180, 44 N. W. 1034.

Negligence in knocking over object on sidewalk. *L. Wolff Mfg. Co. v. Wilton*, 152 Ill. 9, 26 L.R.A. 229, 38 N. E. 694.

Failure to place guard wires, as cause of resultant electric shock. *Block v. Milwaukee Street R. Co.* 89 Wis. 371, 27 L.R.A. 365, 46 Am. St. Rep. 849, 61 N. W. 1101.

Whether spread of fire was proximate to its origin or to change of wind. *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 157, 17 L.R.A. 33, 9 So. 661.

Original improper filling, or later causes acting toward same result, as cause of the breaking through of a pavement into a cavity after many years. *Udike v. Omaha*, 87 Neb. 228, 30 L.R.A.(N.S.) 589, 127 N. W. 229.

Whether dropping of bucket or previous swinging thereof was the proximate cause of injuries to coal heaver who was knocked down by a coal bucket and hurt by its fall, which bucket having acquired "too much swing," was dropped, without warning, at the signal of the hatch tender, where evidence was conflicting as to whether hatch tender saw him while bucket was swinging, or could have seen him after bucket knocked him down, before it dropped. *Anderson v. Pittsburgh Coal Co.* 108 Minn. 455, 26 L.R.A.(N.S.) 624, 122 N. W. 794.

Whether breaking of a kingbolt was the proximate cause of injury received in a runaway. *Comer v. Meyer*, 78 N. J. L. 464, 29 L.R.A.(N.S.) 597, 74 Atl. 497.

Whether the sending out of a locomotive with a defective eccentric was the cause of the injury to the engineer, who, after discovering and repairing it imperfectly, was proceeding to his next station, when it broke. *Koreis v. Minneapolis & St. L. R. Co.* 108 Minn. 449, 25 L.R.A.(N.S.) 339, 133 Am. St. Rep. 462, 122 N. W. 668.

Held to be a court question.—

If the facts connected with an accident are undisputed, the question of proximate cause is for the court. *Fanizzi v. New York & Q. C. R. Co.* 113 App. Div. 440, 99 N. Y. Supp. 281; *Trapp v. McClellan*, 68 App. Div. 362, 74 N. Y. Supp. 130.

It is for the court to say whether the evidence tends to prove causative

negligence. *Cincinnati Street R. Co. v. Murray*, 53 Ohio St. 570, 30 L.R.A. 508, 42 N. E. 596.

Legal proximity as between successive and unrelated causes is for the court. *Missouri P. R. Co. v. Columbia*, 65 Kan. 390, 58 L.R.A. 399, 60 Pac. 338.

7. Reasonableness; necessity; probable cause.

The reasonableness of an act or omission with reference to a particular occasion is for the jury,¹ but if it presents a question of justice or propriety it is for the court.²

¹ Excuse for shooting within city. *Chesterfield v. Ratliff*, 52 S. C. 563, 41 L.R.A. 503, 30 S. E. 593.

Shooting into assemblage of dogs as necessary means to abate nuisance. *Hubbard v. Preston*, 90 Mich. 221, 15 L.R.A. 249, 30 Am. St. Rep. 426, 51 N. W. 203.

Necessity for killing trespassing dog. *Hodges v. Causey*, 77 Miss. 353, 48 L.R.A. 95, 78 Am. St. Rep. 525, 26 So. 945.

Necessity for use of unloading skids across sidewalk. *Jochem v. Robinson*, 72 Wis. 199, 1 L.R.A. 178, 39 N. W. 383.

Held error to submit to jury medical necessity for abortion to get rid of an illegitimate fetus, where such necessity is not suggested in the evidence, and action is on an insurance policy of deceased. *Wells v. New England Mut. L. Ins. Co.* 191 Pa. 207, 53 L.R.A. 327, 71 Am. St. Rep. 763, 43 Atl. 126.

Excessiveness of force to regain possession of property. *Com. v. Donahue*, 148 Mass. 529, 2 L.R.A. 623, 12 Am. St. Rep. 591, 20 N. E. 171, 8 Am. Crim. Rep. 45.

Necessity for officer striking drunken person resisting arrest, over the head with a billy, when bystanders were present who presumably would render assistance, and whether more than permissible force is used where death results from blows. *State v. Phillips*, 119 Iowa, 652, 67 L.R.A. 292, 94 N. W. 229, 13 Am. Crim. Rep. 325.

Use of soft coal to operate factory in a country district suitable for country homes. *McCarty v. Natural Carbonic Gas Co.* 189 N. Y. 40, 13 L.R.A. (N.S.) 465, 81 N. E. 549, 12 A. & E. Ann. Cas. 840.

Use of unloading skids over walk. *John A. Tolman & Co. v. Chicago*, 240 Ill. 268, 24 L.R.A. (N.S.) 97, 88 N. E. 488, 16 A. & E. Ann. Cas. 142.

Reasonable use of flowage right. *Chapman v. Newmarket Mfg. Co.* 74 N. H. 424, 15 L.R.A. (N.S.) 292, 68 Atl. 868.

Whether a party has used more than his fair proportion of the water, where there is insufficient in the stream for power purposes for both upper and lower proprietors. *Canton v. Shock*, 66 Ohio St. 19, 58 L.R.A. 637, 90 Am. St. Rep. 557, 63 N. E. 600.

- Reasonable use by landowners of waters located beneath their premises in well-defined strata and upon which they are dependent for their water supply. *Erickson v. Crookston Waterworks Power & Light Co.* 105 Minn. 182, 17 L.R.A. (N.S.) 650, 117 N. W. 435.
- Whether real property levied upon is reasonably capable of subdivision, and whether levy is therefore excessive. *Bridger v. Exchange Bank*, 126 Ga. 821, 8 L.R.A. (N.S.) 463, 115 Am. St. Rep. 118, 56 S. E. 97.
- ² Use of premises with reference to neighboring property. *Frost v. Berkeley Phosphate Co.* 42 S. C. 402, 26 L.R.A. 693, 46 Am. St. Rep. 736, 20 S. E. 280.
- Owner's use of land for business amounting to nuisance, as proper use and place. *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 9 L.R.A. 737, 25 Am. St. Rep. 595, 20 Atl. 900.
- Meaning of a by-law and its reasonableness when facts are undisputed. *Carney v. New York L. Ins. Co.* 162 N. Y. 453, 49 L.R.A. 471, 76 Am. St. Rep. 347, 57 N. E. 78.
- Tender of \$5 bill for car fare. *Barker v. Central Park, N. & E. River R. Co.* 151 N. Y. 237, 35 L.R.A. 489, 56 Am. St. Rep. 626, 45 N. E. 550.
- The reasonableness of an ordinance is one of law, and not of fact; but in some cases the facts must be established before the question can be determined. *Houston & T. C. R. Co. v. Dallas*, 98 Tex. 396, 70 L.R.A. 850, 84 S. W. 648.
- Reasonableness of municipal ordinance requiring removal of stationary awnings where the question of good faith of municipal authorities was not involved. *Small v. Edenton*, 146 N. C. 527, 20 L.R.A. (N.S.) 145, 60 S. E. 413.

Thus the reasonableness of the regulations of a carrier is a law question,¹ and so is the reasonableness of time as applied to an undisputed state of facts,² while if the time was dependent on doubtful facts it should go to the jury.³

The Federal courts and some, but not all, others hold that it is for the court to say whether an account rendered has been kept an unreasonable time so as to make it an account stated.⁴

- ¹ Reasonableness of regulation excluding colored women from passenger car. *Chilton v. St. Louis & I. M. R. Co.* 114 Mo. 88, 19 L.R.A. 269, 21 S. W. 458.
- Reasonableness of rule separating white and colored passengers. *Bowie v. Birmingham R. & Electric Co.* 125 Ala. 397, 50 L.R.A. 632, 82 Am. St. Rep. 247, 27 So. 1016.
- Reasonableness of a railroad's rule for the government of its business. *South Florida R. Co. v. Rhodes*, 25 Fla. 40, 3 L.R.A. 733, 23 Am. St. Rep. 506, 5 So. 633.

Reasonableness of a regulation of a carrier of passengers. Central R. Co. v. Motes, 117 Ga. 923, 62 L.R.A. 507, 97 Am. St. Rep. 223, 43 S. E. 990.

Reasonableness of railroad's regulation refusing to sell tickets or check baggage to a regular stopping place of passenger train. Pittsburgh, C. & St. L. R. Co. v. Lyon, 123 Pa. 140, 2 L.R.A. 489, 10 Am. St. Rep. 517, 16 Atl. 607.

Reasonableness of a railroad's rules for the movement of trains. Little Rock & M. R. Co. v. Barry, 43 L.R.A. 349, 28 C. C. A. 644, 56 U. S. App. 37, 84 Fed. 944.

Whether freight agent was justified in refusing to deliver freight until payment of a higher amount stated in waybill, or until he verified the charge, where two amounts were given on waybill. Beasley v. Baltimore & P. R. Co. 27 App. D. C. 595, 6 L.R.A.(N.S.) 1048.

2 When the facts are undisputed, and different inferences cannot reasonably be drawn from the same facts, the question of what is reasonable time is one of law for the court. Wright v. Bank of the Metropolis, 110 N. Y. 237, 1 L.R.A. 289, 6 Am. St. Rep. 356, 18 N. E. 79; Traveler's Ins. Co. v. Myers, 62 Ohio St. 529, 49 L.R.A. 760, 57 N. E. 458; Electric Fireproofing Co. v. Smith, 113 App. Div. 615, 99 N. Y. Supp. 37.

But see Houston & T. C. R. Co. v. Batchler, 37 Tex. Civ. App. 116, 83 S. W. 902.

Reasonableness of time for removal of freight from cars so as to relieve carrier from risk of loss, where facts are undisputed. Normile v. Northern P. R. Co. 36 Wash. 21, 67 L.R.A. 271, 77 Pac. 1087.

Whether two months was a reasonable time to allow an attorney to pay a client money collected by him. Goodyear Metallic Rubber Co. v. Baker (Goodyear Metallic Rubber Co. v. Carpenter) 81 Vt. 39, 17 L.R.A.(N.S.) 667, 69 Atl. 160, 5 A. & E. Ann. Cas. 1207.

Bills and notes.—Reasonableness of time within which to demand payment and give notice on a demand note, where facts are undisputed. Turner v. Iron Chief Min. Co. 74 Wis. 355, 5 L.R.A. 533, 17 Am. St. Rep. 168, 43 N. W. 149; Leonard v. Olson, 99 Iowa, 162, 35 L.R.A. 381, 61 Am. St. Rep. 230, 68 N. W. 677.

That the facts relative to the time of forwarding and presenting a check are not disputed does not necessarily make the question whether the presentment was at a reasonable time one for the court. Citizens' Bank v. First Nat. Bank, 135 Iowa, 605, 13 L.R.A.(N.S.) 303, 113 N. W. 481.

3 Reasonableness of time for removal of growing timber, and duration of right of way incident thereto. McRae v. Stillwell, 111 Ga. 65, 55 L.R.A. 513, 36 S. E. 604.

Whether a warranted machine was returned within a reasonable time after seller's abandonment of attempts to make it fulfil the warranty.

First Nat. Bank v. Dutcher, 128 Iowa, 413, 1 L.R.A.(N.S.) 142, 104 N. W. 497.

Reasonableness of eight months' delay after expiration of time within which policy allowed action to be brought thereon, where insurer had authorized delay to await return of agent alleged to have received premiums. Hall v. Union Cent. L. Ins. Co. 23 Wash. 610, 51 L.R.A. 288, 83 Am. St. Rep. 844, 63 Pac. 505.

Whether master repaired defective machine within a reasonable time after general promise to do so. Andrecsik v. New Jersey Tube Co. 73 N. J. L. 664, 4 L.R.A.(N.S.) 913, 63 Atl. 719, 9 A. & E. Ann. Cas. 1006.

Bills and notes.—Whether a train departed too early in the day to admit of the forwarding of a check on the day following its receipt. Lewis. H. & Co. v. Montgomery Supply Co. 59 W. Va. 75, 4 L.R.A.(N.S.) 132, 52 S. E. 1017.

In carriage of passengers or freight.—Reasonableness of time allowed for loading and unloading cars, and charge for detention of cars thereafter. Kentucky Wagon Mfg. Co. v. Ohio & M. R. Co. 98 Ky. 152, 36 L.R.A. 850, 56 Am. St. Rep. 326, 32 S. W. 595.

Time allowed consignee to remove goods so as to reduce carrier's liability to that of warehouseman, is for the court where facts are undisputed, and for the jury where they are in dispute and unsettled. Poythress v. Durham & S. R. Co. 148 N. C. 391, 18 L.R.A.(N.S.) 427, 62 S. E. 515.

Whether six days was a reasonable length of time in which to determine railroad freight rate from Florida to Washington, District of Columbia. Beasley v. Baltimore & P. R. Co. 27 App. D. C. 595, 6 L.R.A.(N.S.) 1048.

Reasonableness of time before departure of train, for passenger to deliver his baggage to carrier. Fleischman v. Southern R. Co. 76 S. C. 237, 9 L.R.A.(N.S.) 519, 56 S. E. 974.

As to what is reasonable time for passenger to leave station and thus terminate his status as passenger, see post, this chapter, Carriers.

⁴ See note to 29 L.R.A.(N.S.) 341.

Whether the special circumstances under which an alleged discriminating rate was made sufficed to make it reasonable and fair has been held a fact question.¹

¹ Whether a discriminatory rate is relieved of its objections by agreement of shipper receiving it to furnish railroad with certain goods at a given price. Louisville, E. & St. L. Consol. R. Co. v. Wilson, 132 Ind. 517, 18 L.R.A. 105, 32 N. E. 311.

Whether a work is one generally necessary to be done on Sunday is a question of law,¹ but the contrary has been held of an act necessary to save a particular property.²

¹ Keeping barbershop open on Sunday. *Com. v. Waldman*, 140 Pa. 89, 11 L.R.A. 563, 21 Atl. 248.

² Pumping of an oil well on Sunday, where evidence is conflicting as to injury caused by not pumping. *State v. McBee*, 52 W. Va. 257, 60 L.R.A. 638, 43 S. E. 121.

Whether an act ordinarily insubordinate was justified by an exigent necessity has been held a jury question,¹ and so also as to what were "necessary" supplies for an undertaking.²

¹ Whether the mate of a vessel should have resorted to strong measures to obtain command, because the captain had become mentally deranged. *Williams v. Hays*, 157 N. Y. 541, 43 L.R.A. 253, 68 Am. St. Rep. 797, 52 N. E. 589.

² Whether supplies furnished were necessary, where one agreed to crop another's land for a share of the crop after paying for supplies furnished to enable him to make the crop. *Bourland v. McKnight*, 79 Ark. 427, 4 L.R.A.(N.S.) 698, 96 S. W. 179.

The court may decide if a given cause was probable cause,¹ but must leave its existence in fact to the jury.²

¹ For arrest, where the facts are not in controversy. *Slater v. Taylor*, 31 App. D. C. 100, 18 L.R.A.(N.S.) 77.

Whether an official board had reasonable and probable cause for asserting its authority under the statute is for the court; thus, whether board of health acted without reasonable and probable cause for taking sanitary measures. *Valentine v. Englewood*, 76 N. J. L. 509, 19 L.R.A.(N.S.) 262, 71 Atl. 344, 16 A. & E. Ann. Cas. 731.

² *Stoecker v. Nathanson*, 5 Neb. (Unof.) 435, 70 L.R.A. 667, 98 N. W. 1061.

The question of probable cause is for the jury where there is room for two opinions. *Davis v. McMillan*, 142 Mich. 391, 3 L.R.A.(N.S.) 928, 113 Am. St. Rep. 585, 105 N. W. 862, 7 A. & E. Ann. Cas. 854.

Whether defendant in a malicious prosecution action had probable cause for believing another committed crime, so as to justify making a complaint. *Smith v. Clark*, — Utah, —, 26 L.R.A.(N.S.) 953, 106 Pac. 653.

8. Diligence.

It is for the jury to say whether there was diligence under the particular circumstances in proof.¹

¹ Diligence of consignee of C. O. D. goods in making claim after time for transmission of money to consignor. *Hardy v. American Exp. Co.* 182 Mass. 328, 59 L.R.A. 731, 65 N. E. 375.

Diligence in rescinding subscription to stock induced by correspondence, after subscriber learned of insolvency of the bank. *Newton Nat. Bank v. Newbegin*, 33 L.R.A. 727, 20 C. C. A. 339, 40 U. S. App. 1, 74 Fed. 135.

Depositor's diligence in examining his pass book and returned vouchers, and in supervising his agent's conduct, where he is permitted to make the examination, where the evidence tends to show lack of diligence. *First Nat. Bank v. Richmond Electric Co.* 106 Va. 347, 7 L.R.A. (N.S.) 744, 117 Am. St. Rep. 1014, 56 S. E. 152.

9. Probability.

In a criminal case it was held a question of fact whether an unlawful assemblage of men to intimidate officers might probably culminate in the killing of one of them.¹

¹ Probability that killing of legislator would result from assemblage of men at state capitol gathered as result of conspiracy to alarm legislators by so assembling. *Powers v. Com.* 110 Ky. 386, 53 L.R.A. 245, 61 S. W. 735, 13 Am. Crim. Rep. 464.

10. Carriers; passengers.

Whether a railroad is a common carrier,¹ or was carrying goods at a certain time in a certain way,² or whether it took goods as carrier or warehouseman,³ are for the jury if resolvable upon special facts.

As to reasonableness of carriers' rules, see ante, this chapter, Reasonableness, § 7.

¹ Whether a railroad is a general commercial railroad or a logging road, where the evidence is not clear. *Campbell v. Duluth & N. E. R. Co.* 107 Minn. 358, 22 L.R.A. (N.S.) 190, 120 N. W. 375.

² Whether a carrier was, at a particular time, shipping freight at published rates. *Hilton Lumber Co. v. Atlantic Coast Line R. Co.* 141 N. C. 171, 6 L.R.A. (N.S.) 225, 53 S. E. 823.

³ Whether railroad received trunks as carrier or warehouseman. *Fleischman v. Southern R. Co.* 76 S. C. 237, 9 L.R.A. (N.S.) 519, 56 S. E. 974.

The sufficiency of proven facts to make one a passenger is a law question.¹

It is for the jury to say what is a reasonable time for a passenger to depart from the depot, thus terminating his relation,² or whether his acts showed intention to terminate it,³ but on undisputed facts it devolves on the court.⁴

¹ What facts will create contract relation of carrier and passenger. *Chicago & E. I. R. Co. v. Jennings*, 190 Ill. 478, 54 L.R.A. 827, 60 N. E. 818.

² Whether passenger injured at station after his arrival had a reasonable opportunity to terminate, by arranging to leave station, his relation to the carrier. *Powell v. Philadelphia & R. R. Co.* 220 Pa. 638, 20 L.R.A.(N.S.) 1019, 70 Atl. 268.

See note to 2 L.R.A.(N.S.) 876, citing *Houston & T. C. R. Co. v. Batchler*. 37 Tex. Civ. App. 116, 83 S. W. 902.

³ Good faith of passenger in turning back when leaving carrier's premises, on hearing that his brother had been shot, where action is for assault on passenger by servants of carrier. *Layne v. Chesapeake & O. R. Co.* 68 W. Va. 213, 31 L.R.A.(N.S.) 414, 69 S. E. 700.

⁴ *Glenn v. Lake Erie & W. R. Co.* 165 Ind. 659, 2 L.R.A.(N.S.) 872, 112 Am. St. Rep. 255, 75 N. E. 282, 6 A. & E. Ann. Cas. 1032.

So as to time for removal of goods at destination.¹

¹ *For jury*.—Reasonable diligence in removing goods before carrier's liability became that of warehouseman. *Lewis v. Louisville & N. R. Co.* 135 Ky. 361, 25 L.R.A.(N.S.) 938, 122 S. W. 184.

Whether a particular building at a place was a passenger depot within the meaning of a statute was for the jury.¹

So it is almost invariably a jury question whether a particular point is within the limits of the depot grounds of a railroad.²

¹ *State v. Indiana & I. S. R. Co.* 133 Ind. 69, 18 L.R.A. 502, 32 N. E. 817.

² *Wilmot v. Oregon R. & Nav. Co.* 48 Or. 494, 7 L.R.A.(N.S.) 202, 120 Am. St. Rep. 840, 87 Pac. 528, 11 A. & E. Ann. Cas. 18, and note to 7 L.R.A.(N.S.) 213, citing many cases.

Whether a point where animals entered upon railroad tracks was a part of the depot grounds, where the evidence is conflicting or different inferences might be drawn. *Wilmot v. Oregon R. & Nav. Co.* supra.

11. Incorporation.

Whether dealings were with an ineffectual incorporation or the members thereof,¹ and whether persons carrying on a bank were acting as a partnership or a corporation,² is for the jury.

The duties of corporate directors and the degree of care entailed by them is a law question, but it is for the jury to say whether they have fulfilled their duties as defined by the court.³

¹ *Slocum v. Head*, 105 Wis. 431, 50 L.R.A. 324, 81 N. W. 673.

² Question whether corporation or partnership, where there was evidence of the organization of a bank under a legal charter, holding of stock, and receipt of dividends thereon. *Hallstead v. Coleman* (*Hallstead v. Curtis*) 143 Pa. 352, 13 L.R.A. 370, 22 Atl. 977.

³ See also note to 55 L.R.A. 758.

12. Partnership.

When the question whether a partnership exists is a matter of doubt, to be decided by inferences to be drawn from all the evidence, it is one of fact for the jury; and the court should not nonsuit or direct the jury to find a verdict for the plaintiff or defendant,¹ but the right to protection of a limited partnership act is one of law.²

¹ *Seabury v. Bolles* (*Seabury v. Crowell*) 51 N. J. L. 103, 52 N. J. L. 413, 11 L.R.A. 136, 16 Atl. 54, 21 Atl. 952.

² Partners' right to protection of Pennsylvania limited partnership act where failure to comply with its requirements appears on the face of their certificate. *Vanhorn v. Corcoran*, 127 Pa. 255, 4 L.R.A. 386, 18 Atl. 6.

13. Personal status, relation, occupation, or capacity.

The relation created between parties by a written contract is exclusively a court question, and the same is true as to an oral one if there is no dispute as to the terms; but if there is any question on the evidence as to what the contract was, the question becomes one for the jury.¹

¹ Relation created between parties to a written contract for railroad construction work. *Good v. Johnson*, 38 Colo. 440, 8 L.R.A. (N.S.) 896, 88 Pac. 439.

Applied in determining "who are independent contractors," in note to 17 L.R.A. (N.S.) 382.

Existence of marriage ordinarily rests in fact;¹ and infancy, question depending on uncorroborated testimony of mother, is for the jury.²

¹ The court cannot rule as a matter of law that a marriage had been entered into in good faith and followed by continuous cohabitation after the removal of an existing impediment, under a statute validating marriages under such circumstances, since such question is one of fact. *Turner v. Williams*, 202 Mass. 500, 24 L.R.A. (N.S.) 1199, 132 Am. St. Rep. 511, 89 N. E. 110.

The court should not rule that a marriage has been annulled by divorce, as a matter of law, where that fact is in evidence. *Ibid.*

² *Waterman v. Waterman*, 42 Misc. 195, 85 N. Y. Supp. 377.

Whether persons were engaging in a common enterprise,¹ or whether one was a "guide,"² have been held jury questions; but whether a proved occupation was or was not within a statutory definition was for the court.³

¹ Whether riding with another in his private conveyance constitutes engaging in a common enterprise. *Nesbit v. Garner*, 75 Iowa, 314, 1 L.R.A. 152, 9 Am. St. Rep. 486, 39 N. W. 516.

² What constitutes unlicensed guiding. *State v. Snowman*, 94 Me. 99, 50 L.R.A. 544, 80 Am. St. Rep. 380, 46 Atl. 815.

³ Whether one doing proven kind of work is entitled to "laboring man or woman's" exemption. *Wildner v. Ferguson*, 42 Minn. 112, 6 L.R.A. 338, 18 Am. St. Rep. 495, 43 N. W. 794.

14. Master and servant; agency.

As to negligence of or towards servants, see post, this chapter, § 28, Negligence of Master or Servant.

Necessity of minor servant's assumption of authority, see ante, this chapter, Necessity.

It is for the jury to determine whether the relation of master and servant existed between two parties,¹ or whether a party was agent of one to whom he reported,² or for which party one acted as agent,³ or whether he acted for both parties,⁴ and whether an agent had a given authority.⁵

¹ *Williams v. First Nat. Bank*, 118 App. Div. 555, 102 N. Y. Supp. 1031.

² Agency of party whose letters, coupled with testimony that he reported merchant's status to a mercantile agency, indicated agency, but there
Abbott. Civ. Jur. T.—33.

was other evidence that he was not such agent. *Bradstreet Co. v. Gill*, 72 Tex. 115, 2 L.R.A. 405, 13 Am. St. Rep. 768, 9 S. W. 753.

- ³ Agency for the lender or borrower of one who, in negotiating a loan, takes a bonus therefor from borrower in addition to highest legal rate of interest. *Vahlberg v. Keaton*, 51 Ark. 534, 4 L.R.A. 462, 14 Am. St. Rep. 73, 11 S. W. 878.
- ⁴ Whether agent of insured "in any manner" aided insurer. *People v. People's Ins. Exch.* 126 Ill. 466, 2 L.R.A. 340, 18 N. E. 774.
- ⁵ Whether agent in possession of horses for purposes of sale had authority to take notes payable to himself for the purchase price, where there is nothing to show that he might not have taken cash in payment. *Galbraith v. Weber*, 58 Wash. 132, 28 L.R.A.(N.S.) 341, 107 Pac. 1050.

Whether an officer's act was in virtue of governmental or proprietary powers of a municipality is for the jury, when it might have been either.¹

- ¹ Whether borough sued as responsible superior has succeeded in showing that a hydrant, part of the waterworks system, was flushed, under supervision of waterworks superintendent, for the benefit of the fire department, the evidence tending to show that such was the case. *Judson v. Winsted*, 80 Conn. 384, 15 L.R.A.(N.S.) 91, 68 Atl. 999.

It is also for them to determine whether an act amounts to ratification,¹ and generally whether a servant's act was in furtherance of his master's interest and within the scope of his employment,² or whether at the time he had abandoned his master's employment.³

- ¹ Use by a city of gas separators, for two months after discovery that its agent had received a commission upon the sale, as a ratification of sale. *Findlay v. Pertz*, 13 C. C. A. 559, 29 L.R.A. 188, 31 U. S. App. 340, 66 Fed. 427.

Retention in service of agent as ratification to be passed upon from all the evidence. *Dillingham v. Anthony*, 73 Tex. 47, 3 L.R.A. 634, 15 Am. St. Rep. 753, 11 S. W. 139.

- ² Question whether servant acted within the scope of his employment and in furtherance of his master's interest. *Baltimore Consol. R. Co. v. Pierce*, 89 Md. 495, 45 L.R.A. 527, 43 Atl. 940; *Ritchie v. Waller*. 63 Conn. 155, 27 L.R.A. 161, 38 Am. St. Rep. 361, 28 Atl. 29.

Master's liability for motorman's act in running car into a buggy, where it was claimed he did it maliciously, but there were circumstances from which it was inferable that it was done in furtherance of master's business. *Baltimore Consol. R. Co. v. Pierce*, supra.

Whether railroad company was the responsible superior of a sleeping-car porter who assaulted a passenger at the time of transferring him to another train because of accident, the porter having the ticket and being the only representative of the railroad, and the passenger having demanded that he procure sleeping-car privileges on the other train. *Dwinelle v. New York C. & H. R. R. Co.* 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319.

Question whether servant's act was within the course of his employment, or to wreak personal revenge, where evidence admits of either inference. *Nelson Business College Co. v. Lloyd*, 60 Ohio St. 448, 46 L.R.A. 314, 71 Am. St. Rep. 729, 64 N. E. 471.

Whether servant who recklessly shot at a trespasser on master's property acted within the scope of his employment. *Magar v. Hammond*, 183 N. Y. 387, 3 L.R.A.(N.S.) 1038, 76 N. E. 474.

Whether carrier's agent acted within the scope of his employment in shooting a person who used abusive language to him concerning storage charges on baggage. *Daniel v. Petersburg R. Co.* 117 N. C. 592, 4 L.R.A.(N.S.) 485, 23 S. E. 327.

Whether agent who went upon premises to take possession of mortgaged chattel was acting as such agent when he assaulted the mortgagee. *Anderson v. International Harvester Co.* 104 Minn. 49, 16 L.R.A.(N.S.) 440, 116 N. W. 101.

Liability for arrest of a person by servant, where evidence tended to show it was to get person out of the way so the master's telephone line might be run across other's property without his consent, and also that it was because of an assault on servant by arrested person. *Jackson v. American Teleph. & Teleg. Co.* 139 N. C. 347, 70 L.R.A. 738, 51 S. E. 1015.

The court may rule as law that servant acted for his master in casting vessel off from a wharf, as he stated, though it was done after he had forbidden the mooring by his master's authority and been sworn at by the vessel owner because of it, and threatened. *Ploof v. Putnam*, 83 Vt. 252, 26 L.R.A.(N.S.) 251, 138 Am. St. Rep. 1085, 75 Atl. 277.

³ Servant's abandonment of his master's business, at time he committed a tort so as to relieve master from liability, where evidence is conflicting. *Barmore v. Vicksburg, S. & P. R. Co.* 85 Miss. 426, 70 L.R.A. 627, 38 So. 210, 3 A. & E. Ann. Cas. 594.

Whether the facts exist which make two servants fellows is a jury question, but it is for the court to decide if there is no conflict in the evidence or in the inferences permissible, and ordinarily as a practical result it becomes a jury question whether they were fellow servants.¹

When there is no dispute as to the facts or the inferences to be drawn from them, it is a law question whether, in a given

act, an alleged vice principal was doing one of the personal and nondelegable duties of the master;² but if there is any doubt or dispute it ought to go to the jury.³

¹ *McGowan v. St. Louis & I. M. R. Co.* 61 Mo. 528; *Neal v. Northern P. R. Co.* 57 Minn. 365, 59 N. W. 312.

See also exhaustive discussion and collection of cases in note to 50 L.R.A. 421.

For the jury to determine from all the evidence whether two were fellow-servants, unless the evidence clearly proves that relationship, and it is error to restrict the jury to the question, to what extent the conditions which would make them so specifically existed. *Illinois Steel Co. v. Ziemkowski*, 220 Ill. 324, 4 L.R.A. (N.S.) 1161, 77 N. E. 190.

Whether city employee of one department taking measurements of a bridge was a fellow servant of other city employees of a different department, who were tending the bridge. *Gothman v. Chicago*, 236 Ill. 9, 19 L.R.A. (N.S.) 1178, 86 N. E. 152, 15 A. & E. Ann. Cas. 830.

Employees as fellow servants in the performance of a particular act, where the evidence was conflicting, and legitimate conclusions therefrom were not such that all reasonable men would agree on them. *Illinois Southern R. Co. v. Marshall*, 210 Ill. 562, 66 L.R.A. 297, 71 N. E. 597.

² *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017.

³ For jury whether superintendent who ordered an employee to clean a machine while it was running was in the performance of an act which was a part of mode and manner of the master's business, and whether such command was that of the master. *Moore v. Dublin Cotton Mills*, 127 Ga. 609, 10 L.R.A. (N.S.) 772, 56 S. E. 839.

Whether superintendent's act in assisting men whom he directed to replace a belt on a pulley was one of superintendence or that of ordinary employee. *Gallagher v. Newman*, 190 N. Y. 444, 16 L.R.A. (N.S.) 146, 83 N. E. 480.

See also note in 54 L.R.A. 63, and cases there cited.

It is a law question whether the agent's disobedience makes him liable.¹

¹ Agent's liability for loss to principal caused by failure to comply with clear and specific written instructions, where the facts are undisputed. *Queen City F. Ins. Co. v. First Nat. Bank*, 18 N. D. 603, 22 L.R.A. (N.S.) 509, 120 N. W. 545.

The rightfulness of the discharge of a servant is a law question,¹ but the reasonableness of a justification for disobedience,² or for interference with employment, was held a fact question.³

Except in clear cases, it is a question of fact whether the misconduct of a servant has been condoned by the master.⁴

¹ Whether servant was properly discharged, where the facts are undisputed and show disobedience of master's reasonable orders, defiance of his authority, and unfaithfulness justifying a discharge. *Von Heyne v. Tompkins*, 89 Minn. 77, 5 L.R.A. (N.S.) 524, 93 N. W. 901.

² Whether an order issued to an employee to perform was so unreasonable as to justify its disobedience. *Development Co. v. King*, 24 L.R.A. (N.S.) 812, 88 C. C. A. 255, 161 Fed. 91.

³ Whether interference with laborer's employment under a closed shop agreement was justifiable. *Berry v. Donovan*, 188 Mass. 353, 5 L.R.A. (N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 A. & E. Ann. Cas. 738.

⁴ *Sabin v. Kendrick*, 58 App. Div. 108, 68 N. Y. Supp. 546; *McGrath v. Bell*, 1 Jones & S. 195; *Jordan v. J. R. Weber Moulding Co.* 77 Mo. App. 577.

See also note to 8 L.R.A. (N.S.) 1007.

15. Bodily or mental conditions.

The sufficiency of evidence evincive of one's mental state, from which to infer insanity, is for the jury.¹

The question of insurable good health when the evidence is conflicting or lacking on material questions of fact,² and that of total disability,³ and the resulting bodily and mental effect of bad treatment of a husband or wife by the other, is a pure question of fact.⁴

¹ *Blackstone v. Standard Life Acci. Ins. Co.* 74 Mich. 592, 3 L.R.A. 486, 42 N. W. 156.

² *Barnes v. Fidelity Mut. Life Asso.* 191 Pa. 618, 45 L.R.A. 264, 43 Atl. 341.

Whether a government pensioner, for vertigo and impaired sight resulting from cannon-shot wound in head, was "bodily infirm" within the warranty of a life insurance policy, where it was not shown that his actual physical condition was affected. *Black v. Travellers' Ins. Co.* 61 L.R.A. 500, 58 C. C. A. 14, 121 Fed. 732.

³ Total disability of person who was shown to go to his office every day, but was unable to do any kind of work. *Turner v. Fidelity & C. Co.* 112 Mich. 425, 38 L.R.A. 529, 67 Am. St. Rep. 428, 70 N. W. 898.

⁴ Whether the treatment of a husband or wife by the other was such as to seriously endanger reason or health. *Robinson v. Robinson*, 66 N. H. 600, 15 L.R.A. 121, 49 Am. St. Rep. 632, 23 Atl. 362.

If there is any conflict in the evidence, it should be left to the jury to say whether habits of an insured brought him within a provision of the policy against the use of liquors,¹ or whether one was intoxicated at a given time.²

¹ Order of United C. T. v. McAdam, 61 C. C. A. 22, 125 Fed. 358; *Follis v. United States Mut. Acci. Asso.* 94 Iowa, 435, 28 L.R.A. 78, 58 Am. St. Rep. 408, 62 N. W. 807; *Johanns v. National Acci. Soc.* 16 App. Div. 104, 45 N. Y. Supp. 117. See also note to 15 L.R.A.(N.S.) 212.

² Intoxication, where sleep and time to sober had intervened before the accident occurred. *Bakalars v. Continental Casualty Co.* 141 Wis. 43, 25 L.R.A.(N.S.) 1241, 122 N. W. 721, 18 A. & E. Ann. Cas. 1123.

16. Physical conditions and qualities.

The fact of a particular physical tendency is for the jury.¹

¹ The liability of cattle from a certain locality to communicate a disease. *Clarendon Land, Invest. & Agency Co. v. McClelland Bros.* 89 Tex. 483, 31 L.R.A. 669, 59 Am. St. Rep. 70, 34 S. W. 98, 35 S. W. 474.

Whether a commodity is in fact adulterated or degraded,¹ and by what means,² is for the jury.

¹ Whether the artificial red coloring of kerosene was an adulteration under a statute making it prima facie evidence without test that dark-colored or dirty appearing oils are unsalable, the evidence being conflicting as to the nature and effect of the color. *Bartles Oil Co. v. Lynch*, 109 Minn. 487, 25 L.R.A.(N.S.) 1234, 124 N. W. 1, 994.

² Whether milk was skimmed or watered, where it was below standard in solids but there was a doubt as to which was done. *Seattle v. Erickson*, 55 Wash. 675, 25 L.R.A.(N.S.) 1027, 104 Pac. 1128.

The jury may determine whether or not a beverage is an intoxicant, and whether vinous or spirituous.¹

¹ The intoxicating parties of various liquors and their general nature are to be decided by the jury. *Com. v. Peckham*, 2 Gray, 514; *State v. Giersch*, 98 N. C. 720, 4 S. E. 193; *State v. Muncey*, 28 W. Va. 494. See also note to 20 L.R.A. 649.

"Peach cider" as an intoxicant. *Topeka v. Zufall*, 40 Kan. 47, 1 L.R.A. 387, 19 Pac. 359.

Whether cider was vinous or spirituous liquor was for the jury where there was testimony by some persons that they felt its intoxicating effects. *Com. v. Reyburg*, 122 Pa. 299, 2 L.R.A. 415, 16 Atl. 351.

They may also declare whether a stream can be a public highway,¹ or whether waters were a water course,² or what was the general nature of a water way.³

The court may determine the character of a way used by the public, where the facts are not in dispute.⁴

¹ Whether or not waters are inherently capable of use as a common passage for the public. *New England Trout & S. Club v. Mather*, 68 Vt. 338, 33 L.R.A. 569, 35 Atl. 323.

Proof of sufficiency of stream for floatage of logs and flat boats during winter season, to authorize its declaration as a public highway. *Olive v. State*, 86 Ala. 88, 4 L.R.A. 33, 5 So. 653.

² Whether or not an obstructed bayou was a water course. *Yazoo & M. Valley R. Co. v. Davis*, 73 Miss. 678, 32 L.R.A. 262, 55 Am. St. Rep. 562, 19 So. 487.

³ Whether ditch across river bend was ever anything more than a drainage ditch. *Stimson v. Brookline*, 197 Mass. 568, 16 L.R.A. (N.S.) 280, 125 Am. St. Rep. 382, 83 N. E. 893, 14 A. & E. Ann. Cas. 907.

⁴ Character of way used by public, whether by dedication, prescription, or invitation, where facts are undisputed. *Hammill v. Pennsylvania R. Co.* 56 N. J. L. 370, 24 L.R.A. 531, 29 Atl. 151.

What constitutes vacancy or nonoccupancy is a question for the court; but whether or not a building is vacant or unoccupied is a question of fact.¹

¹ *Moody v. Amazon Ins. Co.* 52 Ohio St. 12, 26 L.R.A. 313, 49 Am. St. Rep. 699, 38 N. E. 1011.

Whether mill in which machinery was not operated for more than thirty days was shut down held for court. *Brehm Lumber Co. v. Svea Ins. Co.* 36 Wash. 520, 68 L.R.A. 109, 79 Pac. 34.

Nonoccupancy of church where windows are boarded up and services not held, because there is for time being no minister to officiate, held for jury. *Hampton v. Hartford F. Ins. Co.* 65 N. J. L. 265, 52 L.R.A. 344, 47 Atl. 433.

Whether in any case appliances or buildings placed upon the land can become fixtures partakes of intent and the circumstances, and is a fact question.¹

¹ *Miller v. Wadingham*, 91 Cal. 377, 13 L.R.A. 680, 27 Pac. 750.

Whether gas fixtures, steam radiators, kitchen range, and window and door screens are fixtures which will pass under a mortgage of the realty. *Hook v. Bolton*, 199 Mass. 244, 17 L.R.A. (N.S.) 699, 127 Am. St. Rep. 487, 85 N. E. 175.

The court should not determine that trade fixtures placed on leased property by a tenant are not removable, unless such holding is clearly necessary, where the lease showed that parties intended such additions should be made and should be removable as trade fixtures. *Re New York City (Re Improvement of Water Front)* 192 N. Y. 295, 18 L.R.A.(N.S.) 423, 127 Am. St. Rep. 903, 84 N. E. 1105.

17. Fraud; duress; undue influence.

The existence of fraud or any of its elements is generally a jury question.¹

¹ *Warner v. Norton*, 20 How. 448, 15 L. ed. 950; *Gregg v. Sayre*, 8 Pet. 244, 8 L. ed. 932; *Clark v. United States*, 6 Wall. 543, 18 L. ed. 916.

Good faith of execution sale, regular on its face, assailed on ground of fraud and collusion. *Caswell v. Jones*, 65 Vt. 457, 20 L.R.A. 503, 36 Am. St. Rep. 879, 26 Atl. 529.

Good faith of the giving of notes in payment of stock subscription. *Rouse, H. & Co. v. Detroit Cycle Co.* 111 Mich. 251, 38 L.R.A. 794, 69 N. W. 511.

Inability of injured passenger and her witness to tell name of ferryboat on which injured, as ignorance or evidence of fraud. *Rosen v. Boston*, 187 Mass. 245, 68 L.R.A. 153, 72 N. E. 992.

Efficacy of false token to deceive. *Com. v. Beckett*, 119 Ky. 817, 68 L.R.A. 633, 115 Am. St. Rep. 285, 84 S. W. 758.

Whether architect's certificate of completion required by building contract was arbitrarily withheld. *Bush v. Jones*, 6 L.R.A.(N.S.) 774, 75 C. C. A. 582, 144 Fed. 942.

In any case of doubt it is for the jury to say whether a statement designed to induce action by another was an expression of opinion or a representation of fact; but statements clearly falling within the settled rules of law, as to which are of fact and which of opinion, are to be governed thereby, and not given to the jury.¹

And the materiality of an alleged misrepresentation is a question of law where the facts are undisputed.²

Whether it was relied upon is for the jury.³

Whether or not a conveyance is in fraud of creditors is primarily a question of fact, but where the facts shown are *prima facie* evidence of such intent, the law, in the absence of anything to control them, draws such inference.⁴

¹ *Messer v. Smyth*, 59 N. H. 41; *Simar v. Canaday*, 53 N. Y. 298, 13 Am.

Rep. 523; *Banta v. Savage*, 12 Nev. 151, 7 Mor. Min. Rep. 113. See also note 35 L.R.A. 441.

- ² *Dawe v. Morris*, 149 Mass. 188, 4 L.R.A. 158, 14 Am. St. Rep. 404, 21 N. E. 313.

Materiality of false representation is for court, whether relied upon affirmatively to support an action for deceit, or defensively to avoid a contract because of deceit. *Greenleaf v. Gerald*, 94 Me. 91, 50 L.R.A. 542, 80 Am. St. Rep. 377, 46 Atl. 799.

But materiality of omission to mention another policy and that applicant was an embezzler, in an application for life insurance, was for jury under a statute providing that only material misstatements and concealments should defeat the policy. *Penn. Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L.R.A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413, 38 L.R.A. 70, 19 C. C. A. 316, 43 U. S. App. 75, 73 Fed. 653.

Held for jury where statement of age was not made in response to a direct inquiry of the insurer, and its materiality not settled by agreement of the parties. *Spence v. Central Acci. Ins. Co.* 236 Ill. 444, 19 L.R.A. (N.S.) 88, 86 N. E. 104.

- ³ Whether one claiming to have been deceived rightly or properly relied on the statements made to him has been held a jury question in numerous cases, as shown by *Hopkins v. Hawkeye Ins. Co.* 57 Iowa, 203, 42 Am. Rep. 41, 10 N. W. 605; *Sim v. Pyle*, 84 Ill. 271; *Farr v. Peterson*, 91 Wis. 182, 64 N. W. 863; *Savage v. Stevens*, 126 Mass. 207; *Sinar v. Canaday*, 53 N. Y. 298, 13 Am. Rep. 523. See also note in 37 L.R.A. 615.

Whether seller of land against whom specific performance is sought was induced by words or acts of buyer to believe that he would transfer an option on another piece of land to him. *Rudishill v. Whitener*, 146 N. C. 403, 15 L.R.A. (N.S.) 81, 59 S. E. 995.

The question of fraudulent intent in an alleged preferential purchase of goods from an insolvent debtor is one of fact. *Babcock v. Eckler*, 24 N. Y. 623; *Hooser v. Hunt*, 65 Wis. 71, 26 N. W. 442; *McFadden v. Mitchell*, 54 Cal. 628; *Wilcox v. Landberg*, 30 Minn. 93, 14 N. W. 365. And this rule is made by statute in some jurisdictions. See note to 36 L.R.A. 363, and cases there cited.

Where the statutes make intent to defraud a question of fact, it nevertheless remains for the court to decide whether the instrument is, on its face, fraudulent as matter of law. *Robinson v. Elliott*, 22 Wall. 513, 22 L. ed. 758. Though it is said that the cases will be rare in which an instrument is, on its face, void. *Lockwood v. Harding*, 79 Ind. 133.

- ⁴ *Matthews v. Thompson*, 186 Mass. 14, 66 L.R.A. 421, 104 Am. St. Rep. 550, 71 N. E. 93.

Adequacy of consideration for transfer of real estate by failing debtor is

for jury. *Mobile Sav. Bank v. McDonnell*, 89 Ala. 434, 9 L.R.A. 645; 18 Am. St. Rep. 137, 8 So. 137.

What constitutes duress is a matter of law; whether it exists in a particular state of facts is a question of fact.¹

¹ *Galusha v. Sherman*, 105 Wis. 263, 47 L.R.A. 417, 81 N. W. 495.

The validity of a release, and whether a payment was as compensation or gratuity, is a jury question.¹

¹ Fraud in obtaining release from injured servant. *Schus v. Powers-Simpson Co.* 85 Minn. 447, 69 L.R.A. 887, 89 N. W. 68.

Payment to injured servant as gratuity or compensation. *Ibid.*

Whether a release was fraudulently obtained from an injured passenger, where the evidence is in dispute. *Norvell v. Kanawha & M. R. Co.* 67 W. Va. 467, 29 L.R.A. (N.S.) 325, 68 S. E. 288.

Inferences as to undue influence should go to a jury.¹

¹ Validity of will which makes inadequate provision for a helpless child without property, in favor of other children happily circumstanced, where there is evidence of undue influence. *Meier v. Buchter*, 197 Mo. 68, 6 L.R.A. (N.S.) 202, 94 S. W. 883, 7 A. & E. Ann. Cas. 887.

Supposed communications to a woman from her deceased husband through a medium, which to some extent prompted provisions of her will, as constituting undue influence. *Steinkuhler v. Wempner*, 169 Ind. 154, 15 L.R.A. (N.S.) 673, 81 N. W. 482.

18. Intent, assent, election, waiver, or other mental purpose.

Intent, even where the facts are undisputed, is for the jury, since it lies in inference, yet some proof must be adduced from which the inference may be drawn that such intent existed; ¹ so of the question whether acts were done with intent to deliver goods,² or to change domicile.³

¹ *Hall v. Stevens*, 116 N. Y. 201, 5 L.R.A. 802, 22 N. E. 374.

Intent and purpose of president and another, who effected a contract prior to time of incorporation. *Oakes v. Cattaraugus Water Co.* 143 N. Y. 430, 26 L.R.A. 544, 38 N. E. 461.

Predetermination to commit suicide, where insured was insolvent and heavily involved. *Ritter v. Mutual L. Ins. Co.* 42 L.R.A. 583, 17 C. A. 537, 28 U. S. App. 612, 70 Fed. 954.

Whether a notation referring to additional security was placed on a note with such intent as materially to alter it by incorporating terms of a previous note, or whether it was done simply by way of memorandum. *Farmers' Nat. Bank v. McCall*, 25 Okla. 600, 26 L.R.A. (N.S.) 217, 106 Pac. 866.

Whether acts of landlord in filling and building dock were with intention of repairing or of re-entering leased lot. *Kneeland v. Schmidt*, 78 Wis. 345, 11 L.R.A. 498, 47 N. W. 438.

² Whether executory grain contract contemplated actual delivery or was a deal in futures. *Pope v. Hanke*, 155 Ill. 617, 28 L.R.A. 568, 40 N. E. 839.

Delivery as divesting vendor's lien, where facts are numerous and equivocal, susceptible of different inferences as to intent. *Conrad v. Fisher*, 37 Mo. App. 352, 8 L.R.A. 147.

³ Whether the departure from established domicile in one state and residence in another state resulted in a change of residence. *Bechtel v. Bechtel*, 101 Minn. 511, 12 L.R.A. (N.S.) 1100, 112 N. W. 883.

Where the evidence is conflicting or inferences diverse, the question of assent or volition,¹ acceptance,² delivery,³ election,⁴ abandonment,⁵ or waiver⁶ is for the jury.

¹ Householder's consent to a search, by an officer of the law, of premises for evidence of crime. *McClurg v. Brenton*, 123 Iowa, 368, 65 L.R.A. 519, 101 Am. St. Rep. 323, 98 N. W. 881.

Assent to limited liability stipulation where live-stock shipper knew that a contract was to be signed, and expected to sign one like he previously used, but did not know the terms thereof, and different forms had previously been used. *St. Louis & St. R. Co. v. Gorman*, 79 Kan. 643, 28 L.R.A. (N.S.) 637, 100 Pac. 647.

Whether an employee consented to the transfer of a business to a lessee, where different conclusions may be drawn from the facts. *White v. Lumiere North American Co.* 79 Vt. 206, 6 L.R.A. (N.S.) 807, 64 Atl. 1121.

Whether, from patient's consent to an operation on her left ear, consent to an operation on the right ear was implied, the need for which was greater and was found upon examination while patient was under the influence of anesthetics. *Mohr v. Williams*, 95 Minn. 261, 1 L.R.A. (N.S.) 439, 111 Am. St. Rep. 462, 104 N. W. 12, 5 A. & E. Ann. Cas. 303.

Consent by member to trial by society without charges or notice, action being against labor union for procuring discharge. *Brennan v. United Hatters*, 73 N. J. L. 729, 9 L.R.A. (N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165.

Whether submission to the control of another was voluntary or brought

about by fear that force would be used is for the jury in a false imprisonment action, unless it is clear that there was no reasonable apprehension of force. *Hebrew v. Pulis*, 73 N. J. L. 621, 7 L.R.A. (N.S.) 580, 118 Am. St. Rep. 716, 64 Atl. 121.

But question whether payment of license fees was voluntary or involuntary is for the court, where facts are undisputed. *Eshow v. Albion*, 153 Mich. 720, 22 L.R.A.(N.S.) 872, 117 N. W. 328.

² Acceptance as payment or not, of note given for a special purpose and where debt was secured by lien and no book credit was entered. *Quimby v. Durgin*, 148 Mass. 104, 1 L.R.A. 514, 19 N. E. 14.

³ On the delivery of goods by a seller to a carrier, if there is any doubt as to the intention that it should be a delivery for the purpose of passing title, the question ought to go to the jury, for it is a question of intent. *Gibbons v. Robinson*, 63 Mich. 146, 29 N. W. 533; *Alabama G. S. R. Co. v. Mt. Vernon Co.* 84 Ala. 173, 4 So. 356; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291. It is for the court where the act is such that as matter of law the intent follows. *Smith v. Edwards*, 29 Hun, 493. See also note in 22 L.R.A. 415.

⁴ Devisee's refusal to state whether she will accept devise of lands in her possession or claim dower in other lands devised in the same will, as evidence of election to take under the will. *Zimmerman v. Lebo*, 151 Pa. 345, 17 L.R.A. 536, 24 Atl. 1082.

⁵ Nonuser of condemned easement of flowage by dam which has washed away, where abandonment is claimed. *Gross v. Jones*, 85 Neb. 77, 32 L.R.A.(N.S.) 47, 122 N. W. 681.

Whether logs had been so abandoned as to lose title. *Log-Owners' Boom. Co. v. Hubbell*, 135 Mich. 65, 4 L.R.A.(N.S.) 573, 97 N. W. 157.

Whether one who demanded and received for cancellation notes given for rent of premises of which lessor could not give possession intended thereby to rescind the contract and abandon claim for damages. *Herpolsheimer v. Christopher*, 76 Neb. 352, 9 L.R.A.(N.S.) 1127, 107 N. W. 382, 111 N. W. 359, 14 A. & E. Ann. Cas. 399.

⁶ Waiver of printed stipulations by telegraph company in orally receiving and delivering market quotations. *Western U. Teleg. Co. v. Stevenson*, 128 Pa. 442, 5 L.R.A. 515, 15 Am. St. Rep. 687, 18 Atl. 441.

Whether a seller who was not accessible to bank waived agreement to pay cash, where he neglected to present check for payment for several weeks. *People's State Bank v. Brown*, 80 Kan. 520, 23 L.R.A.(N.S.) 824, 103 Pac. 102.

Waiver and abandonment of right to sue undisclosed principal, where sale was to agent as principal, who professed to represent a third person, and where after learning the facts there was delay in pursuing the principal but no proven detriment to him by the delay. *Gay v. Kelley* (*Gay v. Uren*) 109 Minn. 101, 26 L.R.A.(N.S.) 742, 123 N. W. 295.

Waiver of proofs of loss, where adjuster told insured payment of policy

would be refused on the ground that policy had been assigned and that he would have to deal direct with company, which advised him that the matter was still in the adjuster's hands. *Allen v. Phoenix Assur. Co.* 12 Idaho, 653, 8 L.R.A. (N.S.) 903, 88 Pac. 245, 10 A. & E. Ann. Cas. 328.

Waiver of iron-safe clause by receipt and retention of premium after loss and by requiring duplicate invoices. *Gish v. Insurance Co. of N. A.* 16 Okla. 59, 13 L.R.A. (N.S.) 826, 87 Pac. 869.

The conclusion to be drawn from conduct which it is alleged was a waiver of demand and notice of nonpayment of commercial paper is a question for the jury unless the conduct is such that the intent can, in the light of usage and judicial decisions, have no debatable meaning. See note to 29 L.R.A. 315.

The character of the occupancy of property as constituting an election,¹ or as inconsistent with a collateral agreement,² are jury questions.

¹ Whether devisee of a life estate in remainder after a prior life estate, who purchased at tax sales caused by default of the first life tenant, and entered into possession after the latter's death, had accepted or renounced the devise. *Defreese v. Lake*, 109 Mich. 415, 32 L.R.A. 744, 63 Am. St. Rep. 584, 67 N. W. 505.

² Character of husband's occupancy of wife's real property as consistent with an agreement to make it their home, where he while living apart from her has taken another family into the house. *McKendry v. McKendry*, 131 Pa. 24, 6 L.R.A. 506, 18 Atl. 1078.

19. Knowledge, belief, or mental perception.

Notice or knowledge¹ in a particular case is a question of fact.

Whether or not a party had a right to believe that an act would be taken as a joke is a question of fact.²

¹ Viciousness of dog and *scienter*. *Emmons v. Stevane*, 77 N. J. L. 570, 24 L.R.A. (N.S.) 458, 73 Atl. 544, 18 A. & E. Ann. Cas. 812.

Whether parties dealing with agent authorized to purchase goods during principal's absence had notice of revocation when principal returned. *Wheeler v. McGuire*, 86 Ala. 398, 2 L.R.A. 808, 5 So. 190.

Notice of one who frequently stopped at hotel, of existence of a safe, where it was shown that his attention had been called to it at a prior visit. *Shultz v. Wall*, 134 Pa. 262, 8 L.R.A. 97, 19 Am. St. Rep. 686. 19 Atl. 742.

Member's notice of a hearing which resulted in his expulsion from a benefit .

society. *Pepin v. Societe St. Jean Baptiste*, 24 R. I. 550, 60 L.R.A. 626, 54 Atl. 47.

Whether person put off chartered train for refusal to pay extra fare had knowledge of the character of the train when he boarded it. *Kirkland v. Charleston & W. C. R. Co.* 79 S. C. 273, 15 L.R.A.(N.S.) 425, 128 Am. St. Rep. 848, 60 S. E. 668.

Unusual circumstances attending the purchase of a check by the vice president of the bank were held insufficient, as a matter of law, to show notice of facts sufficient to arouse suspicions of its validity. *Matlock v. Scheuerman*, 51 Or. 49, 17 L.R.A.(N.S.) 747, 93 Pac. 823.

Testimony of a witness that a promissory note was held in good faith was some evidence on that issue and, together with conflicting evidence, was for the jury. *Neyens v. Worthington*, 150 Mich. 580, 18 L.R.A.(N.S.) 142, 114 N. W. 404.

Whether one who purchased land with knowledge of facts that would put a prudent man on inquiry, which, if pursued, would give him notice of rights claimed adversely to his vendor, was chargeable with notice under statute. *Cooper v. Flesner*, 24 Okla. 47, 23 L.R.A.(N.S.) 1180, 103 Pac. 1016, 20 A. & E. Ann. Cas. 29.

Whether a common carrier acting in good faith and with due caution had knowledge of contents of a package which contained intoxicating liquor. *Adams Exp. Co. v. Com.* 129 Ky. 420, 11 L.R.A.(N.S.) 1182, 112 S. W. 577.

Whether the money advanced upon a check was used for gambling purposes and whether payee knew such fact. *Camas Prairie State Bank v. Newman*, 15 Idaho, 719, 21 L.R.A.(N.S.) 703, 128 Am. St. Rep. 81, 99 Pac. 833.

Whether untrue statement that applicant had never been rejected by any insurance company was knowingly made with intent to deceive, where he had been rejected, although there was no direct proof that he had been informed thereof, and but one inference could be fairly drawn from the circumstances. *Langdeau v. John Hancock Mut. L. Ins. Co.* 194 Mass. 56, 18 L.R.A.(N.S.) 1190, 80 N. E. 452.

Whether occupation of land over the line of a tenancy, after securing survey of the premises, was too deceptive to constitute adverse possession. *Smith v. Jones*, — Tex. —, 31 L.R.A.(N.S.) 153, 132 S. W. 469.

Knowledge or notice as element of negligence, see post, this chapter, negligence; negligence as to servants.

² Defense that act was done as joke, where parties had been joking with each other. *Wartman v. Swindell*, 54 N. J. L. 589, 18 L.R.A. 44, 25 Atl. 356.

20. Contracts and writings; construction.

The genuineness of a writing,¹ the purpose with which it

was executed,² the existence of an agreement,³ or whether a seeming contract was a subterfuge⁴ is question of fact.

The legal sufficiency of any element of contract, or its termination, is for the court.⁵

Whether an insurance policy was a wagering policy was for the court on undisputed evidence.⁶

¹ Genuineness of disputed letter signed in typewriting and received in answer to one sent to alleged writer. *Barham v. Bank of Delight*, 94 Ark. 158, 27 L.R.A.(N.S.) 439, 126 S. W. 394.

² Whether or not the second of two similar notes was a renewal of the first and entitled to the same security as it carried with it. *Farmers' Nat. Bank v. McCall*, 25 Okla. 600, 26 L.R.A.(N.S.) 217, 106 Pac. 866.

³ Existence of a contract of insurance, where applicant tried to return a policy just received, insisting that the application, with which it corresponded, had been changed without his knowledge, by the agent. *Waters v. Security Life & Annuity Co.* 144 N. C. 663, 13 L.R.A.(N.S.) 805, 57 S. E. 437.

Account stated.—Whether the facts in evidence constitute an account stated is for the court, but it is for the jury to find the existence of the facts, or to resolve doubts on the evidence. See cases cited in note to 27 L.R.A. 825.

⁴ Whether a transaction was a sale with the right to repurchase or a ruse to evade the usury laws. *Rogers v. Blouenstein*, 124 Ga. 501, 3 L.R.A.(N.S.) 213, 52 S. E. 617.

Whether there was an actual bona fide valuation of property transported by a carrier, or a mere arbitrary effort to limit liability, where there is an issue of fact, is for the jury; but where the written contract of affreightment shows it is the latter, and there is no issue of fact, it is proper for the court to construe the contract. *Central R. Co. v. Hall*, 124 Ga. 322, 4 L.R.A.(N.S.) 898, 110 Am. St. Rep. 170, 52 S. E. 679, 4 A. & E. Ann. Cas. 128.

⁵ The sufficiency of consideration for a contract. *Evans v. Oregon & W. R. Co.* 58 Wash. 429, 28 L.R.A.(N.S.) 455, 108 Pac. 1095.

Sufficiency of cause for discharge from service is for court where facts are not disputed. *McGregor v. Harm*, — N. D. —, 30 L.R.A.(N.S.) 649, 125 N. W. 885.

⁶ Whether policy of insurance taken out by a creditor on the life of his debtor to secure the debt was so excessive as to be a wager policy, the facts not being disputed. *Ulrich v. Reinoehl*, 143 Pa. 238, 13 L.R.A. 433, 24 Am. St. Rep. 534, 22 Atl. 862.

It is a mixed question whether a traffic agreement between competing carriers was or was not oppressive and monopolistic.¹

¹The question whether a contract or agreement entered into between a railroad and a line of steamers plying between two points was entered into in good faith and was legal and binding, or whether such contract constituted an oppressive monopoly and hence was not legal and binding, is a mixed question of law and fact, and it was properly left to the jury to be passed upon by them. *South Florida R. Co. v. Rhodes*, 25 Fla. 40, 3 L.R.A. 733, 23 Am. St. Rep. 506, 5 So. 633.

The construction of statutes, both domestic,¹ and foreign,² of franchises and charters,³ the effect of a copy of the statutes offered in evidence,⁴ and the legal effect or sufficiency of pleadings,⁵ are for the court. Thus the sufficiency of the pleadings in a libel suit are for the court, although the jury are the judges of the law as well as the facts in such cases.⁶

¹Construction of statute and railroad's rule regulating speed of trains as to approach as part of the bridge. *Savannah, F. & W. R. Co. v. Daniels*, 90 Ga. 608, 20 L.R.A. 416, 17 S. E. 647.

²Construction of foreign statutes and interpretation of judicial opinions. *Bank of China v. Morse*, 168 N. Y. 458, 56 L.R.A. 139, 85 Am. St. Rep. 676, 61 N. E. 774.

³Exclusiveness of water company's franchises, where the instruments granting them are before the court in a proceeding for instruction of appraisers. *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6.

⁴*Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 36 L.R.A. 271, 64 Am. St. Rep. 715, 26 S. E. 421.

⁵*Dantzer v. Indianapolis U. R. Co.* 141 Ind. 604, 34 L.R.A. 769, 50 Am. St. Rep. 343, 39 N. E. 223.

⁶*St. James Military Academy v. Gaiser*, 125 Mo. 517, 28 L.R.A. 667, 46 Am. St. Rep. 502, 28 S. W. 851.

The construction of written contracts and writings generally,¹ such as insurance policies,² as well as the legal effect of an undisputed unequivocal oral statement,³ is for the court. On a disputed statement of fact it is for the jury to determine whether a contract is wholly written or partly in parol,⁴ and what it really was.⁵ The intended meaning of a mark on a writing is for the jury.⁶ It is also for the jury to determine the meaning of a statement of one of the contracting parties,⁷

and whether certain acts were within a class covenanted against,⁸ and when, by whom, and with what intent, an instrument was altered.⁹

¹ Construction of a written contract free from ambiguity. *Young v. Fosburg Lumber Co.* 147 N. C. 26, 16 L.R.A.(N.S.) 255, 60 S. E. 654; *Knickerbocker Ice Co. v. Gardiner Dairy Co.* 107 Md. 556, 16 L.R.A.(N.S.) 746, 69 Atl. 405; *R. J. Menz Lumber Co. v. E. J. McNeeley & Co.* 58 Wash. 223, 28 L.R.A.(N.S.) 1007, 108 Pac. 621.

Vendor's notice of intention to remove a machine, under a conditional sale. *Schmaltz v. York Mfg. Co.* 204 Pa. 1, 59 L.R.A. 907, 93 Am. St. Rep. 782, 53 Atl. 522.

Whether a letter amounted to a repudiation of a contract by the purchaser, as justifying rescission by the seller. *Johnson Forge Co. v. Leonard*, 3 Penn. (Del.) 342, 57 L.R.A. 225, 94 Am. St. Rep. 86, 51 Atl. 305.

For jury.—Breach of warranty that machine is of good material and workmanship, and will do good work when properly adjusted and operated, where the evidence is conflicting. *First Nat. Bank v. Dutcher*, 128 Iowa, 413, 1 L.R.A.(N.S.) 142, 104 N. W. 497.

As to the relative provinces of the court and jury in questions of contracts, see also note to 4 L.R.A. 202.

² Construction of an accident policy as to sufficiency of death notice. *Trippe v. Provident Fund Soc.* 140 N. Y. 23, 22 L.R.A. 432, 37 Am. St. Rep. 529, 35 N. E. 316.

Limitation, as to fuel for steam engine, in insurance policy. *Thurston v. Burnett & B. D. Farmers' Mut. F. Ins. Co.* 98 Wis. 476, 41 L.R.A. 316, 74 N. W. 131.

Breach of condition against change of ownership. *Arkansas F. Ins. Co. v. Wilson*, 67 Ark. 553, 48 L.R.A. 510, 77 Am. St. Rep. 129, 55 S. W. 933.

Whether an insurance policy is forfeited or lapsed is a question of law where the facts are admitted or proved, but when the facts are at issue it may be for the jury. *Massachusetts Ben. Life Asso. v. Robinson*, 104 Ga. 256, 42 L.R.A. 261, 30 S. E. 918.

As to bodily condition or health of one insured, see ante, this chapter, § 15, Bodily or Mental Conditions.

Vacancy or nonoccupancy of insured buildings, see ante, this chapter, § 16, Physical Conditions and Qualities.

³ Legal effect of an undisputed and unequivocal statement as constituting a warranty. *Holmes v. Tyson*, 147 Pa. 305, 15 L.R.A. 209, 23 Atl. 564.

⁴ Whether or not the entire contract was reduced to writing, or an independent collateral agreement was made, where there is any evidence
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to sustain a contention on the point. *Hines v. Willcox*, 96 Tenn. 148, 328, 34 L.R.A. 824, 54 Am. St. Rep. 823, 33 S. W. 914, 34 S. W. 420.

Whether or not a contract is wholly in writing or partly in parol, and, if the latter, to determine from all the evidence, written and oral, what it actually is, is for the jury. *Roberts v. Bonaparte*, 73 Md. 191, 10 L.R.A. 689, 20 Atl. 918.

⁵ What the contract really was, where it rested on a conversation more or less ambiguous in meaning. *Blake v. Stump*, 73 Md. 160, 10 L.R.A. 103, 20 Atl. 788.

⁶ Whether a check mark following the word "except" in an application for insurance was intended as a denial of the exception or waiver of an answer thereto. *French v. Fidelity & C. Co.* 135 Wis. 259, 17 L.R.A. (N.S.) 1011, 115 N. W. 869.

⁷ Meaning of a statement made by a person who knew of facts that would give his statement a double intendment. *Simon v. Goodyear Metallic Rubber Shoe Co.* 52 L.R.A. 745, 44 C. C. A. 612, 105 Fed. 573.

⁸ Breach of covenant not to engage in grocery business. *Love v. Stidham*, 18 App. D. C. 306, 53 L.R.A. 397.

⁹ *Wilson v. Hayes*, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 12 N. W. 467.

Whether contract of guaranty offered by person guaranteed, and bearing marks of defacement, was so marked without consent of the guarantor and to cancel a clause which he had insisted on to limit his liability. *O. N. Bull Remedy Co. v. Clark*, 109 Minn. 396, 32 L.R.A. (N.S.) 519, 124 N. W. 20, 18 A. & E. Ann. Cas. 413.

Whether an erasure appearing upon a will duly admitted to probate was made before or after execution is a question of fact, to be determined by the court or jury trying the issue, upon all the evidence, including the probate, aided by all reasonable presumptions and inferences. *Scott v. Thrall*, 77 Kan. 688, 17 L.R.A. (N.S.) 184, 127 Am. St. Rep. 449, 95 Pac. 563.

It has also been held for the jury to say whether the insured was owner of the property at the time the policy was issued,¹ what goods were included in a policy,² whether the risk was increased by a certain use,³ or the acts done were, under the circumstances, a compliance with conditions,⁴ whether properly mailed notice and proof of loss were ever received by the insurer,⁵ and whether it was a known and established custom in a particular place to regard the expression, "at 12 o'clock at noon," as 12 o'clock standard time.⁶

Whether a building has been "totally destroyed" or is a

“total loss” is for the jury, under definitions of those terms, but the meaning of the terms as used in a policy is for the court.⁷

¹ Whether insured was owner of the property at the time the policy was issued, where the evidence is conflicting. *Oakland Home Ins. Co. v. Bank of Commerce*, 47 Neb. 717, 36 L.R.A. 673, 53 Am. St. Rep. 663, 66 N. W. 646.

² Whether policy of insurance on dry goods, groceries, hardware, and similar articles not more hazardous usually kept in country stores, included lumbermen's tools, secondhand furniture, and camp equipment, where evidence as to character of goods was conflicting. *Steele v. German Ins. Co.* 93 Mich. 81, 18 L.R.A. 85, 53 N. W. 514.

³ Whether a certain use of an upper story of an insured building increased the hazard and risk of the insurer. *Kircher v. Milwaukee Mechanics' Mut. Ins. Co.* 74 Wis. 470, 5 L.R.A. 779, 43 N. W. 487.

Whether the risk on insured property was materially increased by the temporary use of a threshing machine operated by an engine, where, during its operation, fire was noticed in the straw about the same time a sudden gust of wind came, by which fire was carried to insured property which burned. *Adair v. Southern Mut. Ins. Co.* 107 Ga. 297, 45 L.R.A. 204, 73 Am. St. Rep. 122, 33 S. E. 78.

⁴ Whether a peculiar system of store tickets and an entry of total sales at the end of each day was a sufficient keeping of books within the terms of an insurance policy could not be decided as a matter of law. *Ætna Ins. Co. v. Johnson*, 127 Ga. 491, 9 L.R.A.(N.S.) 667, 56 S. E. 643, 9 A. & E. Ann. Cas. 461.

But truth or falsity of warranties of an applicant for insurance is for the court, where the beneficiary has confessed upon the witness stand to their falsity. *Beard v. Royal Neighbors*, 53 Or. 102, 19 L.R.A.(N.S.) 798, 99 Pac. 83, 17 A. & E. Ann. Cas. 1199.

Insured's effort to minimize loss, as required by marine insurance policy. *Standard M. Ins. Co. v. Nome Beach Lighterage & Transp. Co.* 1 L.R.A.(N.S.) 1095, 67 C. C. A. 602, 133 Fed. 636.

⁵ Whether notice and proof of loss were received by the insurer, when proof of their mailing properly stamped and addressed is opposed by testimony of insurer's clerks and officers that they were never received. *Pennypacker v. Capital Ins. Co.* 80 Iowa, 56, 8 L.R.A. 236, 20 Am. St. Rep. 395, 45 N. W. 408.

⁶ *Jones v. German Ins. Co.* 110 Iowa, 75, 46 L.R.A. 860, 81 N. W. 188.

Whether a system for reckoning time in a particular locality was of such universal use as to raise the presumption that a contract was made with reference to it. *Rochester German Ins. Co. v. Peaslee-Gaulbert Co.* 120 Ky. 752, 1 L.R.A.(N.S.) 364, 87 S. W. 1115, 89 S. W. 3, 9 A. & E. Ann. Cas. 324.

⁷ *Ampleman v. Citizens' Ins. Co.* 35 Mo. App. 308; *German Ins. Co. v.*

Eddy, 36 Neb. 461, 19 L.R.A. 707, 54 N. W. 856; Commercial Union Assur. Co. v. Meyer, 9 Tex. Civ. App. 7, 29 S. W. 93 See also note to 56 L.R.A. 792, and cases there cited.

The meaning of terms of art or science may be for the court if they are well known and admit of no doubt, but otherwise they require the adduction of evidence, and are for the jury.¹ So the meaning of figures if equivocal is for them.²

¹ Meaning of terms of art may be left to the jury, but not whether men in the business familiar with their meaning used them in their ordinary meaning or not. Crawford v. Oman & S. Stone Co. 34 S. C. 90, 12 L.R.A. 375, 12 S. E. 929.

Sufficiency of the term "yellows" in statute, to define well-known disease of peach trees. State v. Main, 69 Conn. 123, 36 L.R.A. 623, 61 Am. St. Rep. 30, 37 Atl. 80.

The meaning of terms of art in a contract is for the jury if evidence is necessary to arrive at it, but otherwise for the court; and the construction of a written contract is for the court alone. Barnard v. Kellogg, 10 Wall. 383, 19 L. ed. 987; Stagg v. Connecticut Mut. L. Ins. Co. 10 Wall. 589, 19 L. ed. 1038; Eaton v. Smith, 20 Pick. 150. See also cases cited in note in 12 L.R.A. 376.

² Meaning of figures in a bill of lading, as indicating value of one or both animals in the shipment, was for jury. Coupland v. Housatonic R. Co. 61 Conn. 531, 15 L.R.A. 534, 23 Atl. 870.

21. Libel or slander; malicious prosecution.

As to construction of pleadings in libel, see ante, this chapter, § 20, construction of writings.

The libelousness of a publication or words is for the court if there is no dispute as to the publication and the words are unambiguous; but malice, good faith, belief, meaning of doubtful words, or application of them to the plaintiff, are all for the jury.¹ Thus, whether one having privilege used due care and prudence,² and whether an act had the moral qualities attributed thereto, are for the jury;³ and so, where the controlling facts are conceded, it is for the court to say whether it is actionable *per se*.⁴

Pertinency to the issues of alleged defamatory matter in pleadings is also for the determination of the court.⁵

¹ Trimble v. Anderson, 79 Ala. 514; Moore v. Francis, 121 N. Y. 199, 8 L.R.A. 214, 18 Am. St. Rep. 810, 23 N. E. 1127; Donaghue v. Gaffy, 54 Conn. 257, 7 Atl. 552; Hinman v. Hare, 104 N. Y. 641, 10 N. E. 41; Bourreseau v. Detroit Evening Journal Co. 63 Mich. 425, 6 Am.

St. Rep. 320, 30 N. W. 376; Ketrolivansky v. Niebaum, 70 Cal. 216, 11 Pac. 641; Bodine v. Times-Journal Pub. Co. 26 Okla. 135, 31 L.R.A. (N.S.) 147, 110 Pac. 1096.

See also note to 5 L.R.A. 643.

For the court.—Where a libelous communication is alleged to be privileged, the court must determine the question of privilege in the first instance. Holmes v. Royal Fraternal Union, 222 Mo. 556, 26 L.R.A. (N.S.) 1080, 121 S. W. 100.

Privilege of utterance, when facts and circumstances are conceded. Abraham v. Baldwin, 52 Fla. 151, 10 L.R.A. (N.S.) 1051, 42 So. 591, 10 A. & E. Ann. Cas. 1148.

Whether a publication is libelous, and, if so, privileged, where the controlling facts are conceded. Mauk v. Brundage, 68 Ohio St. 89, 62 L.R.A. 477, 67 N. E. 152.

Whether an innuendo was fairly warranted by the alleged slanderous utterances. Brinsfield v. Howeth, 107 Md. 278, 24 L.R.A. (N.S.) 583, 68 Atl. 566.

For the jury.—Whether newspaper publication stating that corporate manager who had strangely disappeared had been located, living in luxury in Canada, was libelous. Press Pub. Co. v. McDonald, 26 L.R.A. 531, 11 C. C. A. 155, 26 U. S. App. 167, 63 Fed. 238.

Whether publication meant what was alleged in the innuendo. Hayes v. Press Co. 127 Pa. 642, 5 L.R.A. 643, 14 Am. St. Rep. 874, 18 Atl. 331.

Whether a defamatory statement made by a clergyman to his congregation was made of a physician in respect to his profession and actionable *per se*. Morasse v. Brochu, 151 Mass. 567, 8 L.R.A. 524, 21 Am. St. Rep. 474, 25 N. E. 74.

Excessive and malicious character of publication of petition to police magistrate, making charges against persons. Flynn v. Boglarsky, 164 Mich. 513, 32 L.R.A. (N.S.) 740, 129 N. W. 674.

Sufficiency of evidence of qualified privilege in libel, where there is evidence of actual malice. Tanner v. Stevenson, 138 Ky. 578, 30 L.R.A. (N.S.) 200, 128 S. W. 878.

Whether the omission of the replication from a publication of the pleadings was malicious. Meriwether v. George Knapp & Co. 211 Mo. 199, 16 L.R.A. (N.S.) 953, 109 S. W. 750.

Unless the alleged slanderous words are plain and unambiguous in their meaning, the meaning intended thereby and the understanding of those who heard them should be left to the jury. Battles v. Tyson, 77 Neb. 563, 24 L.R.A. (N.S.) 577, 110 N. W. 299, 15 A. & E. Ann. Cas. 1241.

² Whether mercantile agency exercised reasonable care and prudence in publishing an assignment as general where it was in fact an assignment for a single creditor. Douglass v. Daisley, 57 L.R.A. 475, 52 C. C. A. 153, 114 Fed. 628.

- ³ Whether one who supported certain measures thereby championed legislation opposed to the moral interests of the community. *Eikhoff v. Gilbert*, 124 Mich. 353, 51 L.R.A. 451, 83 N. W. 110.
- ⁴ *Brewer v. Chase*, 121 Mich. 526, 46 L.R.A. 397, 80 Am. Rep. 527, 80 N. W. 575.
- Whether a publication stating that a judgment had been recovered against a person was libelous *per se*. *Woodruff v. Bradstreet Co.* 116 N. Y. 217, 5 L.R.A. 555, 22 N. E. 354.
- Libelous character of an admitted publication the words of which are unambiguous and admit of but one sense. *Moore v. Francis*, 121 N. Y. 199, 8 L.R.A. 214, 18 Am. St. Rep. 810, 23 N. E. 1127.
- ⁵ *Crockett v. McLanahan*, 109 Tenn. 517, 61 L.R.A. 914, 72 S. W. 950.

Where violent language is used, and improper and evil motives are attributed, the question of malice of a defamatory letter is for the jury, but the question of privilege is for the court.¹

Justification for a libelous publication is for the jury, under a constitutional provision making them judges of law as well as of facts in such cases.²

The question whether an occasion justifies a libelous answer to a libel is for the court to determine, but the question of good faith, *i. e.*, malice in making the answer, is for the jury.³ Whether one was specially damaged⁴ or a retraction was made⁵ is a question of fact.

¹ *Sullivan v. Strathan-Hutton-Evans Commission Co.* 152 Mo. 268, 47 L.R.A. 859, 53 S. W. 912.

² *St. James Military Academy v. Gaiser*, 125 Mo. 517, 28 L.R.A. 667, 46 Am. St. Rep. 502, 28 S. W. 851.

³ *Brewer v. Chase*, 121 Mich. 526, 46 L.R.A. 397, 80 Am. St. Rep. 527, 80 N. W. 575.

⁴ Whether party published as delinquent debtor was specially damaged, where he proves that one person refused him credit because of publication. *Muetze v. Tuteur*, 77 Wis. 236 9 L.R.A. 86, 20 Am. St. Rep. 115, 46 N. W. 123.

⁵ Whether an editorial was a retraction of a libelous news item in the same type and position as far as possible. *Lawrence v. Herald Pub. Co.* 158 Mich. 459, 25 L.R.A.(N.S.) 796, 122 N. W. 1084.

In a malicious prosecution case it is not for the jury to decide whether the advice of counsel under which prosecutor

acted was or was not erroneous as to an offense having been committed.¹

¹ *Cooper v. Flemming*, 114 Tenn. 40, 68 L.R.A. 849, 84 S. W. 801.

Probable cause, see *ante*, this chapter, § 7, Reasonableness, Necessity; Probable Cause.

22. Negligence generally.

What constitutes negligence is a law question.¹ As to its existence, if there is any conflict in the evidence, either as to the negligence of the defendant or the contributory negligence of the plaintiff, the case must go to the jury; but if there be no conflict there is a question for the court,² unless in the uncontradicted evidence there may be diverse inferences of negligence, in which case it must be left to the jury.³ Where negligence by or towards children is alleged the question is for the jury.⁴

It is ordinarily a jury question whether a person's being intoxicated at the time of an injury contributed thereby to the negligence which injured him, or whether he was then intoxicated and thereby contributed to it;⁵ and it is likewise for the jury to say whether the care exercised towards an intoxicated person was proper under the circumstances.⁶

¹ *Emry v. Raleigh & G. R. Co.* 109 N. C. 589, 15 L.R.A. 332, 14 S. E. 352.

What "negligent" means is a question of law where the law declares that, the other conditions being present, a person is liable for the injury caused by his conduct if it is negligent in the sense denoting the conception of moral blame or fault imputed to a person legally liable for the consequences of an unintentional act. *Nolan v. New York. N. H. & H. R. Co.* 70 Conn. 159, 43 L.R.A. 305, 39 Atl. 115.

² *Central R. Co. v. Freeman*, 66 Ga. 170; *Terre Haute & I. R. Co. v. Jones*, 11 Ill. App. 322; *Pittsburgh, C. & St. L. R. Co. v. Wright*, 80 Ind. 182; *Bramm v. Chicago, R. I. & P. R. Co.* 53 Iowa. 595, 36 Am. Rep. 243, 6 N. W. 5; *Garrett v. Chicago & N. W. R. Co.* 36 Iowa, 121; *Baltimore & O. R. Co. v. Fitzpatrick*, 35 Md. 32; *Davis v. Central Cong. Soc.* 129 Mass. 367, 37 Am. Rep. 368; *Hunt v. Salem*, 121 Mass. 294; *Mynning v. Detroit, L. & N. R. Co.* 64 Mich. 93, 8 Am. St. Rep. 804, 31 N. W. 147; *Underhill v. Chicago & G. T. R. Co.* 81 Mich. 43, 45 N. W. 508; *Grand Rapids & I. R. Co. v. Martin*, 41 Mich. 667, 3 N. W. 173; *Roux v. Blodgett & D. Lumber Co.* 85 Mich. 519, 13 L.R.A. 728, 24 Am. St. Rep. 102, 43 N. W. 1092; *Sleeper v. Worcester & N. R. Co.* 58 N. H. 520; *Glushing v. Sharp*, 96 N. Y. 677; *Twogood v. New*

York, 102 N. Y. 216, 6 N. E. 275; Skook v. Cohoes, 108 N. Y. 648, 15 N. E. 531; Bullock v. New York, 99 N. Y. 654, 2 N. E. 1; Greany v. Long Island R. Co. 101 N. Y. 419, 5 N. E. 425; Cosgrove v. New York C. & H. R. R. Co. 87 N. Y. 88, 41 Am. Rep. 355; Kellogg v. New York C. & H. R. R. Co. 79 N. Y. 72; Ernst v. Hudson River R. Co. 35 N. Y. 9, 90 Am. Dec. 761; Salter v. Utica & B. River R. Co. 88 N. Y. 42; Bills v. New York C. R. Co. 84 N. Y. 5; Bernhard v. Rensselaer & S. R. Co. 1 Abb. App. Dec. 131; Rexter v. Starin, 73 N. Y. 601; O'Mara v. Hudson River R. Co. 38 N. Y. 445, 98 Am. Dec. 61; Merritt v. Fitzgibbons, 29 Hun, 634; Bell v. New York C. & H. R. R. Co. 29 Hun, 560; Thomas v. New York, 28 Hun, 110; Corcoran v. New York Elev. R. Co. 19 Hun, 368; Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745; Hayes v. Michigan C. R. Co. 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; Randall v. Baltimore & O. R. Co. 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; Milwaukee Nat. Bank v. City Bank, 103 U. S. 668, 26 L. ed. 417; Hall v. Union P. R. Co. 5 McCrary, 257, 16 Fed. 744; Bierbach v. Good-year Rubber Co. 14 Fed. 826; New York & G. L. R. Co. v. New Jersey Electric R. Co. 60 N. J. L. 52, 38 L.R.A. 516, 37 Atl. 627; Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co. 27 Fla. 1, 17 L.R.A. 33, 9 So. 661; Gratiot v. Missouri P. R. Co. — Mo. —, 16 L.R.A. 189, 16 S. W. 384, 19 S. W. 31; Raines v. Chesapeake & O. R. Co. 39 W. Va. 50, 24 L.R.A. 226, 19 S. E. 565; Solberg v. Schlosser, 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91; Morris v. Trudo, 83 Vt. 44, 25 L.R.A.(N.S.) 33, 74 Atl. 387.

For a general statement of the rule by which the relative provinces of the court and jury in negligence cases are to be defined, see the note to 15 L.R.A. 332.

As to negligence and contributory negligence being generally for the jury, see note to 13 L.R.A. 728.

As to contributory negligence being for the jury, see notes to 6 L.R.A. 214; 4 L.R.A. 53.

For the jury.—Whether the consequences of a negligent act ought to have been foreseen. Lillibridge v. McCann, 117 Mich. 84, 41 L.R.A. 381, 72 Am. St. Rep. 553, 75 N. W. 288.

The court cannot deprive the defendant of the right to a verdict by the jury where the Constitution preserves the right of trial by jury inviolate, by instructing that he was guilty of negligence, although the facts are undisputed. Shobert v. May, 40 Or. 68, 55 L.R.A. 810, 66 Pac. 466.

Ordinarily the question of negligence is one of fact for the jury, to be determined from all the facts and circumstances shown in evidence; and it is error for the court to group certain facts in evidence together and instruct the jury that they constitute negligence. Chicago, B. & Q. R. Co. v. Krayenbuhl, 65 Neb. 889, 59 L.R.A. 920, 91 N. W. 880.

The question of contributory negligence is ordinarily one for the jury: only when the facts are stipulated or are free from substantial conflict and but one inference can be fairly drawn therefrom, may the question be withdrawn from the jury. *Cary Bros. v. Morrison*, 65 L.R.A. 659, 63 C. C. A. 267, 129 Fed. 177.

The question of the existence of negligence should not be withdrawn from the jury, unless the inference of it from the facts is certain and incontrovertible. *Dixon v. Chicago & A. R. Co.* 109 Mo. 413, 18 L.R.A. 792, 19 S. W. 412; *Texas & P. R. Co. v. Carlin*, 60 L.R.A. 462, 40 C. C. A. 605, 111 Fed. 777; *Philadelphia, W. & B. R. Co. v. Anderson*, 72 Md. 519, 8 L.R.A. 673, 20 Am. St. Rep. 483, 20 Atl. 2; *Salladay v. Dodgeville*, 85 Wis. 318, 20 L.R.A. 541, 55 N. W. 696; *Worthington v. Central Vermont R. Co.* 64 Vt. 107, 15 L.R.A. 326, 23 Atl. 590.

The question of the existence of negligence or contributory negligence, where the facts which the evidence reasonably tends to establish are undisputed, is one of law for the court, when reasonable men must draw the same conclusion from those facts, but if fair-minded men may honestly draw different conclusions from them, the cause should not be withdrawn from the jury. *Neeley v. Southwestern Cotton Seed Oil Co.* 13 Okla. 356, 64 L.R.A. 145, 75 Pac. 537.

It is error to take the question of contributory negligence in a personal-injuries action from the jury, except when it clearly appears that there was some new act of negligence that was the proximate cause of the injury. *Rider v. Syracuse Rapid Transit R. Co.* 171 N. Y. 139, 58 L.R.A. 125, 63 N. E. 836.

Illustrations.—

Whether decayed wooden drain had been defective for such a period as to raise statutory presumption of knowledge of its condition by the city. *Montgomery v. Comer*, 155 Ala. 422, 21 L.R.A.(N.S.) 951, 46 So. 761.

Negligence in failing to have express-car doors chained, where it was urged that such was "culpable negligence" absolving indemnity company from liability to reimburse express company for theft. *Great Northern Exp. Co. v. National Surety Co.* 113 Minn. 162, 31 L.R.A. (N.S.) 775, 129 N. W. 127.

Whether violation of understanding between members of hunting party, by reason of which one of them approached another's station through bushes, was contributory negligence, to the resultant shooting of the person by mistake. *Rudd v. Byrnes*, 156 Cal. 636, 26 L.R.A.(N.S.) 134, 105 Pac. 957, 20 A. & E. Ann. Cas. 124.

Whether it was negligent to send a person away from a house where he rightfully was, on a cold night, in a weak and helpless condition and unable to hold the reins to guide his team, where it was shown that his condition was known to those so doing. *Depue v. Flateau*, 100 Minn. 299, 8 L.R.A.(N.S.) 485, 111 N. W. 1.

Failure of eye specialist to discover foreign substance in a wound, where he had been notified of its presence by other physicians and which evidence tends to show would have been disclosed by the use of a probe. *Rann v. Twitchell*, 82 Vt. 79, 20 L.R.A.(N.S.) 1030, 71 Atl. 1045.

Contributory negligence in accepting a wagon with a broken shaft, barring recovery for damages resulting from a runaway caused by shaft dropping from the tug, where it was shown that shaft projected past tug 6 inches, and liveryman had assured hirer that broken shaft did not impair wagon's efficiency. *Opdycke v. Public Service R. Co.* 78 N. J. L. 576, 29 L.R.A.(N.S.) 71, 76 Atl. 1032.

Exercise of due care in burying a carcass near neighbor's spring. *Long v. Louisville & N. R. Co.* 128 Ky. 26, 13 L.R.A.(N.S.) 1063, 107 S. W. 203, 16 A. & E. Ann. Cas. 673.

³ *Roux v. Blodgett & D. Lumber Co.* 13 L.R.A. 728, and note, 85 Mich. 519, 24 Am. St. Rep. 102, 48 N. W. 1092, citing *Brezee v. Powers*, 80 Mich. 172, 45 N. W. 130; *Lowell v. Watertown Twp.* 58 Mich. 568, 25 N. W. 517.

Where the facts are in dispute, or such that reasonable minds may draw different conclusions from them, the question of negligence is for the jury. *Williams v. Sleepy Hollow Min. Co.* 37 Colo. 62, 7 L.R.A.(N.S.) 1170, 86 Pac. 337, 11 A. & E. Ann. Cas. 111; *Harris v. Missouri, K. & T. R. Co.* 24 Okla. 341, 24 L.R.A.(N.S.) 858, 103 Pac. 758; *Najarian v. Jersey City, H. & P. Street R. Co.* 77 N. J. L. 704, 23 L.R.A.(N.S.) 751, 73 Atl. 527; *Winona v. Botzet*, 23 L.R.A.(N.S.) 204, 94 C. C. A. 563, 169 Fed. 321.

Contributory negligence is always a question of fact for the jury where the evidence is conflicting or the possible inferences diverse. *Choctaw, O. & W. R. Co. v. Wilker*, 16 Okla. 384, 3 L.R.A.(N.S.) 595, 84 Pac. 1086; *Williams v. Sleepy Hollow Min. Co.* 37 Colo. 62, 7 L.R.A.(N.S.) 1170, 86 Pac. 337, 11 A. & E. Ann. Cas. 111; *Winona v. Botzet*, 23 L.R.A.(N.S.) 204, 94 C. C. A. 563, 169 Fed. 321; *Slaughter v. Huntington*, 64 W. Va. 237, 16 L.R.A.(N.S.) 459, 61 S. E. 155; *Lewis v. Bowling Green Gaslight Co.* 135 Ky. 611, 22 L.R.A.(N.S.) 1169, 117 S. W. 278.

So it is a question of fact whether injuries were caused by negligence, where evidence is conflicting as to existence of such facts as would show it if undisputed; or, if admitted, facts are such that different conclusions may be drawn. *Ewing v. Lanark Fuel Co.* 65 W. Va. 726, 29 L.R.A.(N.S.) 487, 65 S. E. 200.

For the court.—

Where facts are undisputed, and but one inference can reasonably be drawn therefrom. *Raines v. Chesapeake & O. R. Co.* 39 W. Va. 50, 24 L.R.A. 226, 19 S. E. 565; *Woolwine v. Chesapeake & O. R. Co.* (*Manning v. Chesapeake & O. R. Co.*) 36 W. Va. 329, 16 L.R.A. 271, 32 Am. St. Rep. 859, 15 S. E. 81; *Tobey v. Burlington, C. R. & N. R. Co.* 94 Iowa, 256, 33 L.R.A. 496, 62 N. W. 761; *Clarke v. Louisville & N. R. Co.*

101 Ky. 34, 36 L.R.A. 123, 39 S. W. 840; Morrison v. Lee, 16 N. D. 377, 13 L.R.A.(N.S.) 650, 113 N. W. 1025.

The maxim, *Res ipsa loquitur*, raises only a rebuttable case of negligence, and no presumption of negligence necessarily follows its invocation so as to compel a submission of fact to the jury. Jenkins v. St. Paul City R. Co. 105 Minn. 504, 20 L.R.A.(N.S.) 401, 117 N. W. 928.

⁴ Whether a child exercised ordinary care and caution. Rachmel v. Clark, 205 Pa. 314, 62 L.R.A. 959, 54 Atl. 1027.

It was held error to charge that a six-year-old child could not be guilty of negligence. Chicago City R. Co. v. Wilcox, — Ill. —, 8 L.R.A. 494, 24 N. E. 419, reversed on rehearing in 138 Ill. 370, 21 L.R.A. 76, 27 N. E. 899.

Whether a child was contributorily negligent in a given case is for the jury in view of his age, intelligence, knowledge of his surroundings, and capacity to know and appreciate the danger. Rolin v. R. J. Reynolds Tobacco Co. 141 N. C. 300, 7 L.R.A.(N.S.) 335, 53 S. E. 891. 8 A. & E. Ann. Cas. 638.

So as to weight of evidence offered to overthrow the presumption that a fourteen-year-old boy has discreet judgment. Baker v. Seaboard Air Line R. Co. 150 N. C. 562, 29 L.R.A.(N.S.) 846, 64 S. E. 506, 17 A. & E. Ann. Cas. 351.

Whether eight-year-old child was contributorily negligent in playing near a leaky gate valve in a gas main, where his parents had warned him to keep away from it. United States Natural Gas Co. v. Hicks, 134 Ky. 12, 23 L.R.A.(N.S.) 249, 135 Am. St. Rep. 407, 119 S. W. 166.

Whether city could foresee that boys might go into an unguarded conduit for a distance of 600 feet, about 400 feet of which was wholly dark, to play, and might fall into water entering conduit at that point and be drowned. Brown v. Salt Lake City, 33 Utah, 222, 14 L.R.A.(N.S.) 619, 126 Am. St. Rep. 828, 93 Pac. 570, 14 A. & E. Ann. Cas. 1004.

Contributory negligence where an eight-year-old boy went into a dark, unguarded, underground water conduit for a considerable distance and was there drowned. Ibid.

As to contributory negligence and negligence being for the jury where children are injured, see note to 17 L.R.A. 79.

That negligence of an infant is a question of fact, see note to 3 L.R.A. 385.

See also post, § 25, "Negligence as to railroads and street railways."

⁵ *Tompkins v. Oswego*, 40 N. Y. S. R. 4, 15 N. Y. Supp. 371; *Newton v. Central Vermont R. Co.* 80 Hun, 491, 30 N. Y. Supp. 488; *Healey v. New York*, 6 Thomp. & C. 92; *Houston & T. C. R. Co. v. Sympkins*, 54 Tex. 615, 38 Am. Rep. 632.

⁶ *Clark v. Wilmington & W. R. Co.* 109 N. C. 430, 14 L.R.A. 749, 14 S. E. 43; *Louisville & N. R. Co. v. Johnson*, 108 Ala. 62, 31 L.R.A. 372,

19 So. 51, 104 Ala. 241, 53 Am. St. Rep. 39, 16 So. 75; *Murphy v. Union R. Co.* 118 Mass. 228.

See also cases cited in 40 L.R.A. 141, note.

23. Carrier's negligence.

The question of a carrier's negligence or of contributory negligence is ordinarily one of fact.¹ Thus the question as applied to stations, platforms, and places for taking up and setting down passengers² or freight,³ or to the fitness and safety of the track and equipment,⁴ or the cars,⁵ has been held to be one for the jury.

¹ Whether inference from killing of passenger has been overcome. *Dieckmann v. Chicago & N. W. R. Co.* 145 Iowa, 250, 31 L.R.A.(N.S.) 338, 139 Am. St. Rep. 420, 121 N. W. 676.

Presumption of negligence raised by the collision of two of its cars. *Simone v. Rhode Island Co.* 28 R. I. 186, 9 L.R.A.(N.S.) 740, 66 Atl. 202.

Evidence of good condition of the track and careful handling of trains as overcoming presumption of negligence arising from derailment and overturning of passenger coach to passenger's injury. *Southern P. Co. v. Hogan*, 13 Ariz. 34, 29 L.R.A.(N.S.) 813, 108 Pac. 240.

² Whether dangers existed at a railway station, whether they were habitual and notorious, and whether road was chargeable with knowledge of them, where evidence was in dispute. *Exton v. Central R. Co.* 63 N. J. L. 356, 56 L.R.A. 508, 46 Atl. 1099.

What unevenness of ground at the alighting point of passengers constituted negligence. *Poole v. Consolidated Street R. Co.* 100 Mich. 379, 25 L.R.A. 744, 59 N. W. 390.

Insufficiency of plank placed to facilitate entrance to car. *Messenger v. Valley City Street & I. R. Co.* — N. D. —, 32 L.R.A.(N.S.) 881, 128 N. W. 1023.

Exercise of due care by passenger in using passageway leading to baggage room, where different inferences may be drawn from the evidence. *Exton v. Central R. Co.* 63 N. J. L. 356, 56 L.R.A. 508, 46 Atl. 1099.

Provision of sufficient exits from passenger station, where actual exits were some distance away or not visible. *Cotant v. Boone Suburban R. Co.* 125 Iowa, 46, 69 L.R.A. 982, 99 N. W. 115.

Question of negligence of railroad company in placing a baggage truck where passengers might be endangered thereby. *Denver & R. G. R. Co. v. Spencer*, 27 Colo. 313, 51 L.R.A. 121, 61 Pac. 606.

Carrier's duty to provide extra men at certain hours to prevent dangerous crowding of passengers on its waiting platform. *Kuhlen v. Boston & N. Street R. Co.* 193 Mass. 341, 7 L.R.A.(N.S.) 729, 118 Am. St. Rep. 516, 79 N. E. 815.

Carrier's negligence in leaving check room unattended at different times when attendant's services were required at trains. *Fraam v. Grand Rapids & I. R. Co.* 161 Mich. 556, 29 L.R.A.(N.S.) 834, 126 N. W. 851.

Stops for passengers.—

Where railroad had agreed to stop a night train at a station where night trains did not stop, whether it kept the station platform lighted a reasonable period. *Abbot v. Oregon R. & Nav. Co.* 46 Or. 549, 1 L.R.A.(N.S.) 851, 114 Am. St. Rep. 885, 80 Pac. 1012, 7 A. & E. Ann. Cas. 961.

Sufficiency of a stop of one minute to enable passenger to alight from a train with safety. *Chicago, R. I. & P. R. Co. v. Wimmer*, 72 Kan. 566, 4 L.R.A.(N.S.) 140, 84 Pac. 378, 7 A. & E. Ann. Cas. 756.

Crossing tracks or passing trains at stations.—

Except in cases marked by gross and inexcusable negligence, whether a passenger attempting to cross a railroad track at a station exercised due care is a question of fact for the jury. *Parsons v. New York C. & H. R. R. Co.* 113 N. Y. 355, 3 L.R.A. 683, 10 Am. St. Rep. 450, 21 N. E. 145.

Contributory negligence of passenger who alights at the regular stopping place and is injured by an incoming train, which danger he could have seen if he had looked and listened. *Atlantic City R. Co. v. Goodin*, 62 N. J. L. 394, 45 L.R.A. 671, 72 Am. St. Rep. 652, 42 Atl. 333.

Contributory negligence of one who, to board a car, crosses a street car track at night on a crosswalk, and is injured by car which having been properly signaled he mistakenly believes is slackening speed. *Walker v. St. Paul City R. Co.* 81 Minn. 404, 51 L.R.A. 632, 84 N. W. 222.

Due care by passenger crossing tracks at night to take his train, where the circumstances are not clear. *Dieckmann v. Chicago & N. W. R. Co.* 145 Iowa, 250, 31 L.R.A.(N.S.) 338, 139 Am. St. Rep. 420, 121 N. W. 676.

Whether there was carelessness or negligence of a carrier, and carelessness or gross negligence of its servants, where a train running at extraordinary speed struck a passenger endeavoring to take a train on a farther track.. *Young v. New York, N. H. & H. R. Co.* 171 Mass. 33, 41 L.R.A. 193, 50 N. E. 455.

Running train into station at night at unreasonable speed. *Dieckmann v. Chicago & N. W. R. Co. supra.*

Negligence in running train past station at a high rate of speed while another train standing there is receiving and discharging passengers. *Chicago, R. I. & P. R. Co. v. Stepp*, 22 L.R.A.(N.S.) 350, 90 C. C. A. 431, 164 Fed. 785.

Sufficiency of safety provisions for passengers crossing tracks at night to take trains. *Dieckmann v. Chicago & N. W. R. Co. supra.*

Whether passenger who failed to look and listen before crossing a railroad track between place where he had alighted and a public highway was negligent. *Chesapeake & O. R. Co. v. King*, 49 L.R.A. 102, 40 C. C. A. 432, 99 Fed. 251.

Whether bell was ringing at time locomotive struck a person at the station, where the evidence is conflicting. *Chicago, R. I. & P. R. Co. v. Stepp*, *supra*.

The contributory negligence of one killed through the negligence of railroad's servants, while awaiting the arrival of a relative, in the space between two tracks, used by the company for receiving and discharging passengers, where the situation did not suggest imminent danger. *Denver & R. G. R. Co. v. Spencer*, 27 Colo. 313, 51 L.R.A. 121, 61 Pac. 606.

Whether a passenger who signaled an approaching electric car was negligent in trying to cross the track in the dark to a place of greater safety, instead of remaining between the two tracks and crossing after the car stopped. *Karr v. Milwaukee Heat, Light & Traction Co.* 132 Wis. 662, 13 L.R.A.(N.S.) 283, 122 Am. St. Rep. 1017, 113 N. W. 62.

Contributory negligence of drover crossing track to take his train, for which he had been told to be ready, it being then approaching and the engine which struck him being partly obscured. *Coon v. Atchison, T. & S. F. R. Co.* 82 Kan. 311, 27 L.R.A.(N.S.) 1013, 108 Pac. 85.

For the court.—

Contributory negligence of one who, alighting from a car, passes behind it, onto a parallel track, without looking for an approaching car, which could have been seen a long distance away. *Baltimore Traction Co. v. Helems*, 84 Md. 515, 36 L.R.A. 215, 36 Atl. 119.

³ The safety and suitability of a platform used by a carrier for unloading horses, where the evidence is conflicting. *Chesapeake & O. R. Co. v. American Exch. Bank*, 92 Va. 495, 44 L.R.A. 449, 23 S. E. 935.

Whether dead alley without tight partition was sufficient care to prevent traverse of Texas fever tick from infected cattle to others. *Baltimore & O. R. Co. v. Dever*, 112 Md. 296, 26 L.R.A.(N.S.) 712, 75 Atl. 352.

⁴ Question of negligence, in a collision caused by a defective engine in charge of a fireman. *Lane v. Spokane Falls & N. R. Co.* 21 Wash. 119, 46 L.R.A. 153, 75 Am. St. Rep. 821, 57 Pac. 367.

Whether knowledge of conditions indicative of the cause of an accident would have prompted persons of due care to efficient foresight. *Littlejohn v. Fitchburg R. Co.* 148 Mass. 478, 2 L.R.A. 502, 20 N. E. 103.

Whether a flood which caused an accident could have been reasonably anticipated. *Terre Haute & I. R. Co. v. Fowler*, 154 Ind. 682, 48 L.R.A. 531, 56 N. E. 228.

Whether carrier was negligent in erecting a trolley pole so close to track that passenger on running board of car was injured thereby. *Cameron*

v. Lewiston, B. & B. Street R. Co. 103 Me. 482, 18 L.R.A.(N.S.) 497, 125 Am. St. Rep. 315, 70 Atl. 534.

Railroad's negligence in maintaining derailing device in a switch track connecting with its main track, so that it can be closed by anyone and cars run from switch track on to main track, where they can come into collision with a passenger train. *Barker v. Chicago, P. & St. L. R. Co.* 243 Ill. 482, 26 L.R.A.(N.S.) 1058, 134 Am. St. Rep. 382, 90 N. E. 1057.

⁵ Whether street car conductor was negligent in permitting a hand bag to be set down in and remain in the aisle. *Pitcher v. Old Colony Street R. Co.* 196 Mass. 69, 13 L.R.A.(N.S.) 481, 124 Am. St. Rep. 513, 81 N. E. 876, 12 A. & E. Ann. Cas. 886.

Whether a bolt which caught in the clothing when car jerked had any part in passenger's injury, where passenger gave her opinion that it had not. *Tunncliffe v. Bay Cities Consol. R. Co.* 102 Mich. 624, 32 L.R.A. 142, 61 N. W. 11.

Whether employees on sleeping car left doors open unduly long after leaving station, where mother of a child was told they would be kept closed. *Crandall v. Minneapolis, St. P. & S. Ste. M. R. Co.* 96 Minn. 434, 2 L.R.A.(N.S.) 645, 113 Am. St. Rep. 653, 105 N. W. 185.

Whether street railway was negligent in allowing cars to become so crowded that passenger was pushed off and injured. *Lobner v. Metropolitan Street R. Co.* 79 Kan. 811, 21 L.R.A.(N.S.) 972, 101 Pac. 463.

Whether a passenger was negligent who, upon the train's approaching a stopping place in the night, went to the platform of a vestibule car and, stumbling over a package left at top of the steps by the porter, fell from the train and was injured. *Johnson v. Yazoo & M. Valley R. Co.* 94 Miss. 447, 22 L.R.A.(N.S.) 312, 47 So. 785.

Like rules apply to carriers by passenger elevators,¹ and to carriers by special contract.²

¹ The question of negligence was for the jury in an action by one injured in falling elevator, where the evidence tends to show that the elevator fell, and that passenger was rightfully thereon and was injured. *Springer v. Ford*, 189 Ill. 430, 52 L.R.A. 930, 82 Am. St. Rep. 464, 59 N. E. 953.

Negligence of a tenant's employee who, to deliver packages, went into an unlighted entry way and fell into an unlighted and unguarded elevator well, the elevator having been moved, without notice to him, to another floor. *B. Shoninger Co. v. Mann*, 219 Ill. 242, 3 L.R.A.(N.S.) 1097, 76 N. E. 354.

Whether one who fell into an elevator well in attempting to enter the car contributed to his injury, where the evidence is conflicting as to whether the conductor had left the door open or closed. *Wilcox v. Rochester,*

190 N. Y. 137, 17 L.R.A.(N.S.) 741, 82 N. E. 1119, 13 A. & E. Ann. Cas. 759.

Whether fourteen-year-old boy assumed the risk in operating an elevator, where the doors thereto are set in the walls so that recesses are left into which portions of a passenger's body might project and be caught. Siegel, C. & Co. v. Trcka, 218 Ill. 559, 2 L.R.A.(N.S.) 647, 109 Am. St. Rep. 302, 75 N. E. 1053.

² Adequacy of preventive care of a carrier transporting animals under a special limited contract, where a collision occurred because of the alleged sudden insanity of the engineer. Central R. Co. v. Hall, 124 Ga. 322, 4 L.R.A.(N.S.) 898, 110 Am. St. Rep. 170, 52 S. E. 679, 4 A. & E. Ann. Cas. 128.

Whether the passenger was negligent as a contributor, or the carrier as a prime actor, in injury while boarding or alighting from a moving train or vehicle,¹ or in boarding or alighting at a wrong place,² or riding on the platform or other unsuitable place,³ or riding within the car in an unsafe position,⁴ or in projecting an arm or other member out past the line of the car,⁵ is a jury question.

¹ It is a question of fact whether, from all attending circumstances, alighting from a moving train constitutes negligence. Pennsylvania Co. v. Marion, 123 Ind. 415, 7 L.R.A. 687, 18 Am. St. Rep. 330, 23 N. E. 973; Watkins v. Birmingham R. & Electric Co. 120 Ala. 147, 43 L.R.A. 297, 24 So. 392; New York, P. & N. R. Co. v. Coulburn, 69 Md. 360, 1 L.R.A. 541, 9 Am. St. Rep. 430, 16 Atl. 208. Stepping onto slowly moving train. Distler v. Long Island R. Co. 151 N. Y. 424, 35 L.R.A. 762, 45 N. E. 937. Boarding a moving electric car. Cicero & P. Street R. Co. v. Meixner, 160 Ill. 320, 31 L.R.A. 331, 43 N. E. 823.

Whether passenger was negligent in trying to alight from moving steam car upon invitation of train employees and under the belief that train was not in motion, the evidence sustaining that belief. Baltimore & O. S. W. R. Co. v. Mullen, 217 Ill. 203, 2 L.R.A.(N.S.) 115, 75 N. E. 474, 3 A. & E. Ann. Cas. 1015.

Negligence of passenger going on platform to alight just as train started, where it is uncertain whether he tried to step off or was thrown off by the start of the train. Chicago, B. & Q. R. Co. v. Lampman, 18 Wyo. 106, 25 L.R.A.(N.S.) 217, 104 Pac. 533.

As to contributory negligence of a passenger jumping from a moving train being for the jury, see note to 1 L.R.A. 542.

That it is a jury question in the majority of cases whether one was negligent in getting on or off of a moving street car, see note to 38 L.R.A. 788.

Boarding street car after it started, in consequence whereof person was still on running board when the car reached an obstruction near track and in plain view. *United States Exp. Co. v. Kraft*, 19 L.R.A. (N.S.) 296, 18 C. C. A. 346, 161 Fed. 300.

In emergency or in face of peril.—

Whether the conduct of a passenger, injured while escaping from a car which appeared to be in danger from a blazing oil lamp, was reasonable. *Gannon v. New York, N. H. & H. R. Co.* 173 Mass. 40, 43 L.R.A. 833, 52 N. E. 1075.

Whether carrier was negligent in forcing a passenger to choose between being left and boarding moving cars at an unusual and unsuitable place. *Mills v. Missouri, K. & T. R. Co.* 94 Tex. 242, 55 L.R.A. 497, 59 S. W. 874.

Whether a woman was justified in jumping from a car running down a steep grade, with no one in charge of it, and no one in it but women and children, some of whom also jumped. *Western Maryland R. Co. v. Herold*, 74 Md. 510, 14 L.R.A. 75, 22 Atl. 323.

Whether a man who, from his familiarity with railroad management and schedules, knew that a collision was imminent because of negligence of railroad employees, and went forward into the baggage car and jumped therefrom just as the trains were about to collide, was guilty of contributory negligence. *Cody v. New York & N. E. R. Co.* 151 Mass. 462, 7 L.R.A. 843, 24 N. E. 402.

Whether a passenger was guilty of contributory negligence in jumping from a public carriage, at the driver's direction, while the horses were running and kicking. *Budd v. United Carriage Co.* 25 Or. 314, 27 L.R.A. 279, 35 Pac. 600.

² Whether passenger was guilty of contributory negligence in alighting from train which, having passed the depot, stopped at a bad place. *Foss v. Boston & M. R. Co.* 66 N. H. 256, 11 L.R.A. 367, 49 Am. St. Rep. 607, 21 Atl. 222.

Whether a passenger was negligent in attempting to alight from a train, at night, in response to company's invitation so to do, where the train had stopped before reaching the station platform,—as he might have discovered by looking for the station lights,—and after a momentary pause started to move again slowly, and it was not shown that he knew the purpose of the renewed movement. *Philadelphia, W. & B. R. Co. v. Anderson*, 72 Md. 519, 8 L.R.A. 673, 20 Am. St. Rep. 483, 20 Atl. 2.

Whether a passenger on a freight train is justified in supposing that passengers will be discharged at the first stop after the station has been announced. *Chicago & A. R. Co. v. Arnol*, 144 Ill. 261, 19 L.R.A. 313, 33 N. E. 204.

Whether caretaker of animals on train was negligent in leaving train in darkness while it was on a trestle, unknown to him, he being ill. *Otto Abbott*, Civ. Jur. T.—35.

v. Chicago, B. & Q. R. Co. 87 Neb. 503, 31 L.R.A.(N.S.) 632, 138 Am. St. Rep. 496, 127 N. W. 857.

- ³ Graham v. McNeill, 20 Wash. 466, 43 L.R.A. 300, 72 Am. St. Rep. 121. 55 Pac. 631. Passenger riding on the front platform of an electric car. Sweetland v. Lynn & B. R. Co. 177 Mass. 574, 51 L.R.A. 783, 59 N. E. 443; Watson v. Portland & C. E. R. Co. 91 Me. 584, 44 L.R.A. 157. 64 Am. St. Rep. 268, 40 Atl. 699.

Riding with back to street and holding to stanchion while running car around sharp curve at high speed without warning, passenger riding on platform with consent of conductor because there was no room inside. Trussell v. Morris County Traction Co. 79 N. J. L. 533, 30 L.R.A. (N.S.) 351, 77 Atl. 535.

Whether a person who, at conductor's direction, entered overcrowded car to become a passenger, was negligent. Alton Light & Traction Co. v. Oller, 217 Ill. 15, 4 L.R.A.(N.S.) 399, 75 N. E. 419.

Whether passenger on crowded street car who rides on a crowded platform and is shoved off is contributorily negligent. Lobner v. Metropolitan Street R. Co. 79 Kan. 811, 21 L.R.A.(N.S.) 972, 101 Pac. 463.

Negligence of nauseated passenger who went upon platform of fast train to vomit because closet was locked, and who released hold when asked for ticket. Brice v. Southern R. Co. 85 S. C. 216, 27 L.R.A. (N.S.) 768, 67 S. E. 243.

Whether passenger was negligent in stepping upon running board while the car was in motion, for the purpose of changing seats. Cameron v. Lewiston, B. & B. Street R. Co. 103 Me. 482, 18 L.R.A.(N.S.) 497. 125 Am. St. Rep. 315, 70 Atl. 534.

Whether passenger was chargeable with knowledge of the proximity of a trolley pole to the track, where he had passed it daily for a long period. Ibid.

- ⁴ Whether a passenger who was thrown down by a collision was guilty of contributory negligence by standing in the car. Lane v. Spokane Falls & N. R. Co. 21 Wash. 119, 46 L.R.A. 153. 75 Am. St. Rep. 821. 57 Pac. 367.

Whether a girl on a moving street car was negligent in going to the door to see whether she could get someone on the street to stop the car, after she had twice asked the conductor to stop it on account of her sudden illness. Newark & S. O. R. Co. v. McCann, 58 N. J. L. 642, 33 L.R.A. 127, 34 Atl. 1052.

- ⁵ Whether a passenger riding in a car with his elbow projecting from the window was guilty of contributory negligence or want of due care is for the jury, and the court will not instruct that he was *prima facie* negligent. Quinn v. South Carolina R. Co. 29 S. C. 381, 1 L.R.A. 682, 7 S. E. 614.

The question of passenger's contributory negligence in sitting with elbow

projecting from car window. *Moakler v. Willamette Valley R. Co.* 18 Or. 189, 6 L.R.A. 656, 17 Am. St. Rep. 717, 22 Pac. 948.

On the question whether the riding in a car with arm or member projecting outside the line of the car is negligence *per se* on the passenger's part, there is a conflict whether it is for the court or the jury. See cases cited in note to 16 L.R.A. 92.

Whether a passenger on a street car was negligent in projecting his arm slightly beyond the side of the car. *Georgetown & T. R. Co. v. Smith*, 25 App. D. C. 259, 5 L.R.A. (N.S.) 274.

Whether motorman in a car about to pass another used due care to avoid injury to passenger on the other, whose arm projected from car. *Ibid.*

Whether drover mounting ladder at conductor's invitation was negligent in respect to water crane by which he was struck, the circumstances being doubtful as to what extent the danger was appreciable though the crane was visible. *Leslie v. Atchison, T. & S. F. R. Co.* 82 Kan. 152, 27 L.R.A. (N.S.) 646, 107 Pac. 765.

The questions of negligence in ejecting passengers, and of their negligence after being ejected, are for the jury;¹ likewise the question whether there was negligence where a trainman, to save himself, suddenly seized a passenger;² and whether there was adequate care of helpless, infirm, or intoxicated passengers,³ or undue delay in transportation.⁴

¹ Negligence or wantonness in ejecting trespassers from moving train. *Southern Kansas R. Co. v. Sanford*, 45 Kan. 372, 11 L.R.A. 432, 25 Pac. 891.

Reasonable prudence of woman in undertaking to walk to a certain place after ejection from a train. *Sloane v. Southern California R. Co.* 111 Cal. 668, 32 L.R.A. 193, 44 Pac. 320.

Whether conductor exercised due care in expelling passenger whose ticket had been lost, at an open flag station, on a cold and stormy night. *Tilburg v. Northern C. R. Co.* 217 Pa. 618, 12 L.R.A. (N.S.) 359, 66 Atl. 846.

² Negligence of a conductor in seizing a passenger to save himself as he stumbled, although the cause of the stumbling is not shown. *Whalen v. Consolidated Traction Co.* 61 N. J. L. 606, 41 L.R.A. 836, 68 Am. St. Rep. 723, 40 Atl. 645.

Whether or not a carrier was liable for injury to a passenger, caused by conductor seizing him in grasping for stanchion, to prevent himself from falling from footboard. *Kohner v. Capital Traction Co.* 22 App. D. C. 181, 62 L.R.A. 875.

³ Duty of carrier's servants to assist passenger to alight from train. *Texas*

& P. R. Co. v. Miller, 79 Tex. 78, 11 L.R.A. 395, 23 Am. St. Rep. 308, 15 S. W. 264.

Duty of a carrier as measured by a passenger's apparent drunken condition. Wheeler v. Grand Trunk R. Co. 70 N. H. 607, 54 L.R.A. 955, 50 Atl. 103.

The extent of passenger's intoxication, conductor's knowledge of his condition, and the safety of the place where he was ejected. Louisville & N. R. Co. v. Johnson, 108 Ala. 62, 31 L.R.A. 372, 19 So. 51.

Whether or not carrier could have prevented the injury which befell drunken passenger staggering and dancing between open doors of baggage car. Wheeler v. Grand Trunk R. Co. 70 N. H. 607, 54 L.R.A. 955, 50 Atl. 103.

Whether a passenger who was able to sing, talk, laugh, and dance was too intoxicated to understand the dangers of a position he assumed, or protect himself from its hazards. Ibid.

Whether or not carrier exercised due care for a passenger in feeble mental and physical condition. Croom v. Chicago, M. & St. P. R. Co. 52 Minn. 296, 18 L.R.A. 602, 38 Am. St. Rep. 557, 53 N. W. 1128.

Sufficiency of watch over sleeping car by servant who was fatigued by a long continuous service, and who was absent from the car several times. Pullman Palace Car Co. v. Hunter, 107 Ky. 519, 47 L.R.A. 286, 54 S. W. 845.

Negligence of ticket taker in failing to safeguard sick passenger found on the platform of fast train. Brice v. Southern R. Co. 85 S. C. 216, 27 L.R.A.(N.S.) 768, 67 S. E. 243.

⁴ Sufficiency and reasonableness of a carrier's excuse for delay in the transportation of live stock. Bosley v. Baltimore & O. R. Co. 54 W. Va. 563, 66 L.R.A. 871, 46 S. E. 613.

Carrier's negligence in not securing the carriage of a passenger's baggage on the same train as the passenger. Wald v. Pittsburg, C. C. & St. L. R. Co. 162 Ill. 545, 35 L.R.A. 356, 53 Am. St. Rep. 332, 44 N. E. 888.

Whether a carrier was negligent in failing to forward a corpse on a certain train. Louisville & N. R. Co. v. Hull, 113 Ky. 561, 57 L.R.A. 771, 68 S. W. 433.

24. Negligence as to highways.

The questions how an accident occurred on a highway, whether the highway was negligently defective, and whether the plaintiff used due and proper care under all the circumstances, are ordinarily for the jury:¹ Whether the public authorities had or ought to have had knowledge of a defect or condition,² or foreseen it,³ and whether the care taken was adequate to the situation;⁴ as, for instance, whether holes or inequalities in the way,⁵ or ice or snow on the walks,⁶ the want

of lights,⁷ guards, or barriers,⁸ the insecurity of or danger from overhanging objects,⁹ or vaults beneath,¹⁰ were negligently so; and of contributory negligence in respect to these things;¹¹ as, whether persons were contributorily negligent in driving on the wrong side of the road,¹² or at an illegal rate of speed,¹³ or where the horse might be frightened,¹⁴ or without adequate control or management of horse or vehicle,¹⁵—is for the jury under the rules previously stated in this chapter.

¹ *Cremer v. Portland*, 36 Wis. 92.

Numerous cases applying this general doctrine to various states of facts are reviewed in a note to 13 L.R.A.(N.S.) 1250, 1261.

That contributory negligence of the traveler is usually a jury question in cases of injury on highways, see exhaustive note to 21 L.R.A.(N.S.) 675.

² Whether a city which issued a permit for certain sidewalk work which required inspection should have known of the presence of a boiler for heating purposes under the walk, which inspection might have revealed. *Beall v. Seattle*, 28 Wash. 593, 61 L.R.A. 583, 92 Am. St. Rep. 892, 69 Pac. 12.

Notice of the city of dangerous ice which was protected during the day, but exposed about nightfall by third persons. *Reedy v. St. Louis Brewing Asso.* 161 Mo. 523, 53 L.R.A. 805, 61 S. W. 859.

³ Whether crossing a bridge by a traction engine drawing a water tank was such an ordinary mode of travel and transportation as should have been anticipated. *Hardin County v. Coffman*, 60 Ohio St. 527, 48 L.R.A. 455, 54 N. E. 1054.

Whether county in planning bridge should have anticipated increase in weight of engines and threshers to be hauled in later years. *Kovarik v. Saline County*, 86 Neb. 440, 27 L.R.A.(N.S.) 832, 136 Am. St. Rep. 704, 125 N. W. 1082.

⁴ Whether city performed its duty by seeing that ice on a sidewalk was covered with malt sprouts. *Reedy v. St. Louis Brewing Asso.* 161 Mo. 523, 53 L.R.A. 805, 61 S. W. 859.

⁵ Liability of a municipality for injury caused by a difference in height of adjoining walks. *Watertown v. Greaves*, 56 L.R.A. 865, 50 C.C.A. 172, 112 Fed. 183.

Whether a city was negligent in leaving an unguarded culvert and catch-basin on a rural way, where pedestrian at night, stepping to one side to avoid a vehicle, fell into such catch-basin, the presence of which could not reasonably be anticipated by the condition of the soil and the environments. *Neidhardt v. Minneapolis*, 112 Minn. 149, 29 L.R.A.(N.S.) 822, 127 N. W. 484.

Whether municipal corporation was negligent in permitting boards to remain loose on sidewalk for months. *Neff v. Cameron*, 213 Mo. 350, 18 L.R.A.(N.S.) 320, 127 Am. St. Rep. 606, 111 S. W. 1139.

A municipal sidewalk was not unsafe as a matter of law, within a statute, where a patch of 2-inch planks had been spiked on top of old plank-ing, leaving an abrupt inequality in height of 2 inches. *Kawiecka v. Superior*, 136 Wis. 613, 21 L.R.A.(N.S.) 1020, 118 N. W. 192.

⁶ Safety of a sidewalk covered with slippery ice, on which malt sprouts were spread. *Reedy v. St. Louis Brewing Asso.* 161 Mo. 523, 53 L.R.A. 805, 61 S. W. 859.

Contributory negligence of one injured by slipping and falling on ice on municipal sidewalk, where the condition of the walk was due to the positive negligent act of the city. *Tewksbury v. Lincoln*, 84 Neb. 571, 23 L.R.A.(N.S.) 282, 121 N. W. 994.

The existence of ice and snow on highways or walks forming an obstruction or danger to travel and alleged to be the result of negligence, also the question whether the defendant had such notice as to charge it with a duty in the premises, are for the jury to decide on all the circumstances. See note to 21 L.R.A. 277.

⁷ Whether city was negligent in permitting an electric light to be so placed that the shadow cast by a supporting pole concealed an opening in a cross walk. *Stone v. Seattle*, 30 Wash. 65, 67 L.R.A. 253, 70 Pac. 249.

⁸ Whether a vehicle would have slid over an embankment if proper rail-ings or barriers had been provided at the place. *Malloy v. Walker Twp.* 77 Mich. 448, 6 L.R.A. 695, 43 N. W. 1012.

Necessity of railings or barriers to make a highway reasonably safe to travelers. *Ibid.*

Sufficiency of ordinary railing on bridge to stop a horse crazed by fright. *Stout v. Valle Crucis, S. & E. P. Turnp. Co.* 153 N. C. 513, 31 L.R.A. (N.S.) 804, 69 S. E. 508.

⁹ Whether it was negligent to leave cracked windows above a sidewalk, where their dangerous condition was shown. *Detzur v. B. Stroh Brewing Co.* 119 Mich. 282, 44 L.R.A. 500, 77 N. W. 948.

The presumption of negligence arising from injury caused by a broken electric wire in a public street, as overcome by testimony that wire was properly constructed and put up. *Boyd v. Portland General Electric Co.* 40 Or. 126, 57 L.R.A. 619, 66 Pac. 576.

Negligence in swinging of rope hanging across street as traveler is about to drive under it. *Pennsylvania Steel Co. v. Wilkinson*, 107 Md. 574, 16 L.R.A.(N.S.) 200, 69 Atl. 412.

Augusta v. Hafers, 59 Ga. 151; *Day v. Mt. Pleasant*, 70 Iowa, 193, 30 N. W. 853; *McClure v. Sparta*, 84 Wis. 269, 36 Am. St. Rep. 924, 54 N. W. 337.

¹⁰ Negligence being a mixed question of law and fact, it may be safely

said that in all cases where it is the gravamen of the action the question of the negligence of the defendant must be submitted to the jury whenever it is a matter of controversy; and this rule is, of course, applicable to the question whether space used under a sidewalk is negligently maintained. See note to 61 L.R.A. 589.

- 11 Whether a pedestrian was exercising proper care in passing along sidewalk, and whether he fell from want of care on his part. *Holbert v. Philadelphia*, 221 Pa. 266, 20 L.R.A.(N.S.) 201, 70 Atl. 746.

The question of the contributory negligence of a boy between eight and nine years old who was killed by falling through a hole in a city bridge. *Buechner v. New Orleans*, 112 La. 599, 66 L.R.A. 334, 104 Am. St. Rep. 455, 36 So. 603.

Sufficiency of a whistle which frightened a woman walking along the street at night, to excuse her immediate attention to the walk in front of her. *Graves v. Battle Creek*, 95 Mich. 266, 19 L.R.A. 641, 35 Am. St. Rep. 561, 54 N. W. 757.

Negligence of pedestrian in leaving wagon track, which is safe, to avoid a team, and entering upon sidewalk having a concealed defect, from which injury resulted. *Danville v. Robinson*, 99 Va. 448, 55 L.R.A. 162, 39 S. E. 122.

Whether one who fell into excavation in attempting to ride a bicycle between street-car rails because street was blocked and he had seen street cars passed safely, was negligent. *Dix v. Old Colony Street R. Co.* 202 Mass. 518, 24 L.R.A.(N.S.) 567, 89 N. E. 109.

Whether pedestrian may rely on coal holes in the sidewalk not being left open without notice or guard. *French v. Boston Coal Co.* 195 Mass. 334, 11 L.R.A.(N.S.) 993, 122 Am. St. Rep. 257, 81 N. E. 265.

Necessity of assuming the risk of passing over a known defect in a highway, where evidence leaves it uncertain whether there was a safe way available either by a public road or over adjacent private property. *Shriver v. County Ct.* 66 W. Va. 685, 26 L.R.A.(N.S.) 377, 66 S. E. 1062.

Whether teamster injured by his wagon tipping over when he attempted to drive around a mud hole in a highway, used ordinary care, where he knew of the condition of the defect and of the size and character of his wagon, was an experienced teamster, and had previously driven around the hole without injury. *Ibid.*

Driving top-heavy loads of straw with great care over rough road, where to turn back was impossible and tracks of others were visible. *Solberg v. Schlosser*, 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. D. 91.

12 The question of the negligence of each party, where a person on horseback turns to the left, on a dark night, leaving the traveled road to the right for one approaching at a high speed, where statute provides that persons passing on the highway shall turn to the right. *Riepe*

v. Elting, 89 Iowa, 82, 26 L.R.A. 769, 48 Am. St. Rep. 356, 56 N. W. 285.

Whether one driving on the wrong side of the highway in violation of statute should have anticipated a collision resulting from the shying of horses traveling in opposite direction. *Neal v. Rendall*, 98 Me. 69, 63 L.R.A. 668, 56 Atl. 209.

¹³ Whether person was driving at illegal rate of speed, and, if so, whether a collision resulted therefrom. *Broschart v. Tuttle*, 59 Conn. 1, 11 L.R.A. 33, 21 Atl. 925.

¹⁴ Exercise of due care in driving on a highway, where the horse was frightened by water from an open hydrant. *Topeka Water Co. v. Whiting*, 58 Kan. 639, 39 L.R.A. 90, 50 Pac. 877.

¹⁵ Whether a team was negligently hitched up, where three tugs came loose at one time when team became frightened by blast from a whistle, where the evidence is conflicting. *Winona v. Botzet*, 23 L.R.A. (N.S.) 204, 94 C. C. A. 563, 169 Fed. 321.

Roadworthiness of a particular vehicle which was unwieldy and unmanageable. *Malloy v. Walker Twp.* 77 Mich. 448, 6 L.R.A. 695, 43 N. W. 1012.

Ordinarily whether the leaving of a horse in the street unfastened is negligence rests in circumstances that make it a question for the jury.¹ So is the likelihood that horses may be frightened at an object by the road,² and the question of whether loss of control was momentary or uncontrollable.³

¹ Liability of owner of a runaway team for injury to a bicycle, where team was left in street unattended but hitched to a ground weight and with wagon brakes set. *Caughlin v. Campbell-Sell Baking Co.* 39 Colo. 148, 8 L.R.A. (N.S.) 1001, 121 Am. St. Rep. 158, 89 Pac. 53.

See also cases cited in note to 10 L.R.A. (N.S.) 852.

² It is for the jury to decide whether an object by the roadside is of a nature that it is likely to frighten horses. *Dimock v. Suffield*, 30 Conn. 134; *Ayer v. Norwich*, 39 Conn. 376, 12 Am. Rep. 396; *Lawrence v. Mt. Vernon*, 35 Me. 100; *Chamberlain v. Enfield*, 43 N. H. 356.

³ Whether loss of control of a horse which shied, causing a collision, was momentary or uncontrollable. *Neal v. Rendall*, 98 Me. 69, 63 L.R.A. 668, 56 Atl. 209.

Whether one's negligence is imputable to another in his care or company is a fact question.¹

¹ Whether negligence of a man who was driving was imputable to his wife, who was injured in a collision, because of their relationship of husband

and wife and because she was sixty-eight and he seventy-two years old. *Neal v. Rendall*, 98 Me. 69, 63 L.R.A. 668, 56 Atl. 209.

Whether a mother contributed to injuries to her three-year old child where she left it alone to eat its lunch in an unlocked room, from which it escaped to the street where injured. *Compty v. C. H. Starke Dredge & Dock Co.* 129 Wis. 622, 9 L.R.A.(N.S.) 652, 109 N. W. 650.

Negligence in use of automobiles,¹ and contributory negligence towards them,² are fact questions.

¹ *Murphy v. Wait*, 102 App. Div. 121, 92 N. Y. Supp. 253; *Knight v. Lanier*, 69 App. Div. 454, 74 N. Y. Supp. 999; *Caesar v. Fifth Ave. Coach Co.* 45 Misc. 331, 90 N. Y. Supp. 359.

Whether a driver of an automobile approached a street intersection on which street cars run, at a negligent rate of speed. *Johnson v. Coey.* 237 Ill. 88, 21 L.R.A.(N.S.) 81, 86 N. E. 678.

Whether an automobile driver on a public highway was negligent in not stopping the engine as well as the vehicle. *Mahoney v. Maxfield*, 102 Minn. 377, 14 L.R.A.(N.S.) 251, 113 N. W. 904, 12 A. & E. Ann. Cas. 289.

² *Curley v. Electric Vehicle Co.* 68 App. Div. 18, 74 N. Y. Supp. 35; *Buscher v. New York Transp. Co.* 106 App. Div. 493, 94 N. Y. Supp. 798.

Whether pedestrian injured by automobile while crossing a street was contributorily negligent in failing to observe the amount and kind of travel on the street. *Hennessey v. Taylor*, 189 Mass. 583, 3 L.R.A.(N.S.) 345, 76 N. E. 224, 4 A. & E. Ann. Cas. 396.

Whether delivery boy attempting to cross behind his wagon was negligent in not avoiding an automobile coming from behind, which he did not see, though he looked. *Gerhard v. Ford Motor Co.* 155 Mich. 618, 20 L.R.A.(N.S.) 232, 119 N. W. 904.

The negligence of one in carrying on work in or near a street, whereby one is injured in passing, is for the jury; ¹ likewise the question who was negligently the author of a bad condition.²

¹ Liability of a blacksmith for injury to a passer-by caused by a scale from his hammer, where anvil was in open door close to sidewalk. *Parish v. Williams*, 88 Iowa, 66, 20 L.R.A. 273, 55 N. W. 74.

Duty of steam-shovel operators deepening cut across a highway to warn travelers of danger. *Heinmiller v. Winston Bros.* 131 Iowa, 32, 6 L.R.A.(N.S.) 150, 117 Am. St. Rep. 405, 107 N. W. 1102.

² Whether plumber or city was responsible for unguarded excavation left by laborers under city permit. *Wilson v. Troy*, 135 N. Y. 96, 18 L.R.A. 449, 31 Am. St. Rep. 817, 32 N. E. 44.

25. Negligence as to railroads and street railways.

As to servants of railroad, see post, § 28, Negligence as to servants.

Under the rules previously stated, negligence has been held a question for the jury where a railroad failed to give warning of the approach of a train to a crossing, or of the moving of the train¹ ran at excessive speed,² or failed to stop or signal in a situation of discovered peril,³ or blockaded the street,⁴ or by the unusual character of the noise frightened a team;⁵ likewise whether a person crossing railroad tracks exercised due care in looking and listening for approaching trains before so doing,⁶ or was negligent in not looking for train which could be seen but not heard,⁷ or was justified in depending on assurance of safety furnished by raised gates,⁸ or in using a path along a right of way subject to unknown dangers.⁹

¹ Failure of railroad to warn of the approach of a train to a crossing on a trestle over a public highway, as negligent. *Rupard & Chesapeake & O. R. Co.* 88 Ky. 280, 7 L.R.A. 316, 11 S. W. 70.

Whether a railroad was negligent in not giving warning before moving a train which had obstructed a street for longer than the statutory period. *Lake Erie & W. R. Co. v. Mackey*, 53 Ohio St. 370, 29 L.R.A. 757, 53 Am. St. Rep. 640, 41 N. E. 980.

Liability of railroad for killing a person at a street crossing, where evidence as to whether proper signals were given or not, was conflicting. *Lorenz v. Burlington, C. R. & N. R. Co.* 115 Iowa, 377, 56 L.R.A. 752, 88 N. W. 835.

Whether engincer was negligent in failing to give warning before suddenly starting an engine which was stopped at a busy street crossing, when a team was crossing. *Williams v. Chicago, B. & Q. R. Co.* 78 Neb. 695, 14 L.R.A.(N.S.) 1224, 111 N. W. 596, 113 N. W. 791.

Whether railroad's failure to signal for a street crossing contributed to teamster's death, where he was struck while attempting to stop train after his team had been caught on tracks at the crossing, and it was inferable that team had been caught a very few moments before the train approached. *Thompson v. Seaboard Air Line R. Co.* 81 S. C. 333, 20 L.R.A.(N.S.) 426, 62 S. E. 396.

Backing train over crossing without lookout or signal. *Grant v. Oregon R. & Nav. Co.* 54 Wash. 678, 25 L.R.A.(N.S.) 925, 103 Pac. 1126.

Whether railroad failed to exercise care in operating trains at a point used as a pass way by the public, where it was not shown that such use was with the knowledge or consent of the company, nor so extensive and continuous as to raise a presumption of knowledge.

- Louisville & N. R. Co. v. Daniel, 122 Ky. 256, 3 L.R.A.(N.S.) 119, 91 S. W. 691.
- ² Rate of speed of trains through a populous community, where trespassers on the tracks might be anticipated. Illinois C. R. Co. v. Murphy. 123 Ky. 787, 11 L.R.A.(N.S.) 352, 97 S. W. 729.
- ³ Negligence of railroad employees in failing to discover person driving on the track in a public street, and to stop the train, and his contributory negligence. Kellny v. Missouri P. R. Co. 101 Mo. 67, 8 L.R.A. 783, 13 S. W. 806.
- Duty of engineer, on locomotive, who discovered person going upon the track, to sound warning signal as well as to endeavor to stop the engine to avoid collision. Louisville & N. R. Co. v. Young, 153 Ala. 232, 16 L.R.A.(N.S.) 301, 45 So. 238.
- Railroad's negligence where an animal grazing along track was struck, where evidence is conflicting as to the giving of any warning signal, and it was shown that train was running at high speed through a town, and that animal was seen in time to give signals and apply brakes if necessary. Harris v. Missouri, K. & T. R. Co. 24 Okla. 341, 24 L.R.A.(N.S.) 858, 103 Pac. 758.
- ⁴ Whether a railroad rightfully obstructed a street, where the circumstances were such that different conclusions might be drawn. Chicago & N. W. R. Co. v. Prescott, 23 L.R.A. 654, 8 C. C. A. 109, 19 U. S. App. 291, 59 Fed. 237.
- ⁵ Whether a team accustomed to trains was frightened by the unusual character given to noise, smoke, and steam of a passing train by another train. Selleck v. Lake Shore & M. S. R. Co. 93 Mich. 375, 18 L.R.A. 154, 53 N. W. 556.
- ⁶ Gahagan v. Boston & M. R. Co. 70 N. H. 441, 55 L.R.A. 426, 50 Atl. 146.
- Exercise of due care by one pursuing an escaped cow, in not looking and listening before crossing railroad tracks, so as not to be chargeable with contributory negligence. Lorenz v. Burlington, C. R. & N. R. Co. 115 Iowa, 377, 56 L.R.A. 752, 88 N. W. 835.
- Failure of one approaching a railroad track to constantly look both ways for approaching trains. Gratiot v. Missouri P. R. Co. — Mo. —, 16 L.R.A. 189, 16 S. W. 384, 19 S. W. 31.
- Measure of care required to verify impression of safety in crossing railroad track, by further observation, before acting on it. Ibid.
- Whether a traveler was negligent in stopping to look and listen, at too distant a point, before crossing a railroad track. Newhard v. Pennsylvania R. Co. 153 Pa. 417, 19 L.R.A. 563, 26 Atl. 105.
- Whether person who drove across a side track before discovering an approaching engine, partly or wholly concealed, and was struck while trying to turn her horse, which was frightened by the engine. Gulf,

C. & S. F. R. Co. v. Shieder, 88 Tex. 152, 28 L.R.A. 538, 30 S. W. 902.

Whether passenger killed at railroad crossing could have seen approaching train in time to avoid injury if he had looked. *Cooper v. North Carolina R. Co.* 140 N. C. 209, 3 L.R.A.(N.S.) 391, 52 S. E. 932, 6 A. & E. Ann. Cas. 71.

Whether person crossing railroad track in a vehicle driven by another was contributorily negligent, where both looked and listened before attempting to cross, and passenger assumed no control over driver's action other than calling his attention to a distant headlight in the opposite direction from which train approached which inflicted injury. *Cotton v. Willmar & S. F. R. Co.* 99 Minn. 366, 8 L.R.A.(N.S.) 643, 116 Am. St. Rep. 422, 109 N. W. 835, 9 A. & E. Ann. Cas. 935.

⁷ Whether a man who was walking on a railroad track, and left it to allow a train to pass him, and then returned to it in front of a detached section following by the force of gravity, which he failed to discover because the noise of a waterfall under the bridge he was crossing prevented his hearing the approaching train, was so negligent as to bar recovery from the railroad for his injuries. *Patton v. East Tennessee, V. & G. R. Co.* 89 Tenn. 370, 12 L.R.A. 184, 15 S. W. 919.

⁸ Negligence of person attempting to cross railroad track without usual precautions, where gate was open and person in the gate keeper's place made a signal the meaning of which is in dispute. *Evans v. Lake Shore & M. S. R. Co.* 88 Mich. 442, 14 L.R.A. 223, 50 N. W. 386.

The extent to which a traveler on a highway may rely on the assurance of safety furnished by raised gates, or the absence of a flagman customarily present when a train is approaching, is a question for the jury, unless it conclusively appears that he relied exclusively thereon. *Woehrle v. Minnesota Transfer R. Co.* 82 Minn. 165, 52 L.R.A. 348, 83 Am. St. Rep. 417, 84 N. W. 791.

⁹ Whether one was negligent who, without acquaintance with the place, attempted to use a well-worn path along a railroad right of way and fell into an unguarded cut across the path and was injured. *Matthews v. Seaboard Air Line R. Co.* 67 S. C. 409, 65 L.R.A. 286, 46 S. E. 335.

If, in addition to the regular signals, it is urged that others should have been given, that is for the jury to decide.¹

It is a fact question whether the condition of cars causing an unforeseen accident was negligence.²

It has been held for the court to determine the negligence of one in full possession of all his senses, crossing a railroad track very close to a rapidly moving train,³ and of a railroad

in failing to avoid a collision, where evidence was conclusive that avoidance was impossible,⁴ and where the facts were undisputed.⁵

Whether it was negligent to let animals be at large near to tracks is a fact question.⁶

¹ Whether the duty of the operators of a train required the taking of other precautions than the statutory one of ringing the bell or the like is a question for the jury under the circumstances of the case. *Linfield v. Old Colony R. Corp.* 10 Cush. 562, 57 Am. Dec. 124; *Bradley v. Boston & M. R. Co.* 2 Cush. 539; *Thompson v. New York C. & H. R. R. Co.* 110 N. Y. 636, 17 N. E. 690; *Staal v. Grand Rapids & I. R. Co.* 57 Mich. 239, 23 N. W. 795. See also note in 15 L.R.A. 429.

² Negligence in leaving car doors unfastened and swinging out when passing warehouse, which they struck. *St. Louis, I. M. & S. R. Co. v. Jackson*, 96 Ark. 469, 31 L.R.A. (N.S.) 980, 132 S. W. 206.

Whether an employee of a consignee of a car of gas naphtha is guilty of negligence in trying to unload it in the ordinary way, where, upon attempting to do so, he discovers that the valve at the entrance of the discharge pipe is loose, so that the naphtha begins to flow before connection can be made, and explodes. *Standard Oil Co. v. Wakefield*, 102 Va. 824, 66 L.R.A. 792, 47 S. E. 830.

³ Exercise of due care by an adult who, in full possession of his senses, and with nothing to obstruct his vision or engross his senses, deliberately steps onto a railroad track which he knows is frequently used, in front of a moving engine, without endeavoring to ascertain whether a train is approaching. *Gahagan v. Boston & M. R. Co.* 70 N. H. 441, 55 L.R.A. 426, 50 Atl. 146.

Contributory negligence of a man in possession of all of his faculties in crossing a track within 3 to 6 feet of an engine backing towards him at from 10 to 15 miles per hour. *State use of Dyrenfurth v. Baltimore & O. R. Co.* 73 Md. 374, 11 L.R.A. 442, 21 Atl. 62.

⁴ Liability of railroad for a collision because of failure to take proper steps to avoid it after discovery of traveler's peril, where evidence is conclusive that avoidance would have been impossible. *Colorado & S. R. Co. v. Thomas*, 33 Colo. 517, 70 L.R.A. 681, 81 Pac. 801, 3 A. & E. Ann. Cas. 700.

⁵ The question of the contributory negligence of plaintiff's intestate, killed by a railroad train, where his evidence was not contradicted, and defendant, who submits no other evidence, demurs to that of plaintiff and moves for nonsuit. *Neal v. Carolina C. R. Co.* 126 N. C. 634, 49 L.R.A. 684, 36 S. E. 117.

⁶ Turning horses out to graze upon uninclosed land near a depot, as contributory negligence. *Wilmot v. Oregon R. & Nav. Co.* 48 Or. 494,

7 L.R.A.(N.S.) 202, 120 Am. St. Rep. 840, 87 Pac. 528, 11 A. & E. Ann. Cas. 18.

It is a question of fact whether a street railway was negligent in passing a street crossing,¹ or in approaching persons on or near the track,² or in insufficiently or incompetently manning its cars,³ or in operating cars with defective mechanism,⁴ or at excessive speed,⁵ or keeping tracks safe for general street travel,⁶ or in operating cars so that horses might be frightened thereby.⁷

¹ Negligence of street car company in approaching street crossing at unreasonable speed. *Marden v. Portsmouth, K. & Y. Street R. Co.* 100 Me. 41, 69 L.R.A. 300, 109 Am. St. Rep. 476, 60 Atl. 530.

The question of negligence in permitting street cars to meet and pass at a street crossing. *Roberts v. Spokane Street R. Co.* 23 Wash. 325, 54 L.R.A. 184, 63 Pac. 506.

Two and one-half miles per hour as an excessive speed at which to pass another car on a parallel track on busy street crossing, where controlling mechanism is defective. *Ibid.*

Existence of a regular recognized street crossing at point where one was injured while crossing a street car track, the evidence being in conflict. *Hayward v. North Jersey Street R. Co.* 74 N. J. L. 678, 8 L.R.A.(N.S.) 1062, 65 Atl. 737.

² Whether cable car ran too close to a buggy on the track, and was negligent in failing to stop for buggy to leave the track. *Hicks v. Citizens' R. Co.* 124 Mo. 115, 25 L.R.A. 508, 27 S. W. 542.

Negligence of motorman approaching at high speed a parading band in close proximity to the track. *Montgomery v. Lansing City Electric R. Co.* 103 Mich. 46, 29 L.R.A. 287, 61 N. W. 543.

Whether street railway was negligent in not avoiding the deflection of a car from the main track to a branch track so as to strike a person waiting for the car. *Donovan v. Hartford Street R. Co.* 65 Conn. 201, 29 L.R.A. 297, 32 Atl. 350.

Whether or not a street car could have been stopped so as to prevent a collision with an approaching fire truck, the horses of which were not fully under control, so as to make company liable to the injured truck driver. *Garrity v. Detroit Citizens' Street R. Co.* 112 Mich. 369, 37 L.R.A. 529, 70 N. W. 1018.

Motorman's negligence in discovery of a person in helpless condition on the track, where evidence shows he could have been seen and car stopped before striking him. *Goff v. St. Louis Transit Co.* 199 Mo. 694, 9 L.R.A.(N.S.) 244, 98 S. W. 49.

³ Negligence of street railway company in operating electric car with only

one employee on a line laid on a busy turnpike. *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 40 L.R.A. 518, 66 Am. St. Rep. 754, 45 S. W. 790.

Negligence of street railway in placing passenger car under charge of a conductor of bad character, who was drunk and armed with a pistol. *Savannah Electric Co. v. Wheeler*, 128 Ga. 550, 10 L.R.A.(N.S.) 1176, 58 S. E. 38.

⁴ Negligence of motorman and of eight-year-old boy struck just behind standing car on a parallel track, where testimony is conflicting, and it is shown that the car was not under control and no gong was sounded, and that the boy did not look for the car before going on the track. *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682, 33 L.R.A. 122, 55 Am. St. Rep. 620, 34 Atl. 1094.

⁵ Negligence of interurban street railway in running cars at excessive speed along public highway. *Chicago & J. Electric R. Co. v. Wanic*, 230 Ill. 530, 15 L.R.A.(N.S.) 1167, 82 N. E. 821.

Whether one struck by trolley car running at high speed and without warning signals, while she was awaiting, in the street, the passage of patrol wagon, which diverted her whole attention, was contributorily negligent. *Hayward v. North Jersey Street R. Co.* 74 N. J. L. 678, 8 L.R.A.(N.S.) 1062, 65 Atl. 737.

⁶ Sufficiency of inspection of street railway switch where wagon wheel caught in it, which ordinarily could not have happened if the switch was in good order, but where, though it was in bad order, there was evidence of frequent inspections. *Alcott v. Public Service Corp.* 78 N. J. L. 484, 32 L.R.A.(N.S.) 1084, 138 Am. St. Rep. 619, 74 Atl. 499.

⁷ Negligence in running a tank car on an electric street railway, with clothing hanging thereon in such a way as to frighten horses. *McCann v. Consolidated Traction Co.* 59 N. J. L. 481, 38 L.R.A. 236, 36 Atl. 888.

The contributory negligence of persons walking or driving on the car tracks, or trying to cross in front of an approaching car,¹ or in being in the way of the cars,² is for the jury.

¹ Contributory negligence of one injured by street car, where the company was shown to be actually negligent, and the circumstances were such that different inferences might be drawn. *Bremer v. St. Paul City R. Co.* 107 Minn. 326, 21 L.R.A.(N.S.) 887, 120 N. W. 382.

Negligence of a person in attempting to cross street car track in front of an approaching car. *Kansas City-Leavenworth R. Co. v. Gallagher*, 68 Kan. 424, 64 L.R.A. 344, 75 Pac. 469.

Whether it is negligent for one driving a team to try to cross street car tracks at public crossing after looking along track a considerable

distance without seeing a car when he is but 20 feet from tracks. *Marden v. Portsmouth, K. & Y. Street R. Co.* 100 Me. 41, 69 L.R.A. 300, 109 Am. St. Rep. 476, 60 Atl. 530.

Whether a traveler in a cutter drawn by one horse, whose progress on side of the street on which he is driving is obstructed, is negligent in trying to cross to opposite side of a street car track, which is in a depression a foot deep, where prudence is exercised in so doing. *Gerrard v. La Crosse City R. Co.* 113 Wis. 258, 57 L.R.A. 465, 89 N. W. 125.

Whether pedestrian who waited for two street cars to pass in opposite directions, and saw a third approaching at a safe distance, was negligent in failing to see a fourth car approaching at an unusual speed but concealed by one of the other cars. *Tesch v. Milwaukee Electric R. & Light Co.* 108 Wis. 593, 53 L.R.A. 618, 84 N. W. 823.

Whether participant in bicycle races which are part of holiday festivities was negligent in failing to look for street cars on track he had to cross, and in not trying to stop when he discovered one approaching. *Harrington v. Los Angeles R. Co.* 140 Cal. 514, 63 L.R.A. 238, 98 Am. St. Rep. 85, 74 Pac. 15.

Whether street car company was negligent where person was struck while attempting to cross at crossing where cars were generally run at high rate of speed. *Morris v. St. Paul City R. Co.* 105 Minn. 276, 17 L.R.A.(N.S.) 598, 117 N. W. 500.

Street railway's negligence and plaintiff's contributory negligence, where passenger alighted at a recognized place for discharging passengers and while passing behind the car from which she alighted, to cross adjoining track, was struck by a car thereon, where testimony showed that passenger who alighted ahead of her crossed in safety, and rate of speed and whether usual signals were given by car were in dispute. *Bremer v. St. Paul City R. Co.* 107 Minn. 326, 21 L.R.A.(N.S.) 887, 120 N. W. 382.

Failure to look and listen before crossing interurban street car line laid along a public highway, as negligence. *Chicago & J. Electric R. Co. v. Wanie*, 230 Ill. 530, 15 L.R.A.(N.S.) 1167, 82 N. E. 821.

Contributory negligence of one struck by car at a street car crossing while intent upon avoiding car approaching from opposite direction. *Morris v. St. Paul City R. Co.* supra.

Whether person driving on a street car track could have left it more expeditiously. *Hicks v. Citizens' R. Co.* 124 Mo. 115, 25 L.R.A. 508, 27 S. W. 542.

² Whether pedestrian injured by street car which left the track contributed to his injury by standing in the roadway waiting for the car to pass, where it was shown he was far enough away to be safe if car had remained upon the rails. *Najarian v. Jersey City, H. & P. Street R. Co.* 77 N. J. L. 704, 23 L.R.A.(N.S.) 751, 73 Atl. 527.

In respect to children injured on or about cars or tracks the question of contributory negligence is one for the jury,¹ and also the negligence of the trainmen in not discovering or preventing injury to the child,² or that of the parent or custodian of the child in not being sufficiently watchful.³

¹ It is error to instruct that a six-year-old child cannot be guilty of negligence. *Chicago City R. Co. v. Wilcox* — Ill. —, 8 L.R.A. 494, 24 N. E. 419, reversed on rehearing in 138 Ill. 370, 21 L.R.A. 76, 27 N. E. 899.

Whether twelve-year-old boy was negligent in standing so close to a passing train that he was drawn under it by air current. *Graney v. St. Louis, I. M. & S. R. Co.* 140 Mo. 89, 38 L.R.A. 633, 41 S. W. 236, affirming on rehearing 38 S. W. 969.

Sufficiency of turntable fastening as a jury question, see *Edgington v. Burlington, C. R. & N. R. Co.* 116 Iowa, 410, 57 L.R.A. 561, 90 N. W. 95.

Crossing tracks.—

Whether failure of a school child to look and listen before attempting to cross a street car track showed a want of due care. *Wallace v. City & Suburban R. Co.* 26 Or. 174, 25 L.R.A. 663, 37 Pac. 477.

Whether ten-year-old boy was negligent in attempting to ride a bicycle across street car tracks at a public crossing, and in so doing passes behind one car directly in front of one approaching from the opposite direction, which, because of defective condition, could not be stopped in time to avoid a collision. *Roberts v. Spokane Street R. Co.* 23 Wash. 325, 54 L.R.A. 184, 63 Pac. 526.

See also *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682, 33 L.R.A. 122, 55 Am. St. Rep. 620, 34 Atl. 1094.

Whether nine-year-old boy was negligent in trying to pass between cars when a train had blockaded a crossing longer than the law allowed. *Lake Erie & W. R. Co. v. Mackey*, 53 Ohio St. 370, 29 L.R.A. 757, 53 Am. St. Rep. 640, 41 N. E. 980.

So whether nine-year-old boy was a trespasser in trying to cross a railroad track by climbing a car coupling. *Ibid.*

Negligence of eight-year-old boy in attempting to cross a train which had obstructed street crossing thirty minutes, where brakeman told him he had time to do so, and he saw others doing so, although he knew the danger if train should start. *Gesas v. Oregon Short Line R. Co.* 33 Utah, 156, 13 L.R.A.(N.S.) 1074, 93 Pac. 274.

² Negligence in respect to lookout or improper speed of street cars, where children are injured on the track, is ordinarily for the jury. *Shenners v. West Side Street R. Co.* 78 Wis. 382, 47 N. W. 622; *Mallard v. Ninth Ave. R. Co.* 15 Daly, 376, 27 N. Y. S. R. 801, 7 N. Y. Supp. 666; *Huerzeler v. Central Cross Town R. Co.* 139 N. Y. 490, 34

N. E. 1101; *Dahl v. Milwaukee City R. Co.* 62 Wis. 652. See cases cited in note in 25 L.R.A. 665.

Sufficiency of motorman's watchfulness and warning when child is discovered on or approaching the track. *Chicago City R. Co. v. Tuohy*, 196 Ill. 410, 58 L.R.A. 270, 63 N. E. 997.

Whether children on a bridge were seen in time to stop train before striking them, where it was shown that engineer could have seen the whole length of the bridge for more than 1,000 feet before reaching it, and that the train was running up grade. *Becker v. Louisville & N. R. Co.* 110 Ky. 474, 53 L.R.A. 267, 96 Am. St. Rep. 459, 61 S. W. 997.

Whether prudence requires that in removing child from railroad track, where it was playing, measures should be taken to see that it did not return before engine again reached the place. *Chesapeake & O. R. Co. v. Hawkins*, 26 L.R.A.(N.S.) 309, 98 C. C. A. 443, 174 Fed. 597.

³ Negligence of parents whose son went upon railroad grounds to play after they forbade him, held for the jury. *Baker v. Flint & P. M. R. Co.* 91 Mich. 298, 16 L.R.A. 154, 30 Am. St. Rep. 471, 51 N. W. 897.

Whether mother injured in rescuing her child from street car track was negligent in creating a dangerous situation by letting go of the child's hand near a street car track. *West Chicago Street R. Co. v. Liderman*, 187 Ill. 463, 52 L.R.A. 655, 79 Am. St. Rep. 226, 58 N. E. 367.

26. Negligence as to condition of buildings or grounds.

It is for the jury to say what is negligence in inspection and care of buildings and their accessories,¹ or places for public resort,² and whether licensees were negligent contributors to their own hurt.³

The owner's liability for tenants' injuries caused by an unusual use of premises by others,⁴ and whether tenant contributed thereto,⁵ have been held fact questions.

¹ Whether reasonable inspection by the owner would have revealed and remedied a defect in the fastenings of a fire escape erected by an independent contractor, before servant was injured in the attempted use of the appliance. *Winslow v. Commercial Bldg. Co.* 147 Iowa, 238, 28 L.R.A.(N.S.) 563, 124 N. W. 320.

² Duty to keep the platform of a band stand erected above seats provided for patrons in an amusement place, clear of articles which might fall therefrom. *Williams v. Mineral City Park Asso.* 128 Iowa, 32, 1 L.R.A.(N.S.) 427, 111 Am. St. Rep. 184, 102 N. W. 783, 5 A. & E. Ann. Cas. 924.

³ Whether one who went into a dimly lighted passageway in a warehouse with which he was unfamiliar, and fell into an unprotected elevator shaft, contributed to his injury. *Pauckner v. Wakem*, 231 Ill. 276, 14 L.R.A.(N.S.) 1118, 83 N. E. 202.

Exercise of due care by a customer passing along an aisle in a department store, in looking at goods displayed, rather than at floor in search of obstacles. *Bloomer v. Snellenburg*, 221 Pa. 25, 21 L.R.A.(N.S.) 464, 69 Atl. 1124.

Negligence of an inspector entering strange building under guidance of owner's servant and falling into pit in dark room. *Dashields v. W. B. Moses & Sons*, 35 App. D. C. 583, 31 L.R.A.(N.S.) 380.

⁴ Whether owner would naturally anticipate that tenants in an apartment house would use the common stairways as seats, so as to charge him with duty to make them safe for that purpose. *McGinley v. Alliance Trust Co.* 168 Mo. 257, 56 L.R.A. 334, 66 S. W. 153.

⁵ Whether tenant in a tenement house who fell because of a hole in the stair carpet was contributorily negligent, where she knew of the holes in the carpet, and the stairway was well lighted. *Peil v. Reinhart*, 127 N. Y. 381, 12 L.R.A. 843, 27 N. E. 1077.

Contributory negligence of party who took house and was infected with disease of which he did not know. *Cutter v. Hamlen*, 147 Mass. 471, 1 L.R.A. 429, 18 N. E. 397.

The attractiveness of dangerous premises for children so as to render owner liable for accidents to them,¹ and the questions of contributory negligence arising therefrom,² are also fact questions.

¹ *Pekin v. McMahon*, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114. 39 N. E. 484.

Whether there was an implied invitation from the owner for children to play upon lots upon which there was an uncovered well, where there was evidence that children customarily played there, entertainments for the public were sometimes given on the premises, and people invited to hitch their teams there, and that there was a saloon on one corner of the tract. *Tucker v. Draper*, 62 Neb. 66, 54 L.R.A. 321, 86 N. W. 917.

Sufficiency of turntable fastening, to prevent injury to children playing on it, where it was unfastened by one of them. *Edginton v. Burlington*, C. R. & N. R. Co. 116 Iowa, 410, 57 L.R.A. 561, 90 N. W. 95.

² Whether parents allowed their son to play about a railroad track and depot grounds so as to contribute to his injuries received there, where they testify that they forbade him to do so after receiving notice that he did, and were ignorant of his whereabouts at the time of

his injury. *Baker v. Flint & P. M. R. Co.* 91 Mich. 298, 16 L.R.A. 154, 30 Am. St. Rep. 471, 51 N. W. 897.

Whether five-year-old child was a trespasser in playing near an elevator in a store where its father worked, it being there by the father's invitation. *Siddall v. Jansen*, 168 Ill. 43, 39 L.R.A. 112, 48 N. E. 191.

27. Negligence as to fire, water, electricity or other dangerous thing.

As to children, see ante, § 22, Negligence generally.

Whether due care and precaution were exercised to protect persons and property from injury from charged electric wires,¹ gases,² combustibles,³ or other like dangerous agencies,⁴ is for the jury. And the questions of contributory negligence toward electric currents,⁵ escaping gas,⁶ or explosives⁷ are also jury questions. The same is true where the negligence inheres in the character of the act done, in respect to its situation,⁸ as in construction work or excavations.⁹

¹Omission to place guard wires between trolley wires and telephone wires. *Black v. Milwaukee Street R. Co.* 89 Wis. 371, 27 L.R.A. 365, 46 Am. St. Rep. 849, 61 N. W. 1101.

Negligence in leaving uninsulated electric light wires within close reach of a frame upon which persons had to go to perform duties with respect to other electric wires. *Illingsworth v. Boston Electric Light Co.* 161 Mass. 583, 25 L.R.A. 552, 37 N. E. 778.

Negligence in not cutting uninsulated wires, and in leaving them so that night patrolman, ignorant of their condition, might be injured by turning on the electricity, in performance of his duty. *Willey v. Boston Electric Light Co.* 168 Mass. 40, 37 L.R.A. 723, 46 N. E. 395.

Insufficient assistance to promptly replace electric wires broken simultaneously in many places by an unusual and unexpected storm, as an excuse for delay. *Boyd v. Portland General Electric Co.* 37 Or. 567, 52 L.R.A. 509, 62 Pac. 378.

Exercise of due care to prevent injury by dangerous electric wires. *Perham v. Portland General Electric Co.* 33 Or. 451, 40 L.R.A. 799, 72 Am. St. Rep. 730, 53 Pac. 14.

Liability of city for death caused by contact with unused telephone wire which crossed close to a charged electric light wire, and, sagging so as to interfere with public travel, was cut by a councilman and wrapped around a post within reach of pedestrians and with one

end resting on the ground or in the water. *Mooney v. Luzerne*, 186 Pa. 161, 40 L.R.A. 811, 40 Atl. 311.

Where the evidence tended to show that a person's death resulted from lightning striking telephone pole and being communicated from thence to a telephone instrument near where person was seated, whence it jumped to his body, it was for the jury to determine what force passed over the wire, whether there were suitable appliances known which would have prevented such injury, whether the company was negligent in not providing such appliances, and if death resulted from such negligence. *Griffith v. New England Teleph. & Teleg. Co.* 72 Vt. 441, 52 L.R.A. 919, 48 Atl. 643.

Whether a bolt of lightning striking a flagstaff might be conducted by wire to a building 300 feet distant and burn it, where the evidence of experts was conflicting. *Jackson v. Wisconsin Teleph. Co.* 88 Wis. 243, 26 L.R.A. 101, 60 N. W. 430.

The rule *res ipsa loquitur* is not overcome by mere evidence that one supplying electricity used due care, the accident occurring by merely attempting to turn on a light; but the case ought to go to the jury. *Turner v. Southern Power Co.* 154 N. C. 131, 32 L.R.A. (N.S.) 848, 69 S. E. 767.

Negligence of a village in permitting a live electric wire to hang in street is for the jury, to be determined from length of time it had been hanging, whether the authorities knew or ought to have known of its condition, and whether from its location it was dangerous to travelers. *Fox v. Manchester*, 183 N. Y. 141, 2 L.R.A. (N.S.) 474, 75 N. E. 1116.

Negligence of vendor of electricity in failing to inspect wires carrying a powerful current for two years, where wires were strung along highway, so near together as to touch in swinging, and so that a break in insulation might cause them to melt in two. *Lewis v. Bowling Green Gaslight Co.* 135 Ky. 611, 22 L.R.A. (N.S.) 1169, 117 S. W. 278.

Failure to discover a break in a wire strung along a highway, so close to another wire that, insulation being worn off both of them, they were likely to swing together and burn in two. *Ibid.*

Question of improper insulation and climatic conditions immediately preceding an accident, where it was shown that if the insulation, which was worn and frayed, had been good, current would not have "leaked," except "in quite a spell of bad weather," and that the wire had never been inspected since strung six years before. *Musolf v. Duluth Edison Electric Co.* 108 Minn. 369, 24 L.R.A. (N.S.) 451, 122 N. W. 499.

² Whether company used reasonable precaution before supplying gas to tenants of an apartment house, to ascertain that other tenants would suffer no harm from gas escaping into their rooms. *Schmeer v. Gaslight Co.* 147 N. Y. 529, 30 L.R.A. 653, 42 N. E. 202.

Whether, from the notoriety attending the construction of a sewer, a gas company with a proper system of inspection would or ought to have had knowledge of a leak in its pipe caused by the construction of the sewer, sooner than the leak was discovered. *Koelsch v. Philadelphia Co.* 152 Pa. 355, 18 L.R.A. 759, 34 Am. St. Rep. 653, 25 Atl. 522.

Failure of inspectors to find gas leak, where they merely visited the place and found no odor of gas, the leak being under ground. *Consolidated Gas Co. v. Connor*, 114 Md. 140, 32 L.R.A.(N.S.) 809, 78 Atl. 725.

Negligence in permitting the escape of gas and in the explosion of escaped gas, and negligence of plaintiff contributing thereto, should go to the jury if there is any foundation in the evidence for such questions.

See note in 29 L.R.A. 354.

³ Whether a municipal corporation exercised due care in turning a large quantity of crude petroleum, in midsummer, into a public sewer with an obstructed outlet, and leaving it four days without taking precautions to prevent an explosion. *Fuchs v. St. Louis*, 133 Mo. 168, 34 L.R.A. 118, 31 S. W. 115, 34 S. W. 508.

⁴ Whether compressed air is such a dangerous agency as to demand the adoption of safe precaution to prevent injury to others in its use, and whether or not adequate measures were employed, is a court question only when the facts are undisputed and but one inference can be drawn. *Galveston, H. & S. A. R. Co. v. Currie*, 100 Tex. 136, 10 L.R.A.(N.S.) 367, 96 S. W. 1073.

Whether the owner of a pond violated his duty to his neighbor in suffering water to reach latter's land by percolation, or in failing to prevent such percolation after notice. *Moore v. Berlin Mills Co.* 74 N. H. 305, 11 L.R.A.(N.S.) 284, 124 Am. St. Rep. 968, 67 Atl. 578, 13 A. & E. Ann. Cas. 217.

Negligence in sending up a skyrocket to such a height and with a case of such weight that, in falling, it fells a spectator to the ground. *Crowley v. Rochester Fireworks Co.* 183 N. Y. 353, 3 L.R.A.(N.S.) 330, 76 N. E. 470, 5 A. & E. Ann. Cas. 538.

Negligence of a bottler of aerated water, where it was shown that he knew of the liability of bottles to explode, and that his tests were inadequate to justify the conclusion that they would not explode under customary usage, and that he was reasonably chargeable with such knowledge. *Torgesen v. Schultz*, 192 N. Y. 156, 18 L.R.A.(N.S.) 726, 127 Am. St. Rep. 894, 84 N. E. 956.

Whether an appliance in its ordinary use, in the hands of a servant, is liable to endanger strangers. *Barmore v. Vicksburg, S. & P. R. Co.* 85 Miss. 426, 70 L.R.A. 627, 38 So. 210, 3 A. & E. Ann. Cas. 594.

⁵ Whether one about to go near defectively insulated electric light wires, in the daytime, is chargeable with knowledge that they may be

charged and dangerous, so as to assume the risk of injury therefrom. *Stevens v. United Gas & Electric Co.* 73 N. H. 59, 70 L.R.A. 119, 60 Atl. 848.

Whether night patrolman exercised due care in turning electricity on to light wires, as was his duty, when he did not know it had been turned off because lightning had burned off the insulation. *Wiley v. Boston Electric Light Co.* 168 Mass. 40, 37 L.R.A. 723, 46 N. E. 395.

Exercise of due care in touching an electric light wire on outside of a building by one not an expert. *Griffin v. United Electric Light Co.* 164 Mass. 492, 32 L.R.A. 400, 49 Am. St. Rep. 477, 41 N. E. 675.

Want of ordinary care of an employee in going out at night on a metallic roof, with his employer, to secure signs endangered during a heavy rain, and coming in contact with electric wires he knew were there, but which it was not shown that he knew to be dangerous. *Giraudi v. Electric Improv. Co.* 107 Cal. 120, 28 L.R.A. 596, 48 Am. St. Rep. 114, 40 Pac. 108.

Lineman's negligence in going up a frame which carried electric light wires as well as those which he was working on, where he was injured by coming in contact with uninsulated light wires within a few inches of the frame, while freeing his pliers from another wire. *Illingsworth v. Boston Electric Light Co.* 161 Mass. 583, 25 L.R.A. 552, 37 N. E. 778.

Whether a person knew or ought to have known of the absence of appliance ordinarily used to ground telephone wires, and whether he was negligent in sitting near a telephone lacking such appliance. *Griffith v. New England Teleph. & Teleg. Co.* 72 Vt. 441, 52 L.R.A. 919, 48 Atl. 643.

Whether lineman was negligent in attempting to ascend pole between wires carrying heavy currents, rather than go outside the wires over the ends of the cross-arms, where he had no knowledge of the defective insulation on the wires. *Miner v. Franklin County Teleph. Co.* 83 Vt. 311, 26 L.R.A.(N.S.) 1195, 75 Atl. 653.

Whether pedestrian was negligent in seizing a wire hanging in the highway. *Fox v. Manchester*, 183 N. Y. 141, 2 L.R.A.(N.S.) 474, 75 N. E. 1116; *Lewis v. Bowling Green Gaslight Co.* 135 Ky. 611, 22 L.R.A.(N.S.) 1169, 117 S. W. 278.

⁶ Making lights in cellar where gas had escaped, after time had elapsed, making uncertain causes of resultant explosion. *Consolidated Gas Co. v. Crocker*, 82 Md. 113, 31 L.R.A. 785, 33 Atl. 423.

Negligence of an eighteen-year-old boy in searching for leak in gas pipes with a lighted candle. *Schmeer v. Gaslight Co.* 147 N. Y. 529, 30 L.R.A. 653, 42 N. E. 202.

Whether looking for a gas leak with a lighted match was negligent. *Pine Bluff Water & Light Co. v. Schneider*, 62 Ark. 109, 33 L.R.A. 366, 34 S. W. 547.

Negligence in disconnecting gas pipe in disused house line, where, unknown to person, the pipe had been connected to a new main, and he was asphyxiated. *Pulaski Gaslight Co. v. McClintock*, 97 Ark. 576, 32 L.R.A. (N.S.) 825, 134 S. W. 1189, 1199.

⁷ Whether one was negligent in going upon a boat at a wharf, and going to sleep in the cabin, knowing that contractors were blasting near by. *Smith v. Day*, 49 L.R.A. 108, 40 C. C. A. 366, 100 Fed. 244.

Whether ferryman was contributorily negligent in approaching blasting operations, where blasters gave warning but were unaware of his presence, though he was aware of theirs and called to desist. *Cary Bros. v. Morrison*, 65 L.R.A. 659, 63 C. C. A. 267, 129 Fed. 177.

Whether a purchaser of cartridges could, by the exercise of reasonable care, have detected that they were not the kind for which he asked. *Smith v. Clarke Hardware Co.* 100 Ga. 163, 39 L.R.A. 607, 28 S. E. 73.

⁸ Negligence of the owner of a horse in hitching it within a few feet of a hive of bees, which he could have seen had he looked. *Parsons v. Manser*, 119 Iowa, 88, 62 L.R.A. 132, 97 Am. St. Rep. 283, 93 N. W. 86.

Negligence in allowing machinery from which a set-screw projected 4 or 5 inches on a beam revolving so fast screw could not be seen, to remain unprotected, with notice that the structure was used by men and boys as a fishing platform. *Biggs v. Consolidated Barb-Wire Co.* 60 Kan. 217, 44 L.R.A. 655, 56 Pac. 4.

Whether fourteen-year-old boy had sufficient intelligence to be capable of contributory negligence, where he was injured by a set screw projecting 5 or 6 inches from beam revolving so fast the screw could not be seen. *Ibid.*

⁹ Necessity for bracing a wall in course of construction, where plans provide for such bracing. *Dettmering v. English*, 64 N. J. L. 16, 48 L.R.A. 106, 44 Atl. 855.

Whether due care was exercised in the construction of structure to be used by the public for a consideration in view of its purpose. *Barrett v. Lake Ontario Beach Improv. Co.* 174 N. Y. 310, 61 L.R.A. 829, 66 N. E. 968.

Where there is no dispute as to the facts, or but one inference can be drawn, it is for the court to say whether there was negligence in guarding against fire¹ or explosion,² but otherwise it must go to the jury.³

¹ Whether starting back fire to protect property was negligent, when negligence was not inferable from the undisputed facts. *Owen v. Cook*, 9 N. D. 134, 47 L.R.A. 646, 81 N. W. 285.

Executor's negligence in failing to apply for vacancy permit for insured premises which continue vacant, which had been granted with an agree-

ment to extend it. *Henderson Trust Co. v. Stuart*, 108 Ky. 167, 48 L.R.A. 49, 55 S. W. 1082.

² Duty to repair weak boiler, where adequate time elapsed before explosion. *Louisville, N. A. & C. R. Co. v. Lynch*, 147 Ind. 165, 34 L.R.A. 293, 44 N. E. 997, 46 N. E. 471.

³ Unless evidence given to rebut the presumption of actionable negligence arising from the kindling of fire by sparks from a locomotive is conclusive both as to facts and inferences to be drawn therefrom, the question of negligence is for the jury. *Continental Ins. Co. v. Chicago & N. W. R. Co.* 97 Minn. 467, 5 L.R.A.(N.S.) 99, 107 N. W. 548.

Whether railroad employees exercised due diligence in extinguishing a fire. *Missouri P. R. Co. v. Platzer*, 73 Tex. 117, 3 L.R.A. 639, 15 Am St. Rep. 771, 11 S. W. 160.

Failure to exercise reasonable prudence by neglecting to burn grass around a haystack as a protection from an approaching prairie fire seen twenty-four hours before it reached the stack. *Brown v. Brooks*, 85 Wis. 290, 21 L.R.A. 255, 55 N. W. 395.

Preventive care of a man setting a fire on his own premises. *Mahaffey v. J. L. Rumbarger Lumber Co.* 61 W. Va. 571, 8 L.R.A.(N.S.) 1263, 56 S. E. 893.

What is ordinary care to avoid setting fire from a threshing-machine engine. *Martin v. McCrary*, 115 Tenn. 316, 1 L.R.A.(N.S.) 530, 89 S. W. 324.

It has been held a jury question whether there was negligence in selling for food that which was unfit and dangerous.¹

¹ Negligence in selling bad meat. *Craft v. Parker, W. & Co.* 96 Mich. 245, 21 L.R.A. 139, 55 N. W. 812.

28. Negligence as to servants.

It is for the jury to determine whether, in a given situation, the danger was one the master should have known and guarded against, or which the servant assumed,¹ or of which warning should have been given,² or whether warning was sufficient;³ and whether place of work or appliance furnished was a safe one or might have been made safe,⁴ and whether rules were needful or those given suitable for the government of employees.⁵ Whether a risk was such that a servant appreciated and assumed it,⁶ or whether he was contributing to the master's negligence,⁷ is generally for the jury, but may be of law for the court.⁸

¹ Whether a machine had acted abnormally so as to be dangerous to operatives, for a sufficient period of time to charge master with

knowledge of its abnormality, is for the jury when the time had neither been long enough nor short enough for the court to say as a matter of law. *Fleming v. Northern Tissue Paper Mill*, 135 Wis. 171, 15 L.R.A.(N.S.) 701, 114 N. W. 841.

Whether a contractor who was engaged in cutting a trench along the foundation of a chimney under which he had run tunnels to be filled with masonry to support the chimney, leaving a support of earth between the tunnel roof and the chimney, was liable to servants required to work in the tunnel after he knew that the supporting earth was saturated with water. *Finn v. Cassidy*, 165 N. Y. 584, 53 L.R.A. 877, 59 N. E. 311.

Whether an engineer leaving an engine under steam holding a train on a heavy grade ought to have foreseen that an ignorant fireman left in charge might unintentionally put it in motion. *Mexican Nat. R. Co. v. Mussette*, 86 Tex. 708, 24 L.R.A. 642, 26 S. W. 1075.

Leaving dangerous machinery unguarded for nine days while men were working about it, where it was also desirable to keep it uncovered to observe the working of the defect. *Peterson v. Merchants' Elevator Co.* 111 Minn. 105, 27 L.R.A.(N.S.) 816, 137 Am. St. Rep. 537, 126 N. W. 534.

² Whether a householder was negligent in failing to notify servant, who was hired to cut wood and pile it in a cellar, of the existence of an uncovered hole in cellar bottom, where the evidence as to the darkness of the cellar is conflicting. *Eastland v. Clarke*, 165 N. Y. 420, 70 L.R.A. 751, 59 N. E. 202.

Railroad's duty to warn employees, and to instruct guards placed in a station, to guard against burglars. *Lipscomb v. Houston & T. C. R. Co.* 95 Tex. 5, 55 L.R.A. 869, 93 Am. St. Rep. 804, 64 S. W. 923.

The exercise of ordinary prudence of hospital managers in assigning a nurse to attend a patient whom they knew to be suffering from a contagious disease, but of which fact the nurse was ignorant, where their conduct was explainable upon divergent theories. *Hewett v. Woman's Hospital Aid Asso.* 73 N. H. 556, 7 L.R.A.(N.S.) 496, 64 Atl. 190.

So, whether a reasonable doubt in the mind of attending physician would justify omission to notify the nurse assigned to the case, that the disease might be of a contagious character. *Ibid.*

³ Whether telephone company sending lineman out to straighten a pole used sufficient precautions in telling him only that he should use a guy wire if it leaned badly, where it knew that the pole had pulled out of the ground, and he might have well believed otherwise. *Willis v. Plymouth & C. Teleph. Exch. Co.* 75 N. H. 453, 30 L.R.A.(N.S.) 477, 75 Atl. 877.

Infant servants.—Whether a master has performed his duty in warning a child of the danger of a platform to which he is sent is for the jury under proper instructions, unless the want of evidence of negligence is

so clear and obvious that, assuming all offered to be true, and adding to it every fair and legitimate inference deducible therefrom, it is insufficient to warrant a finding of negligence. *Chambers v. Woodbury Mfg. Co.* 106 Md. 496, 14 L.R.A.(N.S.) 383, 68 Atl. 290.

- 4 Whether mill owners have failed to exercise due care to fulfil statutory duty to safeguard their machinery by not adopting a particular device is a jury question, unless such device is so far out of the ordinary that the court can say as a matter of law that its adaptability could not, by the use of due care, be foreseen. *Barclay v. Puget Sound Lumber Co.* 48 Wash. 241, 16 L.R.A.(N.S.) 140, 93 Pac. 430.

Whether a particular machine was, or could have been, properly or advantageously guarded as required by statute, where evidence is conflicting. *Ibid.*

Whether the fact that a metal lug fastening grooved wheels on a ladder to a pipe on which they ran afforded reasonable ground for anticipating injury to employee from using the ladder, and was sufficient to charge the master with knowledge of the fact. *Rogers v. Roe*, 74 N. J. L. 615, 13 L.R.A.(N.S.) 691, 66 Atl. 408.

Whether a master was negligent in failing to provide some appliance for thawing giant powder, which was necessary to the work and frequently froze, where the testimony was conflicting as to the hazards of thawing it at an open fire, and the existence and safety of another appliance. *Orman v. Mannix*, 17 Colo. 564, 17 L.R.A. 602, 31 Am. St. Rep. 340, 30 Pac. 1037.

It should be left to the jury to infer whether there was negligence on master's part, where machine started from unknown cause while operator was cleaning it after having shifted off the belt, the belt shifter being imperfect. *Ross v. Double Shoals Cotton Mills*, 140 N. C. 115, 1 L.R.A.(N.S.) 298, 52 S. E. 121.

Whether pile of slippery lumber without crosspieces was so defective as to render working place unsafe. *McCormick Harvesting Mach. Co. v. Zakzewski*, 220 Ill. 522, 4 L.R.A.(N.S.) 848, 77 N. E. 147.

Whether a machine with an uncovered cogwheel at a point where servant may be called by his duties was a reasonably safe one. *Strickland v. Capital City Mills*, 74 S. C. 16, 7 L.R.A.(N.S.) 426, 54 S. E. 220.

Whether master rendered place where servant was to work unsafe, in removing a tongue of earth from between two ditches, by attempting to throw down too long a section at one time without precaution to prevent accidents, where there is a fair inference that such is the case. *Hilgar v. Walla Walla*, 50 Wash. 470, 19 L.R.A.(N.S.) 367, 97 Pac. 498.

Negligence of master in using old, spliced harness the leather in which was dead, where harness broke and servant was injured thereby. *Murphy v. O'Neil*, 204 Mass. 42, 26 L.R.A.(N.S.) 146, 90 N. E. 406.

Whether company was negligent in furnishing a certain kind of fuse to its miners, when a better and safer kind had been introduced within recent years and was in common use. *Wiita v. Interstate Iron Co.* 103 Minn. 303, 16 L.R.A.(N.S.) 128, 115 N. W. 169.

Master's negligence in storing dangerous quantities of powder, dynamite, and dynamite caps in room provided for workmen during time of storm, and for their clothing, tools, and lunches at all times. *Brown v. West Riverside Coal Co.* 143 Iowa, 662, 28 L.R.A.(N.S.) 1260, 120 N. W. 732.

Permitting miners to use shaft known to be dangerous. *Hagerty v. Montana Ore Purchasing Co.* (*Hagerty v. Wilson*) 38 Mont. 69, 25 L.R.A.(N.S.) 356, 98 Pac. 643.

Infant servants.—Negligence of employer of boys in permitting floors close to exposed gears to become so slippery as to afford insecure footing. *Mundhenke v. Oregon City Mfg. Co.* 47 Or. 127, 1 L.R.A.(N.S.) 278, 81 Pac. 977.

⁵ Whether a master has promulgated suitable rules for the government of his employees, when the evidence is such that different inferences might fairly be drawn. *Johnson v. Union Pacific Coal Co.* 28 Utah, 46, 67 L.R.A. 506, 76 Pac. 1089.

Whether railroad's rules for the running of trains were adequate to avoid a collision between two trains running off time. *Sprague v. New York & N. E. R. Co.* 68 Conn. 345, 37 L.R.A. 638, 36 Atl. 791.

Commonly the question whether rules for the government of servants in their labor are needful for their safety rests in the facts and circumstances, and therefore ought to go to the jury. See note in 43 L.R.A. 314, and cases there cited.

Disobedience of rule by servant is such strong evidence of negligence as to take the case from the jury in many instances, but it may be a question for the jury if there is a conflict as to whether the rules were knowingly violated. See note in 24 L.R.A. 662.

⁶ The question of contributory negligence and assumption of risk is for the jury, under proper instructions from the court. *LaFollette Coal Iron & R. Co. v. Minton*, 117 Tenn. 415, 11 L.R.A.(N.S.) 478, 101 S. W. 178.

Where the evidence is conflicting, the questions of contributory negligence and the assumption of risk are for the jury. *Johnson v. Griffiths-Sprague Stevedoring Co.* 45 Wash. 278, 8 L.R.A.(N.S.) 432, 88 Pac. 193.

Obviousness of danger of cleaning a machine in motion. *Moore v. Dublin Cotton Mills*, 127 Ga. 609, 10 L.R.A.(N.S.) 772, 56 S. E. 839.

Whether a reasonably prudent man would have assumed the risk of defective appliance which master had promised to repair. *Comer v. Meyer*, 78 N. J. L. 464, 29 L.R.A.(N.S.) 597, 74 Atl. 497.

Assumption of risk by employee stationed near stored dynamite, where

he was shown to be inexperienced, and did not appreciate perils of his position. *Brown v. West Riverside Coal Co.* 143 Iowa, 662. 28 L.R.A.(N.S.) 1260, 120 N. W. 732.

Whether locomotive engineer assumed risk where he repaired eccentric strap imperfectly, and thereafter was able to run 18½ out of 19 miles necessary to go. *Koreis v. Minneapolis & St. L. R. Co.* 108 Minn. 449, 25 L.R.A.(N.S.) 339, 133 Am. St. Rep. 462, 122 N. W. 668.

Under orders of master.—Whether the hazard of a required service was so great that a reasonably prudent employee would not have undertaken it when ordered into a place of danger, and whether, when undertaken, reasonable care was exercised, where the evidence is conflicting. *St. Louis & S. F. R. Co. v. Morris*, 76 Kan. 836, 13 L.R.A.(N.S.) 1100, 93 Pac. 153.

By infant servants.—Whether a youth employed in coupling cars had, or ought to have had, knowledge or appreciation of the danger incident to the use of guard rails with no blocking between them and the main rails. *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L.R.A. 283, 13 S. W. 801.

Contributory negligence of a servant who comes in contact with exposed machinery the danger of which is known to him, but the risk from which he has not assumed, where his work was in its immediate vicinity, and required close attention, rapidity of action, and considerable moving about. *Roux v. Blodgett & D. Lumber Co.* 85 Mich. 519, 13 L.R.A. 728, 24 Am. St. Rep. 102, 48 N. W. 1092.

The question of an employee's care in view of his knowledge, actual and constructive, in choosing a dangerous situation for doing work that might have been safely done at other points. *Stevens v. United Gas & Electric Co.* 73 N. H. 159, 70 L.R.A. 119, 60 Atl. 848.

Whether a miner was negligent who, while lighting a fuse, stood in front, instead of to either side, of the opening in which dynamite was placed, where it was customary to stand in front, and no injury would have resulted if fuse had not been defective. *Wiita v. Interstate Iron Co.* 103 Minn. 303, 16 L.R.A.(N.S.) 128, 115 N. W. 169.

Whether miner knew or ought to have known of danger to himself from water in a neighboring mine. *Williams v. Sleepy Hollow Min. Co.* 37 Colo. 62, 7 L.R.A.(N.S.) 1170, 86 Pac. 337, 11 A. & E. Ann. Cas. 111.

Whether an employee who was injured by a cylinder head blowing out was, at the time of the accident, where he should not have been. *Comer v. W. M. Ritter Lumber Co.* 59 W. Va. 688, 6 L.R.A.(N.S.) 552, 53 S. E. 906, 8 A. & E. Ann. Cas. 1105.

Assumption of risk and contributory negligence of one who had had some opportunity to observe unguarded condition of machine, where he worked at night, and it was not shown how bright the light was, or whether he appreciated the risk of falling toward moving shaft

and being injured. *Hilgar v. Walla Walla*, 50 Wash. 470, 19 L.R.A. (N.S.) 367, 97 Pac. 498.

Obviousness, as a defect, of broken lug which kept grooved wheels of a movable ladder from leaving the track on which they ran, so as to charge employee with assuming the risk of injury. *Rogers v. Roe*, 74 N. J. L. 615, 13 L.R.A.(N.S.) 691, 66 Atl. 408.

Obviousness of dangers incident to placing belt upon pulleys of a threshing machine while in motion. *Maxson v. J. I. Case Threshing Mach. Co.* 81 Neb. 546, 16 L.R.A.(N.S.) 963, 116 N. W. 281.

Negligence of lineman in going between wires heavily charged, rather than going over the ends of cross-arms outside of the wires. *Miner v. Franklin County Teleph. Co.* 83 Vt. 311, 26 L.R.A.(N.S.) 1195, 75 Atl. 653.

Servant's negligence or assumption of risk in using old harness in which leather was dead, but which looked good on the surface. *Murphy v. O'Neil*, 204 Mass. 42, 26 L.R.A.(N.S.) 146, 90 N. E. 406.

Whether common laborer attempting to oil unguarded cogwheels was negligent, it being uncertain whether he knew they were uncovered, or knew the danger, or had ever done the work before. *Peterson v. Merchants' Elevator Co.* 111 Minn. 105, 27 L.R.A.(N.S.) 816, 137 Am. St. Rep. 537, 126 N. W. 534.

Orders of master.—

It has been held in numerous cases that the negligence of an employee who does a dangerous act in obedience to orders of the master is a question of fact. See note in 17 L.R.A. 604.

Whether an employee acted properly in obeying a foreman's order to take bottles to an upper floor by the use of an elevator. *Dallemund v. Saalfeldt*, 175 Ill. 310, 48 L.R.A. 753, 67 Am. St. Rep. 214, 51 N. E. 645.

Whether an employee was negligent in using a defective ladder to adjust a belt upon moving machinery, after he had complained of the ladder, and been assured by the manager that it was all right; that if it did not suit him the manager would get someone who would use it. *Neeley v. Southwestern Cotton Seed Oil Co.* 13 Okla. 356, 64 L.R.A. 145, 75 Pac. 537.

Infant servants.—

Mental capacity of infant to comprehend and avoid dangers incidental to his employment,—whether he was aware of his danger, and could have avoided it by the use of reasonable care. *Ewing v. Lanark Fuel Co.* 65 W. Va. 726, 29 L.R.A.(N.S.) 487, 65 S. E. 200.

Negligence of thirteen-year-old boy in endeavoring, in obedience to foreman's command, to remove threads from moving cogwheel, where he did not put his hand on cogs, but grasped the threads, which were too strong to break, and drew his hand into cogs. *Dougherty v. Dobson*, 214 Pa. 252, 8 L.R.A.(N.S.) 90, 63 Atl. 748.

Whether twelve-year-old boy employed as door tender at mine entry, who was killed by mine cars, was of sufficient capacity to be chargeable with contributory negligence. *Bare v. Crane Creek Coal & Coke Co.* 61 W. Va. 28, 8 L.R.A.(N.S.) 284, 123 Am. St. Rep. 966, 55 S. E. 907.

Contributory negligence and assumption of risk of fifteen-year-old boy who had never been warned of the dangers of a machine, and had inadequate knowledge thereof. *Jacobson v. Merrill & Ring Mill Co.* 107 Minn. 74, 22 L.R.A.(N.S.) 309, 119 N. W. 510.

⁸ Questions of assumed risk and contributory negligence may become questions of law where the facts and inferences to be drawn from them are admitted. *Kath v. East St. Louis & Suburban R. Co.* 232 Ill. 126, 15 L.R.A.(N.S.) 1109, 83 N. E. 533.

The question of an employee's negligence in coming in contact with an unguarded machine is for the jury, unless the danger is such as no prudent man would incur under the circumstances, when it becomes a question of law. *Hill v. Saugested*, 53 Or. 178, 22 L.R.A.(N.S.) 634, 98 Pac. 524.

Assumption of risk from following master's direction, where the facts were admitted, and the dangers so obvious that no prudent man would have so acted. *Lindsay v. Hollerbach & M. Contract Co.* 29 Ky. L. Rep. 68, 4 L.R.A.(N.S.) 830, 92 S. W. 294.

Reasonable time for repair of defective machine, where master promised to do so within a specified time. *Andrecsik v. New Jersey Tube Co.* 73 N. J. L. 664, 4 L.R.A.(N.S.) 913, 63 Atl. 719, 9 A. & E. Ann. Cas. 1006.

It cannot be said as a matter of law that an experienced miner assumed the risks due to his employer furnishing defective fuse, unless he knew and appreciated the danger. *Wiita v. Interstate Iron Co.* 103 Minn. 303, 16 L.R.A.(N.S.) 128, 115 N. W. 169.

Under like rules it is a fact question whether a railroad was negligent as to its tracks,¹ cars, and equipment,² the moving of cars or trains,³ the competency and sufficiency of its crews,⁴ and whether there was contributory negligence or assumption of risk by its servants.⁵

It is a fact question whether there was negligence in the manner of relieving an injured servant.⁶

¹ Whether the safest route for the erection of a railroad was selected, in action to hold the company for the death of an employee. *Scott v. Astoria & C. River R. Co.* 43 Or. 26, 62 L.R.A. 543, 99 Am. St. Rep. 710, 72 Pac. 594.

Railroad's due care in protecting its switches from interference by ma-

- licious acts of third persons. *East Tennessee, V. & G. R. Co. v. Kane*, 92 Ga. 187, 22 L.R.A. 315, 18 S. E. 18.
- ² Negligence in using a locomotive with a badly worn eccentric strap which had been reported to the master. *Koreis v. Minneapolis & St. L. R. Co.* 108 Minn. 449, 25 L.R.A.(N.S.) 339, 133 Am. St. Rep. 462, 122 N. W. 668.
- Whether a railroad was negligent in loading a tender with coal so that large piece fell off and injured a section man. *Union P. R. Co. v. Erickson*, 41 Neb. 1, 29 L.R.A. 137, 59 N. W. 347.
- ³ Negligence in running a train at such speed that another trainman who had gone upon the track negligently was not discovered and his injury averted. *Neary v. Northern P. R. Co.* 37 Mont. 461, 19 L.R.A.(N.S.) 446, 97 Pac. 944.
- Whether engineer injured through derailment of his engine operated his train in a dangerous manner and contrary to orders, and so contributed to his injury, the evidence being in conflict. *Morgan v. Rainier Beach Lumber Co.* 51 Wash. 335, 22 L.R.A.(N.S.) 472, 98 Pac. 1120.
- Kicking cars at an unlawful speed, with no one in charge to warn persons of their approach or check their speed, as negligent to an employee who is struck thereby as he steps from a parallel track to avoid an engine. *Tobey v. Burlington, C. R. & N. R. Co.* 94 Iowa, 256, 33 L.R.A. 496, 62 N. W. 761.
- Negligence of railroad in running an engine onto a side track without signal or warning, and into collision with cars standing there. *Pugmire v. Oregon Short Line R. Co.* 33 Utah, 27, 13 L.R.A.(N.S.) 565, 126 Am. St. Rep. 805, 92 Pac. 762, 14 A. & E. Ann. Cas. 384.
- ⁴ Negligence of railroad company in not furnishing a conductor for a train which ordinarily carries a good many passengers, and runs on a schedule arranged to encourage travel upon it. *Means v. Carolina C. R. Co.* 124 N. C. 574, 45 L.R.A. 164, 32 S. E. 960.
- Whether inquiries and investigation as to the fitness of one promoted to conductor were sufficient, where it afterwards developed that he did not have the requisite knowledge of the meaning of orders. *Still v. San Francisco & N. W. R. Co.* 154 Cal. 559, 20 L.R.A.(N.S.) 322, 129 Am. St. Rep. 177, 98 Pac. 672.
- ⁵ Whether a railroad track was so defective that no ordinarily intelligent and prudent person would have incurred the risk of using it, where the evidence may leave room for different opinions. *Morgan v. Rainier Beach Lumber Co.* 51 Wash. 335, 22 L.R.A.(N.S.) 472, 98 Pac. 1120.
- Negligence of an employee on outfit cars which were standing upon a switch, who endeavored to leave the cars upon discovery that a collision was imminent, but was unable so to do before the collision. *Pugmire v. Oregon Short Line R. Co.* 33 Utah, 27, 13 L.R.A.(N.S.) 565, 126 Am. St. Rep. 805, 92 Pac. 762, 14 A. & E. Ann. Cas. 384.

Endeavoring to stop gravity car, with defective brake, by means of pinch bar, to avoid a collision. McCallion v. Missouri P. R. Co. 74 Kan. 785, 9 L.R.A.(N.S.) 866, 88 Pac. 50.

Whether a railroad employee was negligent in using a drainpipe upon a tender as a grab iron to assist him in climbing upon tender, in the absence of such an iron. Coley v. North Carolina R. Co. 128 N. C. 534, 57 L.R.A. 817, 39 S. E. 43, 129 N. C. 407, 57 L.R.A. 834, 40 S. E. 195.

Whether brakeman was negligent in mounting an approaching flat car, by grasping a brake staff which was loose and bent, when he had no knowledge of its defects. Prosser v. Montana C. R. Co. 17 Mont. 372, 30 L.R.A. 814, 43 Pac. 81.

Question of a foreman's negligent direction to a section hand, as to removing a hand car from the track in front of an approaching train, and of the latter's contributory negligence. Schroeder v. Chicago & A. R. Co. 108 Mo. 322, 18 L.R.A. 827, 18 S. W. 1094.

Failure of a track repairer to see approaching cars as he steps close to the track from a parallel track to avoid an approaching engine, and has his attention diverted by a companion's efforts to get a tool from in front of the engine. Tobey v. Burlington, C. R. & N. R. Co. 94 Iowa, 256, 33 L.R.A. 496, 62 N. W. 761.

Whether a car inspector was negligent in stepping on a main track without looking behind him, at a time when a train was due from the opposite direction. Louisville & N. R. Co. v. Lowe, 118 Ky. 260, 65 L.R.A. 122, 80 S. W. 768.

Whether the conductor of a freight train was negligent in going forward with engine to examine culverts after a storm, under the roadmaster's orders. Terre Haute & I. R. Co. v. Fowler, 154 Ind. 682, 48 L.R.A. 531, 56 N. E. 228.

Whether a brakeman was negligent, where he was injured while attempting to couple two cars so loaded with lumber that the ends projected over the ends of the car, compelling him to enter between the cars in a stooping position. Schus v. Powers-Simpson Co. 85 Minn. 447, 69 L.R.A. 887, 89 N. W. 68.

Whether one who goes between cars moving 4 or 5 miles an hour, to uncouple them, was negligent. O'Neill v. Chicago, R. I. & P. R. Co. 66 Neb. 638, 60 L.R.A. 443, 92 N. W. 731, 1 A. & E. Ann. Cas. 337.

Acting under orders.—

Whether a brakeman was negligent who, to comply with an order to get on a train just starting and ride thereon to uncouple cars, attempted to step on a jaw strap out of sight under a coal car, and, such strap being missing, was injured, there being evidence that such use of the straps was customary although they were primarily to strengthen the cars. Coates v. Boston & M. R. Co. 153 Mass. 297, 10 L.R.A. 769, 26 N. E. 864.

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Negligence of track laborer who, in compliance with orders, rode on top of freight cars, and in so doing was struck by a bridge. *Nelson v. Chesapeake & O. R. Co.* 88 Va. 971, 15 L.R.A. 583, 14 S. E. 838.

For the court.—Whether crossbeam in front of the engine was a more dangerous position than the top of the train while in motion. *Warden v. Louisville & N. R. Co.* 94 Ala. 277, 14 L.R.A. 552, 10 So. 276.

⁶ Whether proprietor of a laundry exercised ordinary care to release employee whose fingers were caught in ironing mangle, and to alleviate her suffering, where he started the machine, which had been stopped, and thereby greatly increased her injury by drawing her hand further into the machine. *Raasch v. Elite Laundry Co.* 98 Minn. 357, 7 L.R.A.(N.S.) 940, 108 N. W. 477.

29. Negligence of innkeepers, telegraph companies, and bailees or agents.

The question of a telegraph company's negligence in failing to deliver messages or wrongly delivering them,¹ and of warehouseman² and negligence of pledgee in caring for property,³ and whether care and diligence was used in the disposal of goods received on consignment,⁴ or in the selection of material to be manufactured,⁵ are all questions of fact. So is the negligence of a guest at a hotel in not safeguarding against theft.⁶

¹ Exercise of sufficient diligence in attempting to deliver message, the importance of which the company knew, where messenger rapped loudly at addressee's house without response. *McPeck v. Western U. Teleg. Co.* 107 Iowa, 356, 43 L.R.A. 214, 70 Am. St. Rep. 205, 78 N. W. 63.

Whether a messenger used ordinary diligence, where he failed to deliver the message either at the residence or place of business of the addressee. *Western U. Teleg. Co. v. Mitchell*, 91 Tex. 454, 40 L.R.A. 209, 66 Am. St. Rep. 906, 44 S. W. 274.

Whether failure to capture fugitive from justice while detained was due to neglect to deliver telegram which told of his whereabouts. *McPeck v. Western U. Teleg. Co. supra.*

Whether a telegraph company exercised due diligence in attempting to deliver a misdirected message, where correct addressee of addressee was given in the city directory. *Klopf v. Western U. Teleg. Co.* 100 Tex. 540, 10 L.R.A.(N.S.) 498, 123 Am. St. Rep. 831, 101 S. W. 1072.

Counsel's admission in open court that the facts are not in dispute will justify the court in determining a telegraph company's negligence in sending a forged message. *Wells v. Western U. Teleg. Co.* 144 Iowa, 605, 24 L.R.A.(N.S.) 1045, 138 Am. St. Rep. 317, 123 N. W. 371.

Negligence of telegraph company in delaying delivery of important message, received during the night, for one hour after messenger went

on duty in the morning, where addressee lived within a few blocks of its office. *Western U. Teleg. Co. v. Price*, 137 Ky. 758, 29 L.R.A. (N.S.) 836, 126 S. W. 1100.

Whether a telegram was tendered for transmission after the close of hours of the office of destination, where it was tendered about 6 P. M. and hours of destination office closed usually at 6 or 6:30 P. M., but might occasionally continue until late in the evening. *Box v. Postal Teleg. Cable Co.* 28 L.R.A. (N.S.) 566, 91 C. C. A. 172, 165 Fed. 138.

Whether telegraph company was negligent in requiring from 9 A. M. until 6 P. M. to transmit and deliver a message between points in the same state. *Lucas v. Western U. Teleg. Co.* 131 Iowa, 669, 6 L.R.A. (N.S.) 1016, 109 N. W. 191.

² Whether a warehouseman exercised due care to provide a place reasonably safe and adequate, as regards fire, for the storage of goods intrusted to him. *Wiley v. Locke*, 81 Kan. 143, 24 L.R.A. (N.S.) 1117, 105 Pac. 11, 19 A. & E. Ann. Cas. 241.

³ Whether there is a duty upon the holders, as collateral for a loan, of a warehouse receipt for merchandise to which the pledgor has constant access, to protect property after notice that it is deteriorating. *Willets v. Hatch*, 132 N. Y. 41, 17 L.R.A. 193, 30 N. E. 251.

⁴ Care and diligence in disposal of goods received on consignment, which had been retained almost a year, when they were consumed by fire, where there is evidence of their value in the market. *Usborne v. Stephenson*, 36 Or. 328, 48 L.R.A. 432, 78 Am. St. Rep. 778, 58 Pac. 1103.

⁵ Whether due care was exercised in the selection of material for an article ordered to be manufactured from certain material. *Rollins Engine Co. v. Eastern Forge Co.* 73 N. H. 92, 68 L.R.A. 441, 59 Atl. 382.

⁶ Negligence of guest in carrying an amount of money to his room, instead of placing in hotel safe. *Shultz v. Wall*, 134 Pa. 262, 8 L.R.A. 97, 19 Am. St. Rep. 686, 19 Atl. 742.

Whether guest was negligent, where he had been drinking, and there was a mysterious and inexplicable robbery from his room, the doors of which were locked and bolted. *Ibid.*

Whether jewels in a guest's hand bag lost by an innkeeper were within a statute limiting innkeeper's liability. *Rockhill v. Congress Hotel Co.* 237 Ill. 98, 22 L.R.A. (N.S.) 576, 86 N. E. 740.

30. Negligence as to banks and commercial paper.

Whether a bank was negligent in paying forged or altered paper,¹ or in not disclosing the false character of a credit entry in a pass book,² and the negligence of a depositor in keeping a rubber facsimile signature stamp,³ are questions of fact.

¹ Negligence of bank in paying money to one whose signature did not seem

exactly right, where both genuine and forged signatures are in evidence. *Kummel v. Germania Sav. Bank*, 127 N. Y. 488, 13 L.R.A. 786, 28 N. E. 398.

Whether a savings bank was negligent in not preserving depositors' signatures for comparison, in paying forged orders without comparing signatures, and in issuing duplicate book without requiring adequate proof of the original's destruction. *Chase v. Waterbury Sav. Bank*, 77 Conn. 295, 69 L.R.A. 329, 59 Atl. 37, 1 A. & E. Ann. Cas. 96.

Bank's negligence in paying a fraudulently altered check made payable to bearer, where plausible reason for so doing was given, and it was consistent with maker's custom of business. *National Dredging Co. v. Farmers' Bank*. 6 Penn. (Del.) 580, 16 L.R.A.(N.S.) 593, 30 Am. St. Rep. 158, 69 Atl. 607.

² Whether or not a bank was liable which, having made a false entry, equivocated so that one specially inquiring was led to believe that credit was true. *James v. Crosthwait*, 97 Ga. 673, 36 L.R.A. 631, 25 S. E. 754.

³ Negligence of depositor in keeping a rubber stamp which made a facsimile of his signature, which, being unlawfully obtained, was used to forge checks. *Robb v. Pennsylvania Co.* 186 Pa. 456, 41 L.R.A. 695, 65 Am. St. Rep. 868, 40 Atl. 969, 41 Atl. 49.

XXI.—TAKING THE CASE FROM THE JURY.

A. THE RIGHT TO TAKE THE CASE FROM THE JURY.

1. Power of the court.
2. Right of the party.
3. Test of the right to go to jury.

B. MODE OF APPLYING TO TAKE THE CASE FROM THE JURY.

4. Defendant's motion.
 - a. When.
 - b. After strict cross-examination.
 - c. After full cross-examination.
 - d. After final close of case.
 - e. Several codefendants.
 - f. Several coplaintiffs.
 - g. Variance; several causes of action.
 - h. Plaintiff's course to defeat motion.
5. Plaintiff's motion for a verdict.
6. Motion by both parties for a verdict.

C. RULES OF DECISION.

7. Contents of pleading to be considered together.
8. General rule as to assuming truth of adversary's evidence.
9. Sufficiency of evidence.
10. Different inferences.
11. Interested testimony.
12. Party's admission by refusal to testify.
13. Direct met by circumstantial evidence.
14. Affirmative testimony met only by negative.
15. Positive, met only by a conclusion of law.
16. Uncontradicted evidence of specific fact.
17. Expert testimony.
18. Nominal damages.
19. Mode of taking case from jury.

D. VERDICT SUBJECT TO THE OPINION OF THE COURT (SPECIAL CASE).

20. When may be directed.
21. Contest as to facts.
22. Questions of evidence.
23. Determining amount.
24. Effect of consent.

[In some jurisdictions the mode of taking the case from the jury is, if at the instance of the plaintiff, by motion to direct a

verdict; if at the instance of defendant, either by motion for a nonsuit, or by motion to direct a verdict, according to whether defendant is merely to put plaintiff out of court, or to have a final adjudication against him. In these jurisdictions a motion for nonsuit is also called a motion to dismiss the complaint, the latter designation being more usual where the dismissal is on the pleadings; the former where it is on the proofs.

In some other jurisdictions the mode of taking the case from the jury is only by directing a verdict at the instance of either party.

In still others it is by demurrer to evidence. The differences between these methods are to a great extent differences only in name and form of procedure; but there are consequent differences in the effect of the adjudication, which need not be noticed here.

The underlying principle of each of these methods is to dispose of the case by the decision of the judge if no proper question for the jury has been presented; and the rules which regulate the motion in either form and determine how it should be decided are in the main the same, and are here presented together as substantially applicable to all these modes of presenting the question; but with this noteworthy exception, that, according to the weight of authority, a motion for nonsuit or to direct a verdict, after the evidence of both parties has been heard and closed, is determined on the whole case; a demurrer to evidence is determined only on the evidence of the demurree.]

A. THE RIGHT TO TAKE THE CASE FROM THE JURY.

1. Power of the court.

Upon an undisputed state of facts¹ the court may render the judgment or direct the verdict which the law requires without the aid or advice of the jury.²

¹"Undisputed" here does not, however, mean that the counsel shall have ceased to contest; but that in contemplation of the law there should not be room for dispute.

And testimony cannot be said to be undisputed when inconsistent with some other fact or circumstance, either established, or regarding which testimony has been admitted. *Hagan v. Chicago, D. & C. G. T. Junction R. Co.* 86 Mich. 615, 49 N. W. 509.

A fact is legally in dispute, so as to require its submission to the jury, when its affirmation and denial are each supported by competent evidence of same probative force, or such evidence as, standing alone, would naturally and logically lead a reasonable mind to a definite conclusion as to the existence or nonexistence of such fact. *Rauber v. Sundback*, 1 S. D. 268, 46 N. W. 927.

And where there is positive evidence on both sides of an issue, it is an invasion of the province of the jury to withdraw the issue from the jury. *Union P. R. Co. v. James*, 6 C. C. A. 217, 12 U. S. App. 482, 56 Fed. 1001.

But the mere denial of inferences to be drawn from established facts cannot raise a dispute of facts to go to the jury. *Harris v. Louisville, N. O. & T. R. Co.* 35 Fed. 121. See also *infra*, § 13.

² *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. ed. 855; *Bemis v. Woodworth*, 49 Iowa, 340; *Ætna Indemnity Co. v. Ladd*, 68 C. C. A. 274, 135 Fed. 636; *Green v. Stewart*, 23 App. D. C. 570; *Beebe v. Weatherly*, 25 Pa. Super. Ct. 88; *Barrett v. Moise*, 61 S. C. 569, 39 S. E. 755; *Lane v. Old Colony & F. River R. Co.* 14 Gray, 143; *McClaren v. Indianapolis & V. R. Co.* 83 Ind. 319 (where it was held no error to recall the jury and direct a verdict for defendant); *Thomasson v. Groce*, 42 Ala. 431; *Chenery v. Palmer*, 6 Cal. 119, 122; *Bassinger v. Spangler*, 9 Colo. 175, 10 Pac. 809; *Cutler v. Hurlbut*, 29 Wis. 152, 165; *Thompson v. Etowah Iron Co.* 91 Ga. 538, 17 S. E. 663 (where it was held no error to direct a verdict after the court, on deciding that plaintiff had failed to establish his case, had announced its intention to so direct a verdict, thus giving plaintiff an opportunity to dismiss or take a nonsuit, neither of which he does); *Wabash R. Co. v. Williamson*, 104 Ind. 154, 3 N. E. 814; *Chicago, B. & Q. R. Co. v. Barnard*, 32 Neb. 306, 49 N. W. 362; *McCormack v. Standard Oil Co.* 60 N. J. L. 243, 37 Atl. 617; *Fromherz v. Yankton F. Ins. Co.* 7 S. D. 187, 63 N. W. 784; *Corley v. Lenz*, — Tex. Civ. App. —, 24 S. W. 935; *Schonbachler v. Mischell*, 121 Ky. 498, 89 S. W. 525; *McDonald v. Metropolitan Street R. Co.* 167 N. Y. 66, 60 N. E. 282; *Rice v. Bamberg*, 68 S. C. 184, 46 S. E. 1009; *Colcord-Williams Lumber Co. v. Warren Grain Co.* 114 Ga. 966, 41 S. E. 41. See also note to *People v. People's Ins. Exchange*, 2 L.R.A. 340.

"In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Pleasants v. Fant*, 22 Wall. 116, 120, 22 L. ed. 780, 782, and cases cited; *Meyer v. Houck*, 85 Iowa, 319, 52 N. W. 235, and cases cited.

This rule requires, not merely undisputed testimony, but an undisputed state of facts; for if differences of fact may be drawn from un-

disputed testimony the case raises a question that the jury ought to pass upon. See *infra*, § 16.

And in those jurisdictions where the "scintilla of evidence" doctrine prevails the court cannot take the case from the jury where there is any evidence tending to prove the issue. *Robinson v. Louisville & N. R. Co.* 2 Lea, 594.

Withdrawing the case from the jury and directing verdict for the proper party upon such an undisputed state of facts is no invasion of a constitutional prohibition that judges shall not charge juries with regard to matters of fact, but shall declare the law. *Jones v. Chalfant*, — Cal. —, 31 Pac. 257. But it is in fact a compliance therewith. *Catlett v. St. Louis, I. M. & S. R. Co.* 57 Ark. 461, 21 S. W. 1062.

If plaintiff makes out a case by clear and uncontradicted evidence, he is entitled to a directed verdict. *Tedder v. Fraleigh-Lines-Smith Co.* 55 Fla. 496, 46 So. 419.

A verdict for defendant should be directed if plaintiff's evidence fails to make a *prima facie* case. *Smithley v. Snowden*, 120 Ill. App. 86; *Keckler v. Modern Brotherhood*, 77 Neb. 301, 109 N. W. 157; *Smith v. Chicago Junction R. Co.* 127 Ill. App. 89; *Brunson v. Southwestern Development Co.* 7 Ind. Terr. 209, 104 S. W. 593.

Even where there is conflicting evidence, the court may direct a verdict if a conceded fact shows that the evidence on one side is not true. *Baumann v. Hamburg-American Packet Co.* 67 N. J. L. 250, 51 Atl. 461.

The court need not state its reasons in directing a verdict. *Owens v. San Pedro, L. A. & S. L. R. Co.* 32 Utah, 208, 89 Pac. 825; *Fidelity Trust Co. v. Palmer*, 22 Wash. 473, 79 Am. St. Rep. 953, 61 Pac. 158.

Contra, *Foote v. American Product Co.* 195 Pa. 190, 49 L.R.A. 764, 78 Am. St. Rep. 806, 45 Atl. 934.

And the power of the court to withdraw the case from the jury in a proper case extends to actions of libel and slander, as in other civil cases, notwithstanding a constitutional provision making the jury, under the direction of the court, the judges of the law and the facts in libel and slander suits. *Hazy v. Weitke*, 23 Colo. 556, 48 Pac. 1048.

So, a statute making the question of fraudulent intent one of fact does not affect the power of the court to direct a verdict in a case involving that question, if it is otherwise proper to direct a verdict. *First Nat. Bank v. North*, 2 S. D. 480, 51 N. W. 96.

And the court does not lose control over the jury because they have retired to the jury room, under its direction, to deliberate on their verdict; but it may, in the further conduct of the trial, recall them and direct them to render a proper verdict. *Rainger v. Boston Mut. Life Asso.* 167 Mass. 109, 44 N. E. 1088.

If the amount of recovery involves only a mathematical computation, the court may make such computation and direct the jury to find for that amount. *Baldwin v. Central Sav. Bank*, 17 Colo. App. 7, 67 Pac. 179.

And it would seem from *Schechter v. Denver, L. & G. R. Co.* 8 Colo. App. 25, 44 Pac. 761, the court may, in a proper case, order an involuntary nonsuit *of its own motion*. Or direct the proper verdict. *Johnson v. Rider*, 84 Iowa, 50, 50 N. W. 36; *Peavy v. Dure*, 131 Ga. 104, 62 S. E. 47. Otherwise in Washington, except for abandonment of the case by the plaintiff, his refusal to make necessary parties, or his disobedience of an order concerning the proceedings in the action. *McDaniel v. Pressler*, 3 Wash. 636, 29 Pac. 209.

Where the plaintiff's evidence did not justify a verdict for a particular amount, but the answer admitted a specified indebtedness, a direction to find for this amount was held proper. *McCormick v. Gubner*, 90 N. Y. Supp. 1073.

But a direction of verdict should be granted only when a verdict for the defeated party would be improper. *Hampshire v. Greeves*, — Tex. Civ. App. —, 130 S. W. 665; *St. Louis Southwestern R. Co. v. Anderson*, — Tex. Civ. App. —, 124 S. W. 1002.

In North Carolina the court can never find or direct an affirmative finding by the jury. The most the court can do is to instruct the jury, where there is no dispute in the evidence, that if they believe the evidence they should find yes or no, as the case may be. Where there is no evidence, or no such evidence as should be allowed to go to the jury, tending to establish the affirmative of the issue, the court should direct the negative finding. *White v. Suffolk & C. R. Co.* 121 N. C. 484, 27 S. E. 1002, and cases cited. See also *infra*, §§ 2, 5.

For the various methods in which the rule in the text is applied in different jurisdictions, see note to next section.

2. Right of the party.

In a case where it is proper to take the case from the jury, the right of the party and the power of the judge are correlative; the right implies the duty.¹

¹ *Pleasants v. Fant*, 22 Wall. 116, 120, 22 L. ed. 780, 782, and cases cited; *Lomer v. Mceker*, 25 N. Y. 361.

The reason is that the judge, if he understands the law applicable to the case, ought to protect parties against unjust verdicts, and ought not to occupy the jury, the parties, and the public time in reaching a verdict (or possibly a disagreement) in a case where, if a verdict adverse to his opinion were reached, it would forthwith be his duty to set it aside on motion for new trial.

The following analysis of the authorities shows in what jurisdictions this rule is now established; and in what it has been denied or qualified:

United States courts—Formerly, compulsory nonsuit after evidence taken was held, by the Supreme Court, not allowable in the Federal courts. *Schuchardt v. Allen*, 1 Wall. 359, 17 L. ed. 642. Even though the practice in the state court was otherwise. *Elmore v. Grymes*, 1 Pet. 469, 7 L. ed. 224. And it is still so held by some of the circuit courts of appeals. *Northern P. R. Co. v. Charles*, 2 C. C. A. 380, 7 U. S. App. 359, 51 Fed. 562. But in *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539, Mr. Justice Field characterized the difference between a motion to nonsuit and a motion to direct a verdict, as “rather a matter of form than of substance.” And in *Central Transp. Co. v. Pullman’s Palace Car Co.* 139 U. S. 34, 35 L. ed. 60, 11 Sup. Ct. Rep. 478, it was expressly held that a Federal court could, in a proper case, nonsuit plaintiff against his objection, if that was the proper practice in the courts of the state in which it was sitting. And this doctrine was affirmed in *Coughran v. Bigelow*, 164 U. S. 301, 41 L. ed. 442, 17 Sup. Ct. Rep. 117. None of these cases, however, question the power and duty of the court to withdraw the case from the jury, and the right of the defendant to have it done, in a proper case. Indeed, as was said in *Travelers’ Ins. Co. v. Selden*, 24 C. C. A. 92, 42 U. S. App. 253, 78 Fed. 285, “the legal sufficiency of the evidence to support the verdict presents a question of law, the decision of which is not a matter of discretion, but of duty, and is as much the subject of exception and review as any other ruling of the court in the course of the trial.” See also *Mercantile Mut. Ins. Co. v. Folsom*, 18 Wall. 237, 21 L. ed. 827 (direction of a verdict is a matter of right in a proper case); *Pleasants v. Fant*, 22 Wall. 116, 22 L. ed. 780; *Merchants’ Nat. Bank v. State Nat. Bank*, 3 Cliff. 102, Fed. Cas. No. 9,448; *Retzer v. Wood*, 109 U. S. 185, 27 L. ed. 900, 3 Sup. Ct. Rep. 164 (error to refuse to direct a verdict for plaintiff on a proper case); *Hathaway v. East Tennessee, V. & G. R. Co.* 29 Fed. 489, 492.

Alabama—*Smith v. Seaton*, Minor (Ala.) 75 (in absence of statute court has no power to grant compulsory nonsuit, but may direct the jury how to find; and if they disobey may grant new trial); *Saunders v. Coffin*, 16 Ala. 421; *Gluck v. Cox*, 90 Ala. 331, 8 So. 161 (demurrer to evidence allowed as matter of right in all civil cases); *Louisville & N. R. Co. v. Dancy*, 97 Ala. 338, 11 So. 796 (error to refuse general affirmative charge in a proper case). But a general affirmative charge at the close of all the evidence is properly refused where a demurrer to his adversary’s evidence by the party requesting it could not have been legally sustained. *Central R. & Bkg. Co. v. Roquemore*, 96 Ala. 236, 11 So. 475. See *infra*, § 7.

Arizona—*Bryan v. Pinney*, 3 Ariz. 34, 21 Pac. 332; *Roberts v. Smith*, 5 Ariz. 368, 52 Pac. 1120 (where it is held that involuntary nonsuit cannot be granted under the Arizona statutes, but the court may, in a proper case, direct a verdict. These cases base this doctrine on the

former doctrine of the United States Supreme Court. See United States court cases, *supra*).

Arkansas—*Martin v. Webb*, 5 Ark. 72, 39 Am. Dec. 363 (court has no power to grant compulsory nonsuit, but may direct jury to find as in case of nonsuit); *Hill v. Rucker*, 14 Ark. 706 (such a verdict bars a future action); *Obaugh v. Finn*, 4 Ark. 110, 37 Am. Dec. 773 (demurrer to evidence; *dictum* that in proper case it is a matter of legal right); *Catlett v. St. Louis, I. M. & S. R. Co.* 57 Ark. 461, 21 S. W. 1062 (duty of court to permit plaintiff to take a nonsuit if the missing links in his evidence can probably be supplied; otherwise, to direct verdict against party whose evidence is legally insufficient to support a verdict for him).

California—*Dalrymple v. Hanson*, 1 Cal. 125 (nonsuit; error to refuse); *Johnson v. Moss*, 45 Cal. 515; *Selden v. Cashman*, 20 Cal. 56 (direction of a verdict granted in a proper case); *O'Connor v. Witherby*, 111 Cal. 523, 44 Pac. 227 (direction of verdict upheld as proper in the particular case, but the practice is characterized as hazardous, and to be sanctioned only in the clearest cases); *Downing v. Murray*, 113 Cal. 455, 45 Pac. 869 (nonsuit); *Lacey v. Porter*, 103 Cal. 597, 37 Pac. 635 (direction of verdict proper, unless the circumstances of the case indicate that upon another trial the evidence may be materially different, in which case the facts should be submitted to the jury in order that a new trial may be had).

Colorado—*Murray v. Denver & R. G. R. Co.* 11 Colo. 124, 17 Pac. 484 (nonsuit; Code Civ. Proc. § 48); *Union Coal Co. v. Edman*, 16 Colo. 438, 27 Pac. 1060 (error to refuse to direct verdict, in the absence of motion for nonsuit or other relief); *Stratton v. Union P. R. Co.* 7 Colo. App. 126, 42 Pac. 602 (nonsuit not the privilege, but the duty, of the court, in a proper case).

Connecticut—*Naugatuck R. Co. v. Waterbury Button Co.* 24 Conn. 468 (nonsuit authorized by a statute which is held not to be unconstitutional as violating the right of trial by jury); *Fitch v. Bill*, 71 Conn. 24, 40 Atl. 910 (nonsuit authorized by statute if *prima facie* case not established); *Ward v. Metropolitan L. Ins. Co.* 66 Conn. 227, 33 Atl. 902 (direction of verdict, duty of court in proper case, and error to refuse). But according to *Cook v. Morris*, 66 Conn. 196, 33 Atl. 994, nonsuit is never a matter of right, and should rarely, if ever, be granted where there can be any doubt, unless the evidence of the plaintiff distinctly raises a question of law determinative of the plaintiff's right of action. Where the granting must depend in any appreciable degree upon the court's passing upon the credibility of witnesses, the nonsuit should not be granted. And ordinarily, as a matter of practice, where the nonsuit can settle no principle of law essential to the plaintiff's right of action, the consideration of ending the litigation by the verdict of a jury should control, and the trial should go on; and the statute should not be extended, even where the evidence on its face is extremely improbable, so as to permit a nonsuit in any

case where the facts claimed as presenting the question of law may depend upon the credit to be given witnesses, or may depend upon inferences to be drawn from testimony, as to which inferences the parties may reasonably differ.

Dakota—Holt v. Van Eps, 1 Dak. 206, 46 N. W. 689 (compulsory nonsuit not allowed); Territory v. Stone, 2 Dak. 155, 4 N. W. 697 (direction of verdict proper when evidence is not sufficient to sustain a contrary verdict).

Delaware—Flanagan v. Wilmington, 4 Houst. (Del.) 548 (compulsory nonsuit allowed).

District of Columbia—Jackson v. Merritt, 21 D. C. 276 (compulsory nonsuit not allowed in courts of the District; but the court should, in a proper case, direct the jury as to their verdict); Somerville v. Knights Templars & M. Life Indemnity Asso. 11 App. D. C. 417, and cases cited (direction of verdict in a proper case).

Florida—Hinote v. Simpson, 17 Fla. 444 (demurrer to evidence seems allowable in proper cases); C. B. Rogers Co. v. Meinhardt, 37 Fla. 480, 19 So. 878 (direction of verdict allowable by statute in proper case).

Georgia—Tison v. Yawn, 15 Ga. 491, 60 Am. Dec. 708 (nonsuit); Hanson v. Crawley, 51 Ga. 528, 533 (direction of verdict for defendant at close of plaintiff's case is not proper; but a motion for a nonsuit at that stage of the trial is the proper way to raise the question of sufficiency of plaintiff's evidence; Moon v. Fink, 102 Ga. 526, 28 S. E. 980 (nonsuit); Stewart v. Bank of Social Circle, 100 Ga. 496, 28 S. E. 249 (direction of verdict).

Idaho—Holt v. Spokane & P. R. Co. 4 Idaho, 443, 40 Pac. 56 (direction of verdict; error to refuse in a proper case); Lewis v. Lewis, 3 Idaho, 645, 33 Pac. 38 (nonsuit, by statute, in proper case). But to direct verdict for defendants is error where plaintiff refuses to introduce evidence to prove his case, and defendants fail to produce evidence to prove their cross-demand against plaintiff. The action in such case should be dismissed, or a judgment of nonsuit entered. Simmons v. Cunningham, 4 Idaho, 426, 39 Pac. 1109.

Illinois—Holmes v. Chicago & A. R. Co. 94 Ill. 439, 444 (nonsuit seems allowable only at close of plaintiff's case, upon an entire failure of evidence as to an essential point. Motion to exclude all of the plaintiff's evidence is an equivalent remedy). Compare Poleman v. Johnson, 84 Ill. 269 (where the power of the court to nonsuit under the Illinois statute is questioned, but it is held error to deny motion to exclude all of the plaintiff's evidence upon an entire failure of proof on an essential point. Direction of verdict for defendant is a matter of right in such a case); Pennsylvania Co. v. Conlan, 101 Ill. 93 (motion to exclude plaintiff's evidence is in the nature of a demurrer to evidence and is tested by the same rules); Foster v. Wadsworth-Howland Co. 168 Ill. 514, 48 N. E. 163, and cases cited (direction of verdict not error in proper case. If made at close of plaintiff's

testimony, the only question raised is whether or not there is evidence tending to prove averments of declaration, but if made at close of *all* the evidence, the evidence for both plaintiff and defendant, with all proper inferences deducible therefrom, must be insufficient to support verdict for plaintiff). But a peremptory instruction for defendant, asked along with a series of instructions submitting all the facts to the jury, is properly refused. *Chicago, P. & St. L. R. Co. v. Woolridge*, 174 Ill. 330, 51 N. E. 701.

Indiana—*Williams v. Port*, 9 Ind. 551 (compulsory nonsuit not allowed); *Booe v. Davis*, 5 Blackf. 115, 33 Am. Dec. 457; *Purcell v. English*, 86 Ind. 34; *Crookshank v. Kellogg*, 8 Blackf. 256 (direction of verdict. Error to refuse); *Strough v. Gear*, 48 Ind. 100 (demurrer to evidence allowable under Indiana Code of Procedure); *Sutherland v. Cleveland, C. C. & St. L. R. Co.* 148 Ind. 308, 47 N. E. 624 (direction of verdict duty in proper case); *Stroble v. New Albany*, 144 Ind. 695, 42 N. E. 806 (proper practice to ask for direction of verdict, not withdrawal of case from jury); *Diamond Block Coal Co. v. Edmonson*, 14 Ind. App. 594, 43 N. E. 242 (nonsuit not allowable).

Iowa—*Way v. Illinois C. R. Co.* 35 Iowa, 585 (compulsory nonsuit not allowable by Iowa Rev. Stat. §§ 3127, 3128); *Bemis v. Woodworth*, 49 Iowa, 340 (direction of a verdict proper on undisputed evidence); *Hurd v. Neilson*, 100 Iowa, 555, 69 N. W. 867 (direction of verdict; error to refuse in proper case); *Meyer v. Houck*, 85 Iowa, 319, 52 N. W. 235 (direction of verdict).

Kansas—*Case v. Hannals*, 2 Kan. 490 (compulsory nonsuit not authorized by the Kansas Code. In case of total failure of proof on an essential point the court should so instruct the jury); *Union P. R. Co. v. Adams*, 33 Kan. 427, 6 Pac. 529, and cases cited (error not to sustain demurrer to evidence); *Wisner v. Bias*, 43 Kan. 458, 23 Pac. 586 (demurrer to evidence; error not to sustain in proper case).

Kentucky—*Parker v. Jenkins*, 3 Bush, 588 (error to refuse to direct verdict where defense was established by uncontradicted evidence); *Hanks v. Roberts*, 3 J. J. Marsh. 298 (error to refuse to direct where evidence would not sustain a contrary verdict); *Wilsey v. Louisville & N. R. Co.* 83 Ky. 512 (peremptory instruction proper on plaintiff's evidence alone, and also on *all* evidence if *all* is in favor of party moving; but if evidence is conflicting, case cannot be withdrawn from jury by demurrer to evidence); *Louisville, St. L. & T. R. Co. v. Terry*, 20 Ky. L. Rep. 803, 47 S. W. 588 (peremptory instruction; error to refuse in proper case); *Buford v. Louisville & N. R. Co.* 82 Ky. 286; *Thompson v. Thompson*, 17 B. Mon. 28.

Louisiana—*Wilson v. McHugh*, 1 La. 380 (nonsuit proper if evidence is insufficient); *Taylor v. Almanda*, 50 La. Ann. 351, 23 So. 365 (nonsuit).

Maine—*White v. Bradley*, 66 Me. 254 (nonsuit on uncontradicted evidence raising only question of law held proper); *Heath v. Jaquith*, 68 Me.

- 433, 436 (direction of a verdict proper when evidence will not authorize a verdict for opposite party); *State v. Soper*, 16 Me. 293 (demurrer on evidence unusual and no error to refuse to receive it); *Woodstock v. Canton*, 91 Me. 62, 39 Atl. 281 (direction of verdict proper when evidence will not authorize verdict for the party).
- Maryland—*Kettlewell v. Peters*, 23 Md. 312 (nonsuit not adopted and contrary to practice); *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47, 34 Am. Rep. 291 (error to refuse to direct verdict when there is no evidence to sustain contrary verdict); *Northern C. R. Co. v. Medairy*, 86 Md. 168, 37 Atl. 796 (direction of verdict; error to refuse if evidence insufficient to sustain contrary verdict).
- Massachusetts—*Mitchell v. New England Marine Ins. Co.* 6 Pick. 117, 118; *Marshall v. Merritt*, 97 Mass. 516 (it seems that a nonsuit cannot be ordered against the plaintiff's consent. Compare, however, *Wentworth v. Leonard*, 4 Cush. 414, 418, Shaw, Ch. J.); *Lane v. Old Colony & F. River R. Co.* 14 Gray, 143; *Denny v. Williams*, 5 Allen, 1; *Allyn v. Boston & A. R. Co.* 105 Mass. 77; *Tully v. Fitchburg R. Co.* 134 Mass. 499 (direction of a verdict. Error to refuse in a proper case); *Copeland v. New England Ins. Co.* 22 Pick. 135, 143 (demurrer to evidence seems matter of right, but that it is rarely resorted to in Massachusetts practice, see *Golden v. Knowles*, 120 Mass. 336); *Kenneson v. West End Street R. Co.* 168 Mass. 1, 46 N. E. 114 (direction of verdict).
- Michigan—*Cahill v. Kalamazoo Mut. Ins. Co.* 2 Dougl. (Mich.) 124 (court cannot compel nonsuit); *Grand Trunk R. Co. v. Nichol*, 18 Mich. 170 (direction of a verdict; error to refuse where there is no conflicting evidence); *Secord v. Chicago & M. L. S. R. Co.* 107 Mich. 540, 65 N. W. 550 (direction of verdict; error to refuse in proper case).
- Minnesota—*McCormick v. Miller*, 19 Minn. 443, Gil. 384 (compulsory nonsuit allowed by statute); *Giermann v. St. Paul, M. & M. R. Co.* 42 Minn. 5, 43 N. W. 483 (direction of verdict proper if on *all* the evidence a verdict for plaintiff would not be allowed to stand, though on plaintiff's evidence alone the case should go to the jury).
- Mississippi—*Winston v. Miller*, 12 Smedes & M. 550, 554 (no power of compulsory nonsuit, but there is an equivalent remedy in directing a verdict against the plaintiff); *Ewing v. Glidwell*, 3 How. (Miss.) 332, 335 (no power to nonsuit, but court may instruct jury to find a verdict as in case of nonsuit, and this is often done); *Chicago, St. L. & N. O. R. Co. v. Doyle*, 60 Miss. 977 (direction of verdict seems matter of right in a proper case); *Capital City Oil Works v. Black*, 70 Miss. 8, 12 So. 26 (direction of verdict; error to refuse in proper case).
- Montana—*Morse v. Granite County*, 19 Mont. 450, 48 Pac. 745 (nonsuit); *Creek v. McManus*, 13 Mont. 152, 32 Pac. 675 (direction of verdict in effect a nonsuit).
- Nebraska—*Smith v. Sioux City & P. R. Co.* 15 Neb. 583, 19 N. W. 638 (compulsory nonsuit not authorized by Neb. Code, § 430. Error to

grant it); *Atchison & N. R. Co. v. Loree*, 4 Neb. 446 (direction of a verdict. Error to refuse); *Knatt v. Jones*, 50 Neb. 490, 70 N. W. 90 (direction of verdict); *Zittle v. Schlesinger*, 46 Neb. 844, 65 N. W. 892 (compulsory nonsuit not authorized by Civil Code, § 430, and, though error to grant, not fatal if evidence such that verdict should have been directed for defendant).

Nevada—Gen. Stat. § 3173, Civ. Pr. Act, § 151 (nonsuit allowed by statute when the plaintiff fails to prove a sufficient case for the jury). See *Laird v. Morris*, 23 Nev. 34, 42 Pac. 11.

New Hampshire—*Stickney v. Stickney*, 21 N. H. 61 (nonsuit; error to refuse); *Bailey v. Kimball*, 26 N. H. 351, 354; *Brown v. Massachusetts Mut. L. Ins. Co.* 59 N. H. 298, 47 Am. Rep. 205 (nonsuit; error to refuse); *Dame v. Dame*, 20 N. H. 28 (direction of a verdict proper for insufficient evidence); *Edgerly v. Union Street R. Co.* 67 N. H. 312, 36 Atl. 558 (nonsuit; error to refuse).

New Jersey—*New Jersey Exp. Co. v. Nichols*, 33 N. J. L. 434, 436, 97 Am. Dec. 722 (nonsuit; error to refuse); *Baldwin v. Shannon*, 43 N. J. L. 596 (direction of a verdict proper where a verdict for opposite party would be set aside); *American Saw Co. v. First Nat. Bank*, 60 N. J. L. 417, 38 Atl. 662 (direction of verdict; error to refuse in proper case); *New Jersey School & Church Furniture Co. v. Board of Education*, 58 N. J. L. 646, 35 Atl. 397 (nonsuit in proper case).

New Mexico—*Herrera v. Chaves*, 2 N. M. 86; *Montoya v. Donohoe*, 2 N. M. 214 (compulsory nonsuit cannot be granted); *Lutz v. Atlantic & P. R. Co.* 6 N. M. 496, 16 L.R.A. 819, 30 Pac. 912 (direction of verdict).

New York—*Lomer v. Meeker*, 25 N. Y. 361 (motion for nonsuit or to dismiss complaint, or to direct verdict; error to refuse); *Robinson v. McManus*, 4 Lans. 380, 386; *Fish v. Davis*, 62 Barb. 122; *Appleby v. Astor F. Ins. Co.* 54 N. Y. 253, 261 (motion to direct verdict equivalent to motion for nonsuit, but note that it is more serious in results); *Hemmens v. Nelson*, 138 N. Y. 517, 20 L.R.A. 440, 34 N. E. 342 (motion for nonsuit or to direct verdict; duty of court to grant in proper case); *Williams v. United States Mut. Acci. Asso.* 133 N. Y. 366, 31 N. E. 222 (dismissal of complaint; error to refuse in proper case); *Dennison v. Musgrave*, 20 Misc. 678, 46 N. Y. Supp. 530 and cases cited (stating the practice of taking the case in New York to be thus: If at the instance of plaintiff by motion to direct verdict; if at the instance of defendant by motion for nonsuit or to direct verdict, according to whether final adjudication against him). And a justice of the New York city district court should direct a verdict where it would be the duty of a judge of a court of record to do so, under the New York city consolidation act, § 1381, providing that the mode of conducting the trial is the same in such courts as in courts of record. *Douglass v. Seiferd*, 18 Misc. 188, 41 N. Y. Supp. 289.

- North Carolina—Wittkowsky v. Wasson, 71 N. C. 451 (scintilla of evidence not enough to go to the jury); Hygienic Plate Ice Co. v. Raleigh & G. R. Co. 122 N. C. 881, 29 S. E. 575 (nonsuit under act 1897, chap. 109); Cable v. Southern R. Co. 122 N. C. 892, 29 S. E. 377 (direction of verdict a duty if there is no evidence, or nothing more than mere scintilla of evidence).
- North Dakota—McCormick Harvesting Mach. Co. v. Larson, 6 N. D. 533, 72 N. W. 921 (direction of verdict).
- Ohio—Ellis v. Ohio L. Ins. & T. Co. 4 Ohio St. 628, 64 Am. Dec. 610 (compulsory nonsuit allowed only on an entire failure of evidence as to some essential point. Substituted for the ancient practice of demurrer to evidence); Powell v. Jones, 12 Ohio, 35; Grant v. Pittsburg & W. R. Co. 10 Ohio C. C. 362, 6 Ohio C. D. 516 (immaterial whether verdict directed, or case taken from jury and judgment of dismissal entered).
- Oklahoma—Pittman v. El Reno, 4 Okla. 638, 46 Pac. 495 (demurrer to evidence).
- Oregon—Tippin v. Ward, 5 Or. 450 (compulsory nonsuit); Cogswell v. Oregon & C. R. Co. 6 Or. 417; Willis v. Holmes, 28 Or. 583, 42 Pac. 988 (nonsuit).
- Pennsylvania—Lehman v. Kellerman, 65 Pa. 489 (compulsory nonsuit, but error will not lie to a refusal; for defendant may ask for direction that plaintiff's evidence is insufficient to maintain his action); Ritzman v. Philadelphia & R. R. Co. 187 Pa. 337, 40 Atl. 975 (nonsuit: duty of court); Bastian v. Philadelphia, 180 Pa. 227, 36 Atl. 746 (nonsuit in effect a demurrer to evidence; should not be withdrawn from jury if there is any evidence beyond a mere scintilla, however slight, from which jury can draw inference favorable to plaintiff); Du Bois Deposit Bank v. Kuntz, 175 Pa. 432, 34 Atl. 797 (direction of verdict for plaintiff in a proper case). See also Easton v. Neff, 102 Pa. 474; Hyatt v. Johnston, 91 Pa. 196 (direction of verdict; error to refuse plaintiff in this case).
- Rhode Island—Hopkins v. Brown, 5 R. I. 360 (compulsory nonsuit seems to be allowed only where there is total lack of evidence on an essential point); Cassidy v. Angell, 12 R. I. 447, 448, 34 Am. Rep. 690.
- South Carolina—Carrier v. Dorrance, 19 S. C. 30 (compulsory nonsuit only allowed on entire failure of evidence as to some essential point. Then error to refuse); Graham v. Moore, 13 S. C. 115 (direction of a verdict a duty in a proper case); Gandy v. Orient Ins. Co. 52 S. C. 224, 29 S. E. 655 (compulsory nonsuit allowable at close of all evidence).
- South Dakota—McKeever v. Homestake Min. Co. 10 S. D. 599, 74 N. W. 1053 (direction of verdict).
- Tennessee—Littlejohn v. Fowler, 5 Coldw. 284 (nonsuit said to be unconstitutional); West Memphis Packet Co. v. White, 99 Tenn. 256, 38 L.R.A. 427, 41 S. W. 582 (motion to exclude plaintiff's evidence on

- ground that it would not support a verdict in his favor, not proper practice); *Hopkins v. Nashville, C. & St. L. R. Co.* 96 Tenn. 409, 32 L.R.A. 354, 34 S. W. 1029 (demurrer to evidence not unconstitutional as violating the right of trial by jury or the prohibition that judges shall not charge juries with respect to matters of fact. An exhaustive comparison of the practice in the various jurisdictions is here found).
- Texas—*Guest v. Guest, Dallam* (Tex.) 394; *McGill v. Delaplain, Dallam* (Tex.) 493 (court cannot compel a nonsuit); *Willis v. Bullitt*, 22 Tex. 330 (direction of a verdict in a proper case); *Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1059 (direction of verdict a duty in proper case); *Galveston, H. & S. A. R. Co. v. Templeton*, 87 Tex. 42, 26 S. W. 1066 (demurrer to evidence).
- Utah—*Fowler v. Pleasant Valley Coal Co.* 16 Utah, 348, 52 Pac. 594 (compulsory nonsuit; error to refuse in proper case).
- Vermont—*Smith v. Crane*, 12 Vt. 487 (court cannot order nonsuit; error to do so); *Wright v. Bourdon*, 50 Vt. 494 (direction of a verdict in a proper case); *Walcott v. Metropolitan L. Ins. Co.* 64 Vt. 221, 24 Atl. 992 (direction of verdict).
- Virginia—4 Minor, Inst. p. 782 (courts cannot compel nonsuit. Citing *Ross v. Gil*, 1 Wash. [Va.] 87, 89; *Thweat v. Finch*, 1 Wash. [Va.] 217, 219); *Trout v. Virginia & T. R. Co.* 23 Gratt. 619 (demurrer to evidence seems a matter of right); *Eubank v. Smith*, 77 Va. 206 (demurrer to evidence; court has the power to compel joinder in a proper case); *Childress v. Chesapeake & O. R. Co.* 94 Va. 186, 26 S. E. 424 (demurrer to evidence). But in an action for libel it is improper for the trial court to compel plaintiff to join in demurrer to the evidence, under Va. Code 1873, chap. 145, § 2, which provides that no demurrer shall preclude a jury from passing on the alleged insulting words. *Rolland v. Batchelder*, 84 Va. 664, 5 S. E. 695.
- Washington—*Starr v. Chilberg*, 15 Wash. 700, 47 Pac. 10 (nonsuit); *Dunkle v. Spokane Falls & N. R. Co.* 20 Wash. 254, 55 Pac. 51 (motion to discharge the jury and for proper judgment to be entered on verdict found by court, in conformity with Ballinger's Code, § 4994 [Sess. Laws 1895, p. 64, § 17]).
- West Virginia—*Allen v. Bartlett*, 20 W. Va. 46 (demurrer to evidence); *Overby v. Chesapeake & O. R. Co.* 37 W. Va. 524, 16 S. E. 813 (motion to exclude all plaintiff's evidence at the close of his case not allowable); *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999 (direction of verdict after giving plaintiff an opportunity to suffer nonsuit; error to refuse in proper case); *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888 (demurrer to evidence, in which court may compel other party to join).
- Wisconsin—*Hunter v. Warner*, 1 Wis. 141; *Hoeflinger v. Stafford*, 38 Wis. 391 (compulsory nonsuit; error to refuse); *Jackson v. Jacksonport*, 56 Wis. 310, 14 N. W. 296 (direction of a verdict proper when evidence, considered as undisputed, and aided by most favorable legitimate inferences, is sufficient to support a verdict). *Abbott, Civ. Jur. T.—38.*

mate construction and all reasonable inferences, would not justify a contrary verdict); *Wickham v. Chicago & N. W. R. Co.* 95 Wis. 23, 69 N. W. 982 (direction of verdict).

Wyoming—*Mulhern v. Union P. R. Co.* 2 Wyo. 465 (compulsory nonsuit cannot be ordered).

See further on this question, notes to *People v. People's Ins. Exchange*, 2 L.R.A. 340, and *Grube v. Missouri P. R. Co.* 4 L.R.A. 776.

3. Test of the right to go to jury.

The general test as to the propriety of refusing to submit a point to the jury is whether their verdict on the point, if against the moving party, must be set aside as contrary to or against the weight of evidence.¹

¹ United States courts—*Pleasants v. Fant*, 22 Wall. 116, 121, 22 L. ed. 780, 782; *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. ed. 855; *Herbert v. Butler*, 97 U. S. 319, 24 L. ed. 958; *Bowditch v. Boston*, 101 U. S. 16, 25 L. ed. 980; *Griggs v. Houston*, 104 U. S. 553, 26 L. ed. 840; *Phœnix Mut. Ins. Co. v. Doster*, 106 U. S. 30, 27 L. ed. 65, 1 Sup. Ct. Rep. 18; *Montclair v. Dana*, 107 U. S. 162, 27 L. ed. 436, 2 Sup. Ct. Rep. 403; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Adams v. Spangler*, 5 McCrary, 334, 17 Fed. 133; *Connecticut Mut. L. Ins. Co. v. Lathrop*, 111 U. S. 612, 28 L. ed. 536, 4 Sup. Ct. Rep. 533; *Elliott v. Chicago, M. & St. P. R. Co.* 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85; *Bagley v. Cleeland Rolling Mill Co.* 22 Blatchf, 342, 21 Fed. 159; *Hathaway v. East Tennessee, V. & G. R. Co.* 29 Fed. 489 (where it is held to be the duty of the court to direct a verdict for the plaintiff if a verdict for the defendant would be set aside as contrary to evidence); *Proffatt, Jury Trial*, § 354, and cases cited; *St. Louis & S. F. R. Co. v. Whittle*, 20 C. C. A. 196, 40 U. S. App. 23, 74 Fed. 296 (where it is held that no court is required to take the chances of a verdict being rendered which, if rendered, it would deem itself bound to set aside as wholly unsupported by evidence); *McPeck v. Central Vermont R. Co.* 25 C. C. A. 110, 50 U. S. App. 27, 79 Fed. 590, and cases cited. But *Mt. Adams & E. P. Inclined R. Co. v. Lowery*, 20 C. C. A. 596, 43 U. S. App. 408, 74 Fed. 463, draws a distinction between the legal discretion of the court to set aside a verdict as against the evidence and the duty of the court to withdraw a case from the jury, or direct a verdict, for insufficiency of evidence, and holds that the test stated in the text is not the proper one, but that to support a refusal to submit a point to the jury the evidence must be so insufficient in fact as to be insufficient in law, amounting to an absence of any material and substantial evidence which, if credited by the jury, would in law justify a verdict for the other party, and that it is the judge's duty on a motion to direct a verdict to take that view of the evidence most favorable to

the party against whom it is moved to find, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not under the law a verdict might be found for the party having the onus; but that it certainly is not his function to weigh the evidence for the purpose of saying how the verdict should go, as it is on a motion for a new trial. See also *Vany v. Peirce*, 26 C. C. A. 521, 54 U. S. App. 196, 82 Fed. 162.

Arizona—*Root v. Fay*, 5 Ariz. 19, 43 Pac. 527.

California—*Los Angeles Farming & Mill. Co. v. Thompson*, 117 Cal. 594, 49 Pac. 714; *Dalrymple v. Hanson*, 1 Cal. 125; *Ensminger v. McIntire*, 23 Cal. 593, 594.

Colorado—*Chivington v. Colorado Springs Co.* 9 Colo. 597, 14 Pac. 212.

Connecticut—The test would seem to be the same in Connecticut. Compare *Booth v. Hart*, 43 Conn. 480, 484, with *Osborne v. Bradley*, 46 Conn. 465, 466. According to *Cook v. Morris*, 66 Conn. 196, 33 Atl. 994, a motion for a nonsuit cannot be permitted to operate as a motion to set aside the verdict as against the evidence, though the court may set aside a verdict rendered upon the same evidence upon which it has already refused to grant a nonsuit.

Dakota—Territory *v. Stone*, 2 Dak. 155, 4 N. W. 697.

District of Columbia—*Somerville v. Knights Templars & M. Life Indemnity Co.* 11 App. D. C. 417, and cases cited. But according to *Warthen v. Hammond*, 5 App. D. C. 167, where there is testimony of a substantial character to go to the jury, it is always for the jury to determine the question of the preponderance of evidence, subject to the devisory power of the court to order a retrial.

Florida—*C. B. Rogers Co. v. Meinhardt*, 37 Fla. 480, 19 So. 878.

Georgia—*Burnam v. DeVaughn*, 65 Ga. 309; *Zettler v. Atlanta*, 66 Ga. 195.

Illinois—*Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651, and cases cited.

Indian Territory—*Chicago, R. I. & P. R. Co. v. Driggers*, 1 Ind. Terr. 412, 45 S. W. 124, and cases cited.

Indiana—*Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Wolfe v. McMillan*, 117 Ind. 587, 20 N. E. 509.

Iowa—*Meyer v. Houck*, 85 Iowa, 319, 52 N. W. 235. And see *Guthrie v. Dubuque*, 105 Iowa, 653, 75 N. W. 500 (where it is held that a motion for the direction of a verdict by the party having the burden should be denied unless, considering all the evidence, it clearly would be the duty of the court to set aside a verdict for the other party); *Hurd v. Neilson*, 100 Iowa, 555, 69 N. W. 867.

Kansas—This does not seem to be the test in Kansas. But according to *Brown v. Atchison, T. & S. F. R. Co.* 31 Kan. 1, 1 Pac. 605, the rule of practice is, that the trial court in order to withdraw the case from the jury must be able to say that, admitting every fact that is proved.

which is favorable to the party having the burden, and admitting every fact that the jury might fairly and legally infer from the evidence favorable to the party having the burden, still he has utterly failed to establish some one or more of the material elements essential to a recovery by him. See also *St. Louis & S. F. R. Co. v. Tooney*, 6 Kan. App. 410, 49 Pac. 819. And *Sullivan v. Phenix Ins. Co.* 34 Kan. 170, 8 Pac. 112, expressly repudiated the test laid down above, and follows the rule in the *Brown Case*. But see *Emerson v. Thatcher*, 6 Kan. App. 325, 51 Pac. 50, where it was held that a verdict was properly directed on undisputed evidence of one party entitling him to a recovery, although the other party had adduced some evidence in his own behalf, and that a refusal to direct a verdict would have been error; the court saying that had the trial court submitted the case to the jury, and had the jury returned a verdict other than that directed, it would have been the duty of the court to have set aside the verdict and granted a new trial.

Kentucky—This is not the test in Kentucky. *Buford v. Louisville & N. R. Co.* 82 Ky. 286; *Thompson v. Thompson*, 17 B. Mon. 28.

Maine—*Brown v. European & N. A. R. Co.* 58 Me. 384; *Heath v. Jaquith*, 68 Me. 433, 436; *Bennett v. Talbot*, 90 Me. 229, 38 Atl. 112. Compare, however, *Union State Co. v. Tilton*, 69 Me. 244.

Maryland—This seems to be substantially what the Maryland court means when it says that a case must go to the jury where there is evidence which, if believed, is legally sufficient to sustain a verdict for either party. See *State use of Steever v. Union R. Co.* 70 Md. 69, 18 Atl. 1032; *Baltimore City Pass. R. Co. v. Cooney*, 87 Md. 261, 39 Atl. 859.

Massachusetts—In Massachusetts, the rule as laid down in *Denny v. Williams*, 5 Allen, 1, and apparently approved in *Brooks v. Somerville*, 106 Mass. 271, 275, is that "if the evidence is such that the court would set aside any number of verdicts rendered upon it, *toties quoties*, then the cause should be taken from the jury, by instructing them to find a verdict for the defendant. On the other hand, if the evidence is such that though one or two verdicts rendered upon it would be set aside upon motion, yet a second or third verdict would be suffered to stand, the cause should not be taken from the jury, but should be submitted to them under proper instructions." See also *Rainger v. Boston Mut. Life Asso.* 167 Mass. 109, 44 N. E. 1088.

Minnesota—*Giermann v. St. Paul, M. & M. R. Co.* 42 Minn. 5, 43 N. W. 483, and cases cited; *Thompson v. Pioneer-Press Co.* 37 Minn. 285, 43 N. W. 856.

Mississippi—*Chicago, St. L. & N. O. R. Co. v. Doyle*, 60 Miss. 977; *Smith v. Fonda*, 64 Miss. 551, 1 So. 757.

Missouri—*Morgan v. Durfee*, 69 Mo. 469, 33 Am. Rep. 508; *Hite v. Metropolitan Street R. Co.* 130 Mo. 140, 32 S. W. 33; *Adams County Bank v. Hainline*, 67 Mo. App. 483 (holding that a case should not be submit-

ted where the verdict would not be allowed to stand if rendered against the evidence, although there is a mere scintilla of evidence).

Montana—*Garver v. Lynde*, 7 Mont. 108, 14 Pac. 697 nonsuit should be granted if, in view of all the evidence introduced by plaintiff, the court would grant a new trial if the jury should bring in a verdict in his favor.

Nebraska—*Atchison & N. R. Co. v. Loree*, 4 Neb. 446; *Reynolds v. Burlington & M. R. Co.* 11 Neb. 186, 7 N. W. 737; *Knapp v. Jones*, 50 Neb. 490, 70 N. W. 19, and cases cited.

New Hampshire—*Brown v. Massachusetts Mut. L. Ins. Co.* 59 N. H. 298, 47 Am. Rep. 205 (where it is also said that in applying the test it does not seem to be material whether the motion (for a nonsuit) is made at the close of the plaintiff's case, or whether it is delayed till all the evidence is in).

New Jersey—*Aycrigg v. New York & E. R. Co.* 30 N. J. L. 460; *Baldwin v. Shannon*, 43 N. J. L. 596; *American Saw Co. v. First Nat. Bank*, 60 N. J. L. 417, 38 Atl. 662 (where it is held that the test is whether the evidence is such that the court would set aside any number of verdicts rendered against it).

New Mexico—*Lutz v. Atlantic & P. R. Co.* 6 N. M. 496, 16 L.R.A. 819, 30 Pac. 912.

New York—*Cagger v. Lansing*, 64 N. Y. 417, affirming 4 Hun, 812; *Corning v. Troy Iron & Nail Factory*, 44 N. Y. 577, 594; *Neuendorff v. World Mut. L. Ins. Co.* 69 N. Y. 389; *Burt v. Smith*, 83 N. Y. 606 (no opinion); *Fish v. Davis*, 62 Barb. 122; *Wombough v. Cooper*, 2 Hun, 428, 4 Thomp. & C. 586; *Hemmens v. Nelson*, 138 N. Y. 517, 20 L.R.A. 440, 34 N. E. 342. And a case of negligence forms no exception to the rule. *Wilds v. Hudson River R. Co.* 24 N. Y. 430. But see *Bagley v. Bowe*, 105 N. Y. 171, 11 N. E. 386, and *Luhrs v. Brooklyn Heights R. Co.* 11 App. Div. 173, 42 N. Y. Supp. 606, 13 App. Div. 126, 42 N. Y. Supp. 1101 (where it is held that the court cannot withdraw from the jury the ultimate decision of a fact unless the fact is either uncontradicted or the contradiction is illusory, or where the answering evidence is a scintilla merely).

North Dakota—This is the rule, it seems, in North Dakota. See *Pirie v. Gillitt*, 2 N. D. 255, 50 N. W. 710 (where it is held that a verdict can be directed against a party only where his testimony, considered as undisputed, and given the most favorable construction for him, together with all reasonable inferences therefrom, cannot legally sustain a verdict in his favor).

Oregon—*Grant v. Baker*, 12 Or. 329, 7 Pac. 318.

Pennsylvania—*Hyatt v. Johnston*, 91 Pa. 196; *McEwen v. Hoopes*, 175 Pa. 237, 34 Atl. 623.

South Dakota—*McKeever v. Homestake Min. Co.* 10 S. D. 599, 74 N. W. 1053.

Texas—International & G. N. R. Co. v. Hall, 12 Tex. Civ. App. 11, 33 S. W. 127. According to Joske v. Irvine, 91 Tex. 574, 44 S. W. 1059, the case should not be submitted, though there be slight testimony, if its probative force be so weak that it only raises a mere surmise or suspicion of the existence of the fact sought to be established, such testimony in legal contemplation falling short of being any evidence; and the court must determine whether the testimony has more than that degree of probative force.

Utah—Bowers v. Union P. R. Co. 4 Utah, 215, 7 Pac. 251.

Virginia—Deaton v. Taylor, 90 Va. 219, 17 S. E. 944.

Washington—Starr v. Chilberg, 15 Wash. 700, 47 Pac. 10.

Wisconsin—Hunter v. Warner, 1 Wis. 141; Spensley v. Lancashire Ins. Co. 54 Wis. 433, 11 N. W. 894; Jackson v. Jacksonport, 56 Wis. 310, 14 N. W. 296.

B. MODE OF APPLYING TO TAKE THE CASE FROM THE JURY.

4. Defendant's motion.

a. *When*.—Neither a nonsuit,¹ nor a direction of a verdict² for the defendant, nor a demurrer to evidence,³ is proper before the plaintiff has closed his case.⁴

But a motion to dismiss for insufficiency of the complaint may be made at any stage of the case⁵ before evidence of the necessary facts omitted to be alleged has been received without specific objection.⁶

¹ Walker v. Supple, 54 Ga. 178; Bastian v. Philadelphia, 180 Pa. 227, 36 Atl. 746; Nixon v. Brown, 4 Blackf. 158.

² Miller v. House, 63 Iowa, 82, 18 N. W. 708. Regularly the motion should be made at the close of plaintiff's case, and if it was proper at that time it may be renewed after all the evidence is in, provided the defendant has added nothing to the plaintiff's evidence. Bunnell v. Rosenberg, 126 Ill. App. 196.

According to Stern v. Frommer, 10 Misc. 219, 30 N. Y. Supp. 1067, direction of a verdict for the defendant at the close of plaintiff's case is improper; the most that can be done is to enter a nonsuit.

If the defendant introduces evidence in his own behalf after the denial of a motion to direct a verdict at the close of the plaintiff's case, he thereby waives the motion. Fidelity & C. Co. v. Thompson, 11 L.R.A. (N.S.) 1069, 83 C. C. A. 324, 154 Fed. 484, 12 A. & E. Ann. Cas. 181; School Dist. No. 11 v. Chapman, 82 C. C. A. 35, 152 Fed. 887.

³ Proprietary v. Ralston, 1 Dall. 18, 1 L. ed. 18.

⁴ Not even where he has made a *prima facie* case against himself, if by evi-

dence not conclusive against contradiction by him. *Miller v. House*, 63 Iowa, 82, 18 N. W. 708.

And especially where the evidence so far as presented discloses a question of fact, and part of the claim in suit is admitted by defendant's answer. *Hansen v. Burt*, 10 Misc. 235, 30 N. Y. Supp. 1061.

So, too, it is error to nonsuit at the close of the defendant's case without giving the plaintiff an opportunity to rebut or contradict defendant's evidence. *Metzger v. Herman*, 12 N. Y. Week. Dig. 181.

But the court may dismiss the complaint without hearing defendant's evidence, upon being satisfied, at the close of plaintiff's case in an action tried without a jury, that plaintiff cannot recover. *Neuberger v. Keim*, 134 N. Y. 35, 31 N. E. 268.

In Michigan the defendant must announce that he rests his case before he can insist that the court should rule upon a question of sufficiency of plaintiff's testimony to establish his case; until the defendant has so rested, the trial court has the right and discretion to refuse to direct the verdict in favor of defendant. *Hinchman v. Weeks*, 85 Mich. 535, 48 N. W. 790; *Morley v. Liverpool & L. & G. Ins. Co.* 85 Mich. 210, 48 N. W. 502. And it is error to direct a verdict for defendant where plaintiff states, while the case is still in the hands of the defense, that he desires to offer further material testimony. *Field v. Clippert*, 78 Mich. 26, 43 N. W. 1084.

Motion may be made at the close of plaintiff's case, but, if denied, the objection is waived if the defendant afterwards introduces evidence. *Grooms v. Neff Harness Co.* 79 Ark. 401, 96 S. W. 135; *Hanson v. Kline*, 136 Iowa, 101, 113 N. W. 504; *Pease v. Magill*, 17 N. D. 166, 115 N. W. 260; *Slye v. Guerdum*, 29 App. D. C. 550; *San Antonio Traction Co. v. Kelleher*, 48 Tex. Civ. App. 421, 107 S. W. 64.

⁵ *Scofield v. Whitelegge*, 49 N. Y. 259, 12 Abb. Pr. N. S. 320, affirming 10 Abb. Pr. N. S. 104. And see ante, chapter, iv. Motions on the Pleadings, §§ 1 et seq.

⁶ *Reck v. Phoenix Ins. Co.* 3 N. Y. Civ. Proc. Rep. 376, 379.

b. After strict cross-examination.—The case may be taken from the jury after plaintiff's evidence is closed, although defendant has cross-examined plaintiff's witnesses, if not going beyond strict cross-examination.¹

¹ *Eastman v. Howard*, 30 Me. 58, 50 Am. Dec. 611 (where the qualification above stated is not expressed, but implied).

The fact that defendant had set up a counterclaim will not defeat his motion. *Slocum v. Minneapolis Miller's Asso.* 33 Minn. 438, 23 N. W. 862.

c. After full cross-examination.—A defendant who has carried his examination of plaintiff's witnesses beyond the limits of a strict cross-examination, and brought out affirmative evidence properly part of his own case, cannot move for a nonsuit, etc., until plaintiff has had an opportunity of rebuttal.¹

¹ Wallingford v. Columbia & G. R. Co, 26 S. C. 258, 2 S. E. 19. This rule necessarily results from the nature and limits of the right to nonsuit. Otherwise, according to Hogelev. Wilson, 5 Wash. 160, 31 Pac. 469, where the cross-examination is only of an expert introduced by plaintiff, though matter is brought out tending to establish an affirmative defense.

d. After final close of case.—The case may be taken from the jury on the whole evidence, including defendant's, after plaintiff's rebuttal.¹

¹ Lomer v. Meeker, 25 N. Y. 361; Brown v. Massachusetts Mut. L. Ins. Co. 59 N. H. 298, 47 Am. Rep. 205; Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146; Gandy v. Orient Ins. Co. 52 S. C. 224, 29 S. E. 655 (nonsuit).

And the judge may do this notwithstanding he had denied defendant's motion for a nonsuit at the close of plaintiff's case. Fitch v. Hassler, 54 N. Y. 677.

And so, even at the close of plaintiff's case, where defendant, as a witness for plaintiff, testified fully as to the matters in controversy, and plaintiff did not ask leave to introduce rebuttal evidence. Doyle v. Reid, 33 App. Div. 631, 53 N. Y. Supp. 365.

In Alabama, a general affirmative charge at the close of all the evidence is properly granted only in cases where a demurrer to his adversary's evidence by the party requesting the charge could have properly been sustained. Central R. & Bkg. Co. v. Roquemore, 96 Ala. 236, 11 So. 475.

The cases do not clearly indicate plaintiff's right to be heard in rebuttal (if defendant has given evidence in his own behalf, beyond strict cross-examination) before he can be nonsuited on defendant's evidence with his own, but the right is clear. Metzger v. Herman, 12 N. Y. Week. Dig. 181. And see Gandy v. Orient Ins. Co. 52 S. C. 224, 29 S. E. 655.

But a defendant who has refused to answer or plead after his demurrer to the complaint has been overruled, is not, after the evidence on the question of damages is closed, entitled to move for a nonsuit on the merits of the case. Howe v. People, 7 Colo. App. 535, 44 Pac. 512.

And the legal question whether there has been a failure of proof, so that the court should order a particular verdict, must be raised before the argument and submission of the case to the jury. Franklin v. Krum. 171 Ill. 378, 49 N. E. 513.

e. Several codefendants.—One of several codefendants may move for a withdrawal of the case from the jury, by nonsuit or direction of verdict, or otherwise as is proper, as to himself only.¹

¹ Kirk v. Garrett, 84 Md. 383, 35 Atl. 1089; Hunter v. Hauptner, 63 N. Y. S. R. 872, 30 N. Y. Supp. 1132 (dismissal of complaint.)

So held even where another had defaulted; otherwise at common law. Lomer v. Meeker, 25 N. Y. 361, and cases cited.

Not so, however, as to one of several defendants sued jointly, where his liability is shown by the proofs to be several. Hewitt v. Maize, 5 Idaho, 633, 51 Pac. 607.

Such a motion made by all is not available to one of the defendants, as to whom a separate motion might have been entertained. Marks v. Hastings, 101 Ala. 165, 13 So. 297.

A motion to direct a verdict for plaintiff against all of the defendants is properly denied if plaintiff is not, as a matter of law, entitled, on the evidence, to a verdict against all the defendants. First Nat. Bank v. Holan, 63 Minn. 525, 65 N. W. 952.

If the plaintiff is entitled to have the case submitted as to one defendant, the court cannot direct a verdict for all of them. Aygarn v. Blue, 118 Ill. App. 393.

f. Several coplaintiffs.—A nonsuit may be granted as to one of several coplaintiffs;¹ but it is error to grant it at all, for misjoinder of an unnecessary plaintiff.² So, also, a nonsuit should not be granted for defect of parties plaintiff.³

¹ Simar v. Canaday, 53 N. Y. 298, 13 Am. Rep. 523. Otherwise at common law.

² Simar v. Canaday, 53 N. Y. 298, 13 Am. Rep. 523. Otherwise at common law. Fuller v. Fuller, 5 Hun, 595 (nonsuit refused though a joint action was brought on a several interest).

³ As where the contract in a suit was with a copartnership and the suit was by only one of the partners. Williams v. Southern P. R. Co. 110 Cal. 457, 42 Pac. 974. "The absence as parties of some of the partners from a complaint by one or more of them on a partnership demand does not, speaking strictly, affect the merits, and in order to be considered must be pleaded by the defendant."

g. Variance; several causes of action.—The fact that plaintiff has proved a cause of action not alleged in his complaint does not prevent the granting of a nonsuit for an entire failure to

prove the cause which was alleged,¹ unless the evidence was received without objection, and was pertinent solely to the cause of action proved.²

¹ Southwick v. First Nat. Bank, 84 N. Y. 420; Elmore v. Elmore, 114 Cal. 516, 46 Pac. 458 (where a motion for a nonsuit at the close of plaintiff's evidence was held the proper method in which to raise a question of variance between the complaint and plaintiff's evidence); Cook v. Walley, 1 Colo. App. 163, 27 Pac. 950; Shomo v. Ransom, 92 Ga. 97, 18 S. E. 534; Wisconsin C. R. Co. v. Wiczorek, 151 Ill. 579, 38 N. E. 678 (where motion for directed verdict was overruled, and leave to amend granted, but no amendment filed; refusal to direct verdict held error); Anthony v. Wheeler, 130 Ill. 128, 22 N. E. 494.

If the direction of a verdict is sought on the ground of variance, the points of variance should be specifically stated. Illinois C. R. Co. v. Behrens, 208 Ill. 20, 69 N. E. 796; Zellers v. White, 208 Ill. 518, 100 Am. St. Rep. 243, 70 N. E. 669.

Evidence must be pertinent to the allegations of the pleading. Kelly v. Malone, 5 Ga. App. 618, 63 S. E. 639.

Plaintiff cannot recover on a cause of action different from that alleged. Seebach v. Kuhn, 9 Cal. App. 485, 99 Pac. 723; Atlantic Coast Line R. Co. v. Caple, 110 Va. 514, 66 S. E. 855; Griswold v. Haas, 145 Mo. App. 578, 122 S. W. 781.

Plaintiff cannot recover on a substantial variance between the pleadings and the proof. Cockins v. Bank of Alma, 84 Neb. 624, 133 Am. St. Rep. 642, 122 N. W. 16; Gilman v. Ferguson, 116 Ill. App. 347.

And according to Gallaudet v. Kellogg, 133 N. Y. 671, 31 N. E. 337, a complaint should be dismissed, and not a verdict ordered, where there is a material variance between the complaint and proofs. Fiorito v. Interurban Street R. Co. 48 Misc. 614, 95 N. Y. Supp. 528.

So nonsuit was held to have been properly granted, in the absence of a motion to change the narr., in Case v. Central R. Co. 59 N. J. L. 471, 37 Atl. 65.

Otherwise, where the facts whose omission from the complaint constitutes the variance are stated in the answer. Hamilton v. Great Falls Street R. Co. 17 Mont. 334, 42 Pac. 860, 43 Pac. 713. Or in the reply, Walter A. Wood Mowing & Reaping Mach. Co. v. Bobbst, 56 Mo. App. 427.

Or where both causes of action are alleged, though the evidence be pertinent to and sustains only one. Levy v. Harris, 29 App. Div. 453, 51 N. Y. Supp. 953. Especially if defendant has not moved to compel plaintiff to elect on which cause of action he will rely. Purcell v. St. Paul F. & M. Ins. Co. 5 N. D. 100, 64 N. W. 943.

² New York Cent. Ins. Co. v. National Protection Ins. Co. 14 N. Y. 85; Johnson v. Spear, 82 Mich. 453, 46 N. W. 733.

And evidence relevant and pertinent to the issues made by the pleadings is

not available to support a defense not pleaded, so as to require the court to direct a verdict for defendant thereon because it is not contradicted. *Elmer v. Mutual Ben. Life Asso.* 64 Hun, 639, 19 N. Y. Supp. 289.

But a complaint is properly dismissed where evidence establishing a complete defense is admitted without objection, although such defense was not pleaded. *Drennan v. Boice*, 19 Misc. 641, 44 N. Y. Supp. 394.

h. Plaintiff's course to defeat motion.—A motion for a nonsuit, or to direct a verdict, or a demurrer to evidence, though interposed on a sufficient ground, may be defeated by the exercise of the common-law right of submitting to a voluntary nonsuit,¹ or by getting leave of the judge to withdraw a juror,² or to reopen the case and give further evidence.³

¹ *Harris v. Beam*, 46 Iowa, 118; *Pleasants v. Fant*, 22 Wall. 116, 123, 22 L. ed. 780, 783; *Pescud v. Hawkins*, 71 N. C. 299; *Mayer v. Old*, 51 Mo. App. 214 (error to refuse permission to do so). Contra, if defendant has set up his answer and counterclaim for substantive relief. *Wilkins v. Suttles*, 114 N. C. 550, 19 S. E. 606.

But not by asking to discontinue when the cause is called and without giving evidence. *Duncan v. DeWitt*, 7 Hun, 184.

But if plaintiff refuses to avail himself of an offered opportunity to dismiss or take a nonsuit, he cannot complain that the court then directs a verdict for defendant. *Thompson v. Etowah Iron Co.* 91 Ga. 538, 17 S. E. 663.

In some states voluntary nonsuit is discretionary with the court. See pages 360–364 of this brief.

² *Van Syckels v. Perry*, 3 Robt. 621. This application is discretionary.

³ *Hunt v. Maybee*, 7 N. Y. 266, 273; *May v. Hanson*, 5 Cal. 360; *Abbey Homestead Asso. v. Willard*, 48 Cal. 614; *Wadsworth v. Thompson*, 18 Ga. 709; *McColgan v. McKay*, 25 Ga. 631; *Larman v. Huey*, 13 B. Mon. 436.

This application is discretionary. *Hunt v. Maybee*, 7 N. Y. 266; *Reed v. Barber*, 3 N. Y. Code Rep. 160.

But a refusal to exercise discretion is error. *Lewis v. Ryder*, 13 Abb. Pr. 1.

5. Plaintiff's motion for a verdict.

Where the question, after defendant's case is closed, is in like manner entirely one of law, the judge may direct a verdict for the plaintiff.¹

¹ *Anderson County Comrs. v. Beal*, 113 U. S. 227, 241, 28 L. ed. 966, 971, 5 Sup. Ct. Rep. 433, and cases cited. *People v. Cook*, 8 N. Y. 67, 75, 59

Am. Dec. 451; Bemis v. Woodworth, 49 Iowa, 340; and Union P. R. Co. v. McDonald, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619,—are actions for personal injuries in which the undisputed facts showed defendant's negligence, whereupon the court so instructed the jury, leaving to them only the question of damages; Harris v. Louisville. N. O. & T. R. Co. 35 Fed. 121; Terry v. Mutual L. Ins. Co. 116 Ala. 242, 22 So. 532; Los Angeles Farming & Mill. Co. v. Thompson, 117 Cal. 594, 49 Pac. 714; Pendleton v. Smissaert, 1 Colo. App. 508, 29 Pac. 521; Wilson Coal & Lumber Co. v. Hall & B. Woodworking Mach. Co. 97 Ga. 330, 22 S. E. 530; Kinser v. Calumet Fire Clay Co. 165 Ill. 505, 46 N. E. 372; Hartman Steel Co. v. Hoag, 104 Iowa, 269, 73 N. W. 611; Hillis v. First Nat. Bank, 54 Kan. 421, 38 Pac. 565; Moffett v. Hampton, 17 Ky. L. Rep. 534, 31 S. W. 881; Woodstock v. Canton, 91 Me. 62, 39 Atl. 218; Farnum v. Pitcher, 151 Mass. 470, 24 N. E. 590; Webber v. Turner, 94 Mich. 589, 54 N. W. 300 (error to not do so in proper case); Western Mfg. Co. v. Rogers, 54 Neb. 456, 74 N. W. 849; American Saw Co. v. First Nat. Bank, 60 N. J. L. 417, 38 Atl. 662 (error to refuse in proper case); Parker v. McLean, 134 N. Y. 255, 32 N. E. 73; Purcell v. St. Paul F. & M. Ins. Co. 5 N. D. 100, 64 N. W. 943; Davis v. Huggins, 179 Pa. 508, 36 Atl. 318; Yankton F. Ins. Co. v. Fremont, E. & M. Valley R. Co. 7 S. D. 428, 64 N. W. 514; Clancy v. Reis, 5 Wash. 371, 31 Pac. 971. See also note to Grube v. Missouri P. R. Co. 4 L.R.A. 777.

So held, notwithstanding his prior motion to direct a verdict was refused on the ground that his evidence was insufficient, where additional evidence fully justifying such direction is introduced after the first ruling. Ward v. Dickson, 96 Iowa, 708, 65 N. W. 997.

The motion cannot be granted before defendant's case is closed. Kingsford v. Hood, 105 Mass. 495. See also Louisville & N. R. Co. v. Kirby, 19 Ky. L. Rep. 1383, 43 S. W. 441 (sustaining refusal of peremptory instruction asked at the close of defendant's testimony, who had the burden of proof, and before plaintiff had offered any evidence).

In Missouri, it seems, a peremptory instruction to find for plaintiff is improper, even though there be no conflict in the testimony. Compare Huston v. Tyler, 140 Mo. 252, 36 S. W. 654, 41 S. W. 795; Wolff v. Campbell, 110 Mo. 114, 19 S. W. 622; Gregory v. Chambers, 78 Mo. 294; Vaulx v. Campbell, 8 Mo. 224; Bryan v. Wear, 4 Mo. 106; National Brewery Co. v. Lindsay, 72 Mo. App. 591.

In North Carolina, if the plaintiff, or the party who has the burden of proof, has offered no evidence to prove the issue or no such evidence as the jury ought to find a verdict upon (as in Wittkowsky v. Wasson, 71 N. C. 451), the court should say so, and direct a finding in the negative. But no matter how strong and uncontradictory the evidence is in support of the issue the court cannot withdraw the issue from the jury and direct an affirmative finding. This is prohibited by the Code (§ 413). If there is no evidence to support the negative, and the evidence, if true, establishes the affirmative, of the issue, the

court may instruct the jury that if they believe the evidence they may find an affirmative. *Anniston Nat. Bank v. Durham School Committee*, 121 N. C. 107, 28 S. E. 134, and cases cited. But see *Harmon v. Hunt*, 116 N. C. 678, 21 S. E. 559 (where it was held to be the duty of the court to find for plaintiff where defendant admitted the cause of action, and offered no defense).

Motion should specify grounds. *Smalley v. Rio Grande Western R. Co.* 34 Utah, 423, 98 Pac. 311; *Hanson v. Lindstrom*, 15 N. D. 584, 108 N. W. 798; *Howie v. Bratrud*, 14 S. D. 648, 86 N. W. 747.

6. Motion by both parties for a verdict.

As to the effect of a motion for verdict by both parties, there is some conflict among the decisions, but the weight of authority seems to hold that where both parties request a peremptory instruction and do nothing more, they thereby assume the facts to be undisputed, and in effect submit to the trial judge the determination of the inferences proper to be drawn from them.¹

But a party who has requested a peremptory instruction may, upon refusal of the court to give it, insist, by appropriate requests, upon the submission of the case to the jury, where the evidence is conflicting, or the inferences to be drawn from the testimony are divergent.²

¹ *Beuttell v. Magone*, 157 U. S. 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 566; *Bradley Timber Co. v. White*, 58 C. C. A. 55, 121 Fed. 779; *West v. Roberts*, 68 C. C. A. 58, 135 Fed. 350; *Insurance Co. N. A. v. Wisconsin C. R. Co.* 67 C. C. A. 300, 134 Fed. 794; *Northam v. International Ins. Co.* 165 N. Y. 666, 59 N. E. 1127; *Trimble v. New York C. & H. R. Co.* 162 N. Y. 84, 48 L.R.A. 115, 56 N. E. 532; *New England Mortg. Secur. Co. v. Great Western Elevator Co.* 6 N. D. 407, 71 N. W. 130; *Bank of Park River v. Norton*, 12 N. D. 497, 97 N. W. 860; *Duncan v. Great Northern R. Co.* 17 N. D. 610, 19 L.R.A. (N.S.) 952, 118 N. W. 826; *Snow v. Modern Woodmen*, 24 Ohio C. C. 142; *Gilligan v. Supreme Council*, R. A. 26 Ohio C. C. 42; *First Nat. Bank v. Hayes*, 64 Ohio St. 100, 59 N. E. 893; *Patty v. Salem Flouring Mills Co.* 53 Or. 350, 96 Pac. 1106, 98 Pac. 521, 100 Pac. 298; *Sundling v. Willey*, 19 S. D. 293, 103 N. W. 38, 9 A. & E. Ann. Cas. 644; *McComb v. Baskerville*, 20 S. D. 353, 106 N. W. 300.

Contra: *Wolf v. Chicago Sign Printing Co.* 233 Ill. 501, 84 N. E. 614, 13 A. & E. Ann. Cas. 369 (reversing 135 Ill. App. 366); *German Sav. Bank v. Bates Addition Improv. Co.* 111 Iowa, 432, 82 N. W. 1015; *Stauff v. Bingenheimer*, 94 Minn. 309, 102 N. W. 694; *Thompson v. Brennan*, 104 Wis. 564, 80 N. W. 947 (expressly disapproving New York cases).

- ² *Empire State Cattle Co. v. Atchison*, T. & S. F. R. Co. 210 U. S. 1, 50 L. ed. 931, 28 Sup. Ct. Rep. 607, 15 A. & E. Ann. Cas. 70; *Minahan v. Grand Trunk Western R. Co.* 70 C. C. A. 463, 138 Fed. 37; *McCormick v. National City Bank*, 73 C. C. A. 350, 142 Fed. 132, 6 A. & E. Ann. Cas. 544; *Kirtz v. Peck*, 113 N. Y. 226, 21 N. E. 130; *Sutter v. Vandever*, 122 N. Y. 652, 25 N. E. 907; *First Nat. Bank v. Hayes*, 64 Ohio St. 100, 59 N. E. 893; *Strohm v. Zoellner*, 61 Misc. 56, 112 N. Y. Supp. 1063.

C. RULES OF DECISION.

7. Contents of pleading to be considered together.

Where admissions in a pleading are relied on as ground for taking the case from the jury, all the connected admissions and allegations must be taken together. It is not proper to direct a verdict if the effect of admissions is qualified by allegations on which defendant has a right to go to the jury.¹

- ¹ *Goodyear v. De La Vergne*, 10 Hun, 537.

8. General rule as to assuming truth of adversary's evidence.

On an application to take the case from the jury, whether by motion for a nonsuit,¹ or a direction of a verdict,² or by demurrer to evidence,³ the evidence of the opposite party must be assumed to be true, and he is to be given the benefit of all legitimate inferences therefrom in his favor.

- ¹ *Fairfax v. New York C. & H. R. R. Co.* 8 Jones & S. 128, reversed in 67 N. Y. 11, on other grounds; *Myers v. Dixon*, 45 How. Pr. 48, 3 Jones & S. 390; *Cook v. New York C. R. Co.* 1 Abb. App. Dec. 432; *Maynes v. Atwater*, 88 Pa. 496; *Walker v. Supple*, 54 Ga. 178, 180; *Frost v. Gibson*, 59 Ga. 600, 602; *Smyth v. Craig*, 3 Watts & S. 14; *Bevan v. Insurance Co.* 9 Watts & S. 187; *Morse v. Granite County Comrs.* 19 Mont. 450, 48 Pac. 745; *Wallace v. Suburban R. Co.* 26 Or. 174, 25 L.R.A. 663, 37 Pac. 447; *Bastian v. Philadelphia*, 180 Pa. 227, 36 Atl. 746; *Goldstone v. Merchants' Ice & Cold Storage Co.* 123 Cal. 625, 56 Pac. 776.

- ² *Parks v. Ross*, 11 How. 373, 13 L. ed. 735; *Purcell v. English*, 86 Ind. 34; *Pratt v. Stone*, 10 Ill. App. 633; *Bishops v. M'Nary*, 2 B. Mon. 132, 36 Am. Dec. 592; *Gallatin v. Bradford*, 1 Bibb, 209; s. p. *Stone v. Chicago & N. W. R. Co.* 47 Iowa, 82; *Henderson v. Chicago, B. & Q. R. Co.* 73 Ill. App. 57, and cases cited; *Meyer v. Houck*, 85 Iowa, 319, 52 N. W. 235; *Baltimore City Pass. R. Co. v. Cooney*, 87 Md. 261, 39 Atl. 859; *Pirie v. Gillitt*, 2 N. D. 255, 50 N. W. 710; *Snell v. Consolidated*

Street R. Co. 9 Ohio C. C. 348, 6 Ohio C. D. 346; *Marshall v. Harney Peak Tin Min. Mill. & Mfg. Co.* 1 S. D. 350, 47 N. W. 290; *Walcott v. Metropolitan L. Ins. Co.* 64 Vt. 221, 24 Atl. 992.

- ⁸ *Christie v. Barnes*, 33 Kan. 317, 6 Pac. 599, and cases cited; *Miller v. Chicago, M. & St. P. R. Co.* 41 Fed. 898; *Gluck v. Cox*, 90 Ala. 331, 8 So. 161 (Code, § 2747); *Wilkinson v. Pensacola & A. R. Co.* 35 Fla. 82, 17 So. 71; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843; *Friend v. Miller*, 52 Kan. 139, 34 Pac. 397; *Barth v. Kansas City Elev. R. Co.* 142 Mo. 535, 44 S. W. 778; *Pittman v. El Reno*, 4 Okla. 638, 46 Pac. 495; *Summers v. Louisville & N. R. Co.* 96 Tenn. 459, 35 S. W. 210; *Galveston H. & S. A. R. Co. v. Templeton*, 87 Tex. 42, 26 S. W. 1066; *Childress v. Chesapeake & O. R. Co.* 94 Va. 186, 26 S. E. 424; *Bowers v. Bristol Gas & Electric Co.* 100 Va. 533, 42 S. E. 296; *Chesapeake & O. R. Co. v. Hall*, 109 Va. 296, 63 S. E. 1007; *Richmond v. Barry*, 109 Va. 274, 63 S. E. 1074; *Bensick v. St. Louis Transit Co.* 125 Mo. App. 121, 102 S. W. 587; *Coon v. Atchison, T. & S. F. R. Co.* 75 Kan. 282, 89 Pac. 682; *Bass v. Rublee*, 76 Vt. 395, 57 Atl. 965; *Mugge v. Jackson*, 50 Fla. 235, 39 So. 157; *Ruth v. St. Louis Transit Co.* 98 Mo. App. 1, 71 S. W. 1055; *Deitring v. St. Louis Transit Co.* 109 Mo. App. 524, 85 S. W. 140; *Alexander v. Zeigler*, 84 Miss. 560, 36 So. 536; *Heine v. St. Louis & S. F. R. Co.* 144 Mo. App. 443, 129 S. W. 421; *Charlton v. St. Louis & S. F. R. Co.* 200 Mo. 413, 98 S. W. 529; *National Live Stock Commission Co. v. Marion State Bank*, 130 Mo. App. 464, 110 S. W. 34; *Luper v. Henry*, 59 Wash. 33, 109 Pac. 208.

9. Sufficiency of evidence.

To authorize the submission of a question of fact to the jury it is not enough that there was a mere scintilla of evidence.¹

- ¹ *Baulec v. New York & H. R. Co.* 59 N. Y. 356, 17 Am. Rep. 325, affirming in effect, 12 Abb. Pr. N. S. 310, 5 Lans. 436, 62 Barb. 623; *Hathaway v. East Tennessee, V. & G. R. Co.* 29 Fed. 489; *Mt. Adams & E. P. Inclined R. Co. v. Lowery*, 20 C. C. A. 596, 43 U. S. App. 408, 74 Fed. 463; *Bygum v. Southern P. Co.* — Cal. —, 36 Pac. 415; *Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651, and cases cited (where it is held that the phrase "evidence tending to prove" means more than a mere scintilla, but evidence upon which the jury could without acting unreasonably in the eye of the law, decide in favor of the party producing it); *Meyer v. Houck*, 85 Iowa, 319, 52 N. W. 235 (expressly overruling and repudiating the scintilla doctrine); *Elwell v. Hacker*, 86 Me. 416, 30 Atl. 64; *Baltimore & O. R. Co. v. State*, 71 Md. 590, 18 Atl. 969; *Hillyer v. Dickinson*, 154 Mass. 502, 28 N. E. 905 and cases cited; *Rainger v. Boston Mut. Life Asso.* 167 Mass. 109, 44 N. E. 1088; *Hemmens v. Nelson*, 138 N. Y. 517, 20 L.R.A. 440, 34 N. E. 342; *Bulger v. Rosa*, 119 N. Y. 459, 24 N. E.

853; *Cable v. Southern R. Co.* 122 N. C. 892, 29 S. E. 377; *Bastian v. Philadelphia*, 180 Pa. 227, 36 Atl. 746 (where it is held that if there be any evidence beyond a mere scintilla, however slight, from which the jury may draw an inference favorable to plaintiff, the case should go to the jury); *Galveston, H. & S. A. R. Co. v. Faber*, 77 Tex. 153, 8 S. W. 64, and cases cited; *Cunningham v. Union P. R. Co.* 4 Utah, 206, 7 Pac. 795; *Marion County v. Clark*, 94 U. S. 278, 284, 24 L. ed. 59, 61. In this case the court says: "Decided cases may be found where it is held that if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." *Raby v. Cell*, 85 Pa. 80 (where it is said that the rule that a scintilla of evidence must go to the jury has been justly exploded, both in England and in Pennsylvania); *Matlack v. Mann*, 37 Phila. Leg. Int. 349; *Wittkowsky v. Wasson*, 71 N. C. 451; *Nolan v. Shickle*, 3 Mo. App. 300. See also note to *People v. People's Ins. Exchange*, 2 L.R.A. 340.

Especially where it is met, not only by the positive testimony of disinterested witnesses, but also by well-known and recognized physical facts about which there is no conflict. *Laidlaw v. Sage*, 158 N. Y. 73, 44 L.R.A. 216, 52 N. E. 679.

And in general it may be said that even in those jurisdictions where the doctrine that a mere scintilla of evidence must go to the jury seemed to be well established, the tendency of recent decisions has been to repudiate it and to adopt the test laid down above (paragraph 3) and now applied in nearly all jurisdictions.

As illustrations of this change in the law, see the cases above, and compare *Mercier v. Mercier*, 43 Ga. 323, 325, with *Zettler v. Atlanta*, 66 Ga. 195; and *Laing v. Americus*, 86 Ga. 756, 13 S. E. 107; and *Crookshank v. Kellogg*, 8 Blackf. 256, with *Weis v. Madison*, 75 Ind. 241. 39 Am. Rep. 135.

In *Arkansas*, according to *Little Rock & Ft. S. R. Co. v. Perry*, 37 Ark. 193, if there is any evidence whatever, however slight, pertinent to the issue, the case should not be taken from the jury, even if the court is satisfied that it would set aside a verdict found upon it, although the same judge had previously, in *Oliver v. State*, 34 Ark. 639, explained that the scintilla doctrine had never prevailed in *Arkansas*. But *Catlett v. St. Louis, I. M. & S. R. Co.* 57 Ark. 461, 21 S. W. 1062, construes the phrase "any evidence, however slight," to mean that there must be more than a mere scintilla.

In a few states a scintilla of evidence is still allowed to go to the jury. There are decisions to this effect in *South Carolina*, *Ohio*, and, it seems,

in Kentucky and Nebraska. *State ex rel. Jones v. Boles*, 18 S. C. 534; *Bradley v. Drayton*, 48 S. C. 214, 26 S. E. 613 (holding that on motion for nonsuit the question is whether there is *any* testimony to show facts essential to plaintiff's recovery, not whether the evidence is sufficient in that respect); *Ellis v. Ohio L. Ins. & T. Co.* 4 Ohio St. 628, 645, 64 Am. Dec. 610; *Dick v. Indianapolis, C. & L. R. Co.* 38 Ohio St. 389; *Smith v. Sioux City & P. R. Co.* 15 Neb. 583, 19 N. W. 638; *Wadlington v. Newport News & M. Valley R. Co.* 14 Ky. L. Rep. 559, 20 S. W. 783 (where it is said that "the rule is too well settled in this state to need the citation of authority that, if there be any evidence, however slight, to support a recovery," the case should go to the jury).

In Ohio the rule that, if plaintiff's evidence discloses a scintilla the court must ordinarily submit the issue to the jury, even though satisfied that a verdict for plaintiff would not stand, does not apply in an action to contest a will, as there is a legal presumption that the will is valid. *Beresford v. Stanley*. 6 Ohio N. P. 38, 9 Ohio S. & C. P. Dec. 134.

But a total failure of evidence as to the whole case, or a total lack of evidence in support of some one essential element of the cause of action or defense renders it the duty of the court to refuse to submit the case to the jury, and to either direct a nonsuit, or to instruct the jury how to find. *Walker v. Vale Royal Mfg. Co.* 75 Ga. 29; *Sutherland v. Cleveland, C. C. & St. L. R. Co.* 148 Ind. 308, 47 N. E. 624, and cases cited; *Lance v. Gorman*, 136 Pa. 200, 20 Atl. 792. Even in those jurisdictions where the scintilla of evidence doctrine is expressly recognized. *Carrier v. Dorrance*, 19 S. C. 30; *Ellis v. Ohio L. Ins. & T. Co.* 4 Ohio St. 628, 646, 64 Am. Dec. 610; *Dick v. Indianapolis, C. & L. R. Co.* 38 Ohio St. 389; *Martin v. Columbia & G. R. Co.* 32 S. C. 592, 10 S. E. 960.

If the plaintiff's evidence is only a scintilla, and it is overwhelmingly opposed by defendant's testimony, the court should direct a verdict for defendant. *Cromley v. Pennsylvania R. Co.* 211 Pa. 429, 60 Atl. 1007.

10. Different inferences.

It does not follow that because there is no contradictory testimony the court must take the question from the jury and determine it as one of law. On the contrary, if different results would be reached by different minds, the question must go to the jury.¹

¹ *Wait v. Agricultural Ins. Co.* 13 Hun, 371 (action on a fire policy; the question being whether the house was "unoccupied"); *Grand Trunk R. Co. v. Tennant*, 14 C. C. A. 190, 21 U. S. App. 682, 66 Fed. 922; *Alabama G. S. R. Co. v. Burgess*, 114 Ala. 587, 22 So. 169; *Carter v. Fulgham*, 134 Ala. 238, 32 So. 684; *McKune v. Santa Clara Valley Abbott*, Civ. Jur. T.—39.

Mill & Lumber Co. 110 Cal. 480, 42 Pac. 980; Colorado Coal & I. Co. v. John, 5 Colo. App. 213, 38 Pac. 399; Metropolitan R. Co. v. Snashall, 3 App. D. C. 420; C. B. Rogers Co. v. Meinhardt, 37 Fla. 480, 19 So. 878; Offutt v. World's Columbian Exposition, 175 Ill. 472, 51 N. E. 651, and cases cited; Maxwell v. Durkin, 185 Ill. 546, 57 N. E. 433; Brooks v. Missouri P. R. Co. 98 Mo. App. 166, 71 S. W. 1083; Herf & F. Chemical Co. v. Lackawanna Line, 85 Mo. App. 667; Neubacher v. Indianapolis Union R. Co. 134 Ind. 25, 33 N. E. 798; Habig v. Layne, 38 Neb. 743, 57 N. W. 539; Jones v. First Nat. Bank, 3 Neb. (Unof.) 73, 90 N. W. 912; New Jersey School & Church Furniture Co. v. Board of Education, 58 N. J. L. 646, 35 Atl. 397; Shay v. Camden & S. R. Co. 66 N. J. L. 334, 49 Atl. 547; Anderson v. North Pacific Lumber Co. 21 Or. 281, 28 Pac. 5; Tracy v. Grand Trunk R. Co. 76 Vt. 313, 57 Atl. 104; Bass v. Norfolk R. & Light Co. 100 Va. 1, 40 S. E. 100.

So, if a witness is contradicted by circumstances the question should go to the jury. *Elwood v. Western U. Teleg. Co.* 45 N. Y. 549, 554, 6 Am. Rep. 140; s. p. *Hackford v. New York C. & H. R. R. Co.* 53 N. Y. 654; *Smith v. Coe*, 55 N. Y. 678 (facts, not simply evidence, must be clear); *Heyne v. Blair*, 62 N. Y. 19; *Morse v. Erie R. Co.* 65 Barb. 491; *Van Ostrand v. O'Brien*, 1 N. Y. Week. Dig. 312; *Vinton v. Schwab*, 32 Vt. 612 (where the question of defendant's negligence was held to have been properly submitted to the jury, although there was no conflict in the testimony). *Lindsay v. Lindsay*, 11 Vt. 621; *Kane v. Learned*, 117 Mass. 190, 194, and cases cited; *Lane v. Old Colony & F. River R. Co.* 14 Gray, 143; *Kansas P. R. Co. v. Pointer*, 14 Kan. 37, 53 (citing *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, and *Detroit & M. R. Co. v. Van Steinberg*, 17 Mich. 99); *Luke v. Calhoun County*, 52 Ala. 115 (to the effect that if the jury can draw any inferences from the plaintiff's evidence, fatal to his recovery, the jury should not be instructed to find for him, even though the evidence strongly tending to support his case is uncontradicted); *Dolfinger v. Fishback*, 12 Bush, 475 (where the rule is well stated); *New Jersey Exp. Co. v. Nichols*, 32 N. J. L. 166; *Atchison & N. R. Co. v. Bailey*, 11 Neb. 332, 9 N. W. 50; *West Chicago Street R. Co. v. Carr*, 170 Ill. 478, 48 N. E. 992; *Kennedy v. McAllaster*, 31 App. Div. 453, 52 N. Y. Supp. 714; *Wilson v. Pennsylvania R. Co.* 177 Pa. 503, 35 Atl. 677.

But although inferences are generally for the jury, yet where they are certain and incontrovertible the case may be decided as one of law by the court. *Thurber v. Harlem Bridge, M. & F. R. Co.* 60 N. Y. 326, 331; *Dolfinger v. Fishback*, 12 Bush, 475; *Anderson v. Birmingham Mineral R. Co.* 109 Ala. 128, 19 So. 519; *Kenna v. Central P. R. Co.* 101 Cal. 26, 35 Pac. 332; *McDonald v. Fairbanks*, 161 Ill. 124, 43 N. E. 783; *Young v. Chicago, R. I. & P. R. Co.* 57 Kan. 144, 45 Pac. 583; *Baltimore & O. R. Co. v. State*, 75 Md. 526, 24 Atl. 14; *Gaffney v. Brown*, 150 Mass. 479, 23 N. E. 233; *Knapp v. Jones*, 50 Neb. 490, 70 N. W. 19; *Little v. Carolina C. R. Co.* 119 N. C. 771, 26 S. E. 106; *Cawley*

v. LaCrosse City R. Co. 101 Wis. 145, 77 N. W. 179 (nonsuit or direction of verdict matter of right in such case).

The court must determine whether a particular inference is deducible from the facts. *Seely v. Manhattan L. Ins. Co.* 73 N. H. 339, 61 Atl. 585.

So, too, where an inference originally an inference of fact to be drawn or not, in the opinion of the jury, becomes in the course of commercial and legal experience obvious and well known, the court are justified in treating it as a matter of law. For instances see *Armstrong v. Stokes*, L. R. 7 Q. B. 598, 605, 41 L. J. Q. B. N. S. 253, 26 L. T. N. S. 872, 21 Week. Rep. 52, 2 Eng. Rul. Cas. 471; *Hutton v. Bulloch*, L. R. 8 Q. B. 331, 334.

11. Interested testimony.

Where the only evidence sufficient upon an essential point is the testimony of the party in his own favor, or of a witness interested in his favor, it is error to refuse to submit the case to the jury.¹

To constitute an interested witness within this rule, it is not necessary that he should have a legal interest in the result of the litigation.²

¹ *Hodge v. Buffalo*, 1 Abb. N. C. 366, 1 Buffalo Super. Ct. 418; and see *Elwood v. Western U. Teleg. Co.* 45 N. Y. 549, 554, 6 Am. Rep. 140; *Gildersleeve v. Landon*, 73 N. Y. 609; *Nicholson v. Conner*, 8 Daly, 212; *Dean v. Metropolitan Elev. R. Co.* 119 N. Y. 540, 23 N. E. 1054; *Kennedy v. McAllaster*, 31 App. Div. 453, 52 N. Y. Supp. 714; *Cawley v. LaCrosse City R. Co.* 101 Wis. 145, 77 N. W. 179. See also *Sheridan v. New York*, 8 Hun, 424, reversed on other grounds in 68 N. Y. 30.

So held although it is uncontradicted,—especially where it is improbable in many particulars. *Goldsmith v. Coverly*, 75 Hun, 48, 31 Abb. N. C. 149, 27 N. Y. Supp. 116.

Otherwise if his testimony is corroborated by that of another witness and by documentary evidence. *Anderson v. Boyer*, 156 N. Y. 93, 50 N. E. 976. And is reasonable and probable. *Hull v. Littauer*, 8 App. Div. 227, 40 N. Y. Supp. 338. Or where there is no conflict in the evidence, and no circumstances from which an inference against the facts so testified to can be drawn. *Lincoln Nat. Bank v. Kirk*, 18 Misc. 45, 41 N. Y. Supp. 13.

² *Kavanagh v. Wilson*, 70 N. Y. 177 (where the only witness to prove a contract was a son of the plaintiff who was engaged in plaintiff's business upon a salary and was to be paid a fee in case the contract drawn by him "went through;" and hence held error to take the case from the jury and direct a verdict for the plaintiff). See also case of *Wohlfahrt v. Beckert*, 12 Abb. N. C. 478, 92 N. Y. 490 (where the interest of the witness, a clerk in defendant's drug store, consisted in

shielding himself and his employer from the charge of criminal negligence in omitting to label a poisonous drug which had caused the death of plaintiff's intestate); *Pratt v. Ano*, 7 App. Div. 494, 40 N. Y. Supp. 229 (where the interest of the witness resulted from his natural desire to free himself from a charge of neglect of duty); *Dudley v. Satterlee*, 8 Misc. 538, 28 N. Y. Supp. 741 (where the witness was an attorney who had been general counselor for defendant's testator before his death, and acted as professional adviser to him in reference to the claim in suit, after the conversation to which he testifies, and who has an action pending against the executor for legal services rendered the testator).

The same principle applies where the testimony is to the whole case or to any specific fact essential to the case.

But that a witness for defendant, whose testimony is uncontradicted, is connected with a projected enterprise in connection with which the claim in suit arose, and expects to enter its employ, does not make him an interested witness, so as to require the submission of the point to the jury, where he has no pecuniary interest in the result of the suit. *Franklin Bank Note Co. v. Mackey*, 158 N. Y. 140, 52 N. E. 737.

12. Party's admission by refusal to testify.

The refusal of a party to a suit, when testifying as witness, to answer a material question on the ground that it might criminate himself, may go to the jury with other evidence against him on the point inquired of, and makes it error to withdraw that question from them.¹

¹ *Andrews v. Frye*, 104 Mass. 234.

13. Direct met by circumstantial evidence.

Where the direct evidence on one side, although uncontradicted, is met by circumstantial evidence on the other, the question should be submitted to the jury.¹

¹ *Babcock v. Chicago & N. W. R. Co.* 62 Iowa, 593, 17 N. W. 619; s. p. *Artisans' Bank v. Backus*, 36 N. Y. 100.

But where positive testimony is met only by belief or impressions there is no conflict of evidence (*Harris v. Louisville, N. O. & T. R. Co.* 35 Fed. 121; *Alabama G. S. R. Co. v. Rouch*, 116 Ala. 360, 23 So. 52); and a finding is not conclusive, but against evidence, which rejects the former for the latter. *Dresser v. Van Pelt*, 1 Hilt. 316.

So, also, positive testimony which is absolutely inconsistent with the admitted physical facts is unworthy of consideration and should not be

submitted to the jury. *Northern C. R. Co. v. Medairy*, 86 Md. 168, 37 Atl. 796.

14. Affirmative testimony met only by negative.

Affirmative testimony met only by negative testimony as to the same occurrence does not necessarily constitute such a conflict of testimony or raise such doubts as to require the question to be submitted to the jury.¹

¹ *Wickham v. Chicago & N. W. R. Co.* 95 Wis. 23, 69 N. W. 982; *Culhane v. New York C. & H. R. R. Co.* 60 N. Y. 133; *McKeever v. New York C. & H. R. R. Co.* 88 N. Y. 667; s. c. more fully, 14 N. Y. Week. Dig. 226; *Maddox v. Maddox*, 114 Mo. 35, 21 S. W. 499; *Texas-Mexican R. Co. v. Baldez* — *Tex. Civ. App.* —, 43 S. W. 564.

But with these cases compare *Byrne v. New York C. & H. R. R. Co.* 14 Hun, 323; *Cheney v. New York C. & H. R. R. Co.* 16 Hun, 415; *Salter v. Utica & B. River R. Co.* 59 N. Y. 631, reversing without opinion 3 *Thomp. & C.* 800; *Atchison, T. & S. F. R. Co. v. Feehan*, 149 Ill. 202, 36 N. E. 1036; *Annacker v. Chicago, R. I. & P. R. Co.* 81 Iowa, 267, 47 N. W. 68; *Staal v. Grand Rapids & I. R. Co.* 57 Mich. 239, 23 N. W. 795; *Young v. Missouri, K. & T. R. Co.* 72 Mo. App. 263; *Sayer v. King*, 21 App. Div. 624, 47 N. Y. Supp. 420; holding that negative testimony, as to the ringing of a bell of a locomotive, or showing signals, by witnesses who were giving attention or were in a position to hear the bell if rung, or see the signals if shown, and who contradict positive testimony, makes a question on conflicting evidence proper for the jury. See also *Chesapeake & O. R. Co. v. Hawkins*, — *Ky.* —, 124 S. W. 836.

According to *Denver v. Peterson*, 5 Colo. App. 41, 36 Pac. 1111, negative testimony as to the performance of certain acts, nonperformance of which is alleged as negligence, by witnesses who were giving attention and who contradict affirmative testimony in respect thereof, creates a conflict to be settled by the jury.

So, positive proof of the good order and proper management of a locomotive engine, met by negative testimony that it had set several fires as it passed, together with the evidence that an engine in good order and properly managed could not have caused the fire in question, was held, in *Hagan v. Chicago, D. & C. G. T. Junction R. Co.* 86 Mich. 615, 49 N. W. 509, to constitute a conflict to be settled by the jury. So also in *Tribette v. Illinois C. R. Co.* 71 Miss. 212, 13 So. 899; *Thomas v. New York, C. & St. L. R. Co.* 182 Pa. 538, 38 Atl. 413.

15. Positive, met only by a conclusion of law.

Positive testimony met only by testimony to a conclusion of

law does not constitute a conflict of testimony requiring the case to be submitted to the jury.¹

¹ *Sanborn v. Lefferts*, 16 Abb. Pr. N. S. 42, 58 N. Y. 179.

16. Uncontradicted evidence of specific fact.

Where a fact not improbable is positively testified to by unimpeached and uncontradicted witnesses not appearing to be interested, it is error to submit it to the jury against objection.¹

Merely raising a question as to the credibility of a witness who is unimpeached does not take the case out of the rule.

¹ *Robinson v. McManus*, 4 Lans. 380 (as qualified by the rule in *Hodge v. Buffalo*, 1 Abb. N. C. 356); *Newton v. Pope*, 1 Cow. 109, approved in *Elwood v. Western U. Teleg. Co.* 45 N. Y. 553, 6 Am. Rep. 668; *Frace v. New York, L. E. & W. R. Co.* 143 N. Y. 182, 38 N. E. 102; *Harriman v. Queen Ins. Co.* 49 Wis. 71, 5 N. W. 12; *Berg v. Chicago, M. & St. P. R. Co.* 50 Wis. 419, 7 N. W. 347; *Scott v. Clayton*, 54 Wis. 499, 11 N. W. 595; *Lange v. Perley*, 47 Mich. 352, 11 N. W. 193; *Wilson v. Groelle*, 83 Wis. 530, 53 N. W. 900. Contra, it seems, in *Pennsylvania, Lehigh Coal & Nav. Co. v. Evans*, 176 Pa. 28, 34 Atl. 999.

So, even though the fact be established on cross-examination of an adversary's witness, upon whom the adversary relied to negative that fact. *American Exch. Nat. Bank v. New York Belting & Pkg. Co.* 148 N. Y. 698, 43 N. E. 168.

So, too, it is error to submit a question of fact to the jury when there is no evidence in support of it, or where the evidence is all one way. *Algur v. Gardner*, 54 N. Y. 360; *Meguire v. Corwine*, 101 U. S. 108, 111, 25 L. ed. 899, 900; *Merchants Mut. Ins. Co. v. Baring*, 20 Wall. 159, 162, 22 L. ed. 250, 251; *United States v. One Still*, 5 Blatchf. 403, Fed. Cas. No. 15,954.

And where plaintiff's only witnesses were in defendant's employ and might therefore be prejudiced in defendant's favor, the question how far they were so biased is of no weight, and is not to be submitted to the jury; disbelief of their testimony cannot supply a want of proof. *Burt v. Sierra Butte Gold Min. Co.* 138 U. S. 483, 34 L. ed. 1031, 11 Sup. Ct. Rep. 464.

17. Expert testimony.

The testimony of experts on a point to which other witnesses would not be competent to testify, if positive, to a matter of fact, and not mere matter of opinion on facts laid before the jury, is within the above rule; but if the question is not one which only experts are capable of determining, or their testi-

mony is matter of opinion on facts before the jury, the question must be submitted to the jury.¹

¹ I understand this to be the practical test, although the distinction is not made clear by the reported cases. Compare *Leitch v. Atlantic Mut. Ins. Co.* 66 N. Y. 100; *Cornish v. Farm Buildings F. Ins. Co.* 74 N. Y. 298. For example, in *Cadwell v. Arnheim*, 152 N. Y. 182, 46 N. E. 310, an action for damages caused by a runaway team, alleged to have resulted from negligent driving by defendant's coachman, refusal to nonsuit the plaintiff was held error because there was, as opposed to the positive testimony of the coachman (uncontradicted and somewhat corroborated), who was shown to be a skilful driver, that all of his efforts to stop or direct the horses were futile, only the testimony of experts, who had not seen the occurrence, as to what the driver might be able to do in such an emergency as was shown to have existed.

Where the evidence of a party on an essential point consists mainly of the testimony of experts it seems that the case should go to the jury, unless the testimony leaves no reasonable doubt of the facts in issue. *Spensley v. Lancashire Ins. Co.* 54 Wis. 433, 11 N. W. 894, citing *Copp v. German American Ins. Co.* 51 Wis. 643, 8 N. W. 127, 616 (where the reason assigned is, that there are usually elements of doubt, uncertainty, and inconclusiveness in expert testimony which is for the jury to pass upon).

18. Nominal damages.

A motion for nonsuit is properly denied if plaintiff is entitled to recover even nominal damages.¹

¹ *Van Rensselaer v. Jewett*, 2 N. Y. 135, 51 Am. Dec. 275; *Weber v. Kingsland*, 8 Bosw. 415; *Lillie v. Hoyt*, 5 Hill, 395, 40 Am. Dec. 360; *Howard v. Dayton Coal & I. Co.* 94 Ga. 416, 20 S. E. 336; *Potter v. Mellen*, 36 Minn. 122, 30 N. W. 438; *Kellogg v. Hamilton*, — Miss. —, 10 So. 479; *Lance v. Apgar*, 60 N. J. L. 447, 38 Atl. 695 (error to grant in such case).

19. Mode of taking case from jury.

In those jurisdictions where compulsory nonsuit or dismissal of complaint is allowed, the court should not, against plaintiff's objection, direct a verdict for the defendant instead of ordering a nonsuit, unless the ground for taking the case from the jury is such as to constitute a final bar to plaintiff's cause of action.¹

¹ *Briggs v. Waldron*, 83 N. Y. 582, affirming 9 N. Y. Week. Dig. 219.

D. VERDICT SUBJECT TO THE OPINION OF THE COURT (SPECIAL CASE).

20. When may be directed.

When the facts are indisputable, and only questions of law are raised, and no exceptions have been taken, the determination of which could affect the proofs, the judge may direct the jury to render a verdict, subject to the opinion of the court.¹

¹N. Y. Code Civ. Proc. § 1185; *Howell v. Adams*, 68 N. Y. 314, affirming 1 Thomp. & C. 425, 13 Abb. N. C. 382, note; s. p. *Baylis v. Travelers' Ins. Co.* 113 U. S. 316, 28 L. ed. 989, 5 Sup. Ct. Rep. 494. So held in *Mathews v. Traders Bank*, — Va. —, 27 S. E. 609, on a demurrer to the evidence.

The effect is that in entering the verdict it is expressed to be subject to the opinion of the court; and this will prevent judgment on the verdict until the court has passed on the question of law, and leaves it in the power of the trial judge, on subsequent motion, to set aside the verdict on the ground of the insufficiency of the evidence. *Baylis v. Travelers' Ins. Co.* 113 U. S. 316, 28 L. ed. 989, 5 Sup. Ct. Rep. 494.

In this case *Matthews, J.*, says: "If, after the plaintiff's case had been closed, the court had directed a verdict for the defendant on the ground that the evidence, with all inferences that the jury could justifiably draw from it, was insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, it would have followed a practice sanctioned by repeated decisions of the court. . . . Or if, in the present case, a verdict having been taken for the plaintiff by direction of the court, subject to its opinion whether the evidence was sufficient to sustain it, the court had subsequently granted a motion on behalf of the defendant for a new trial, and set aside the verdict on the ground of the insufficiency of the evidence, it would have followed a common practice, in respect to which error could not have been alleged, or it might with propriety have reserved the question what judgment should be rendered and in favor of what party, upon an agreed statement of facts, and afterwards rendered judgment upon its conclusions of law. But without a waiver of the right of trial by jury, by consent of parties, the court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue, and renders judgment thereon." (Judgment reversed for error in so doing.) See also 13 Abb. N. C. 382, note.

Under the New York statute the judge, on motion at the same term as the trial, may order judgment on the verdict or may set aside the verdict, and direct judgment for either party. N. Y. Code Civ. Proc. § 1185.

21. Contest as to facts.

A verdict may be directed, subject to the opinion of the court, when the evidence as matter of law leaves no question of fact for the jury, although counsel still controvert the facts.¹

¹ McBride v. Farmers Bank, 26 N. Y. 450, affirming 25 Barb. 657.

22. Questions of evidence.

Under the New York statute it is error to direct that the verdict be subject to the opinion of the court, even upon failure to object, if exceptions have been taken on questions of evidence, or if there is a conflict of evidence to go to the jury.¹

If there are any questions of fact for the jury, a verdict subject to the opinion of the court cannot be directed even if accompanied with answers by the jury to special questions determining the facts.²

¹ Purchase v. Matteson, 25 N. Y. 211, 15 Abb. Pr. 402; Matson v. Farm Buildings Ins. Co. 73 N. Y. 310, 29 Am. Rep. 149, 13 Abb. N. C. 382. note.

To do so under such circumstances is a mistrial. Flandreau v. Elsworth, 8 Misc. 428, 28 N. Y. Supp. 671.

The question whether there is sufficient evidence to go to the jury may be reserved. Wilde v. Trainor, 59 Pa. 439; Koons v. Western U. Teleg. Co. 102 Pa. 164.

² Gilbert v. Beach, 16 N. Y. 606 (but *quære*).

23. Determining amount.

The verdict directed must determine the amount of recovery, if any, as well as indicate the successful party. The determining of amount cannot be reversed for a reference.¹

¹ Buchanan v. Cheseborough, 5 Duer, 238; Belden v. Davies, 2 Hall, 433. But see Bartels v. Redfield, 16 Fed. 336, where this was done.

24. Effect of consent.

A verdict may be directed, subject to the opinion of the court, notwithstanding exceptions taken, if the parties agree as to the facts, thereby waiving all exceptions.¹

¹ Byrnes v. Cohoes, 67 N. Y. 204, 207.

Or the exception may be expressly waived and verdict directed subject to the opinion of the court. Cowenhoven v. Ball, 118 N. Y. 231, 23 N. E. 470.

XXII.—COUNSEL'S ADDRESS TO THE JURY.

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 - (1) In general.
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 - e. Aspersions; arousing prejudice.
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 - o. Retaliatory statements or remarks.
9. Interruption by adverse counsel.
10. Right of judge to regulate argument.
11. Withdrawal of remarks curing error.
12. Amending pleadings during argument.

1. Election as to cause of action.

At the close of the evidence, if the pleading states the same substantial cause of action in different forms or counts and the evidence applies to both, the court may require plaintiff to elect

which count he will rely on,¹ or may allow him to change an election previously made.²

¹ Roberts v. Leslie, 14 Jones & S. 76. And see ante, chapter iv. Motions on the Pleadings, §§ 13-17.

² McLennan v. McDermid, 52 Mich. 468, 18 N. W. 222.

2. The right to address the jury.

a. In general.—When there is a question of fact to be submitted to the jury, a party has the right to be heard in argument to the jury within the limits hereafter stated; and an exception lies to the refusal of the right.¹

¹ Lanan v. Hibbard, 63 Ill. App. 54; Houck v. Gue, 30 Neb. 113, 46 N. W. 280; Douglass v. Hill, 29 Kan. 527; Cartright v. Clopton, 25 Ga. 85 (holding it would be error to refuse to allow anything more than "stating his points"). The *dictum* to the contrary in People v. Cook, 8 N. Y. 67, 59 Am. Dec. 451, is unsound and was so declared in Fareira v. Smith, 3 Misc. 255, 22 N. Y. Supp. 939.

But if he does not avail himself of the opportunity when offered it is in the discretion of the court whether afterwards to allow him to address the jury. Herrington v. Pouley, 26 Ill. 94.

When the court directs a verdict fixing its nature and extent it is not error to refuse to allow argument to the jury. Harrison v. Park, 1 J. J. Marsh. 170.

Counsel who announce that they represented defendant only for the purpose of moving for a continuance and of arguing a demurrer have no right to argue the case upon its merits to the jury at the close of plaintiff's evidence. Gunn v. Gunn, 95 Ga. 439, 22 S. E. 552.

b. Third person.—*Amicus curiæ* is not entitled to be heard where the parties are attended by competent counsel; nor is counsel in another cause between other parties entitled to be heard merely because the same question arises in both.¹

¹ Nauer v. Thomas, 13 Allen, 572, 574.

3. Right to close.

Unless otherwise regulated by statute he who holds the affirmative on the issues which are to be submitted to the jury has the right to close.¹

But if the party having such affirmative has failed to produce

any evidence it is not error to give the right to close to the other party.²

In those jurisdictions in which the party having the right to close is also entitled to open the argument, a waiver by adverse counsel of his right to reply to the opening argument will cut off the right of his adversary to make any further argument.³

¹ *Williams v. Allen*, 40 Ind. 295; *Daviess v. Arbuckle*, 1 Dana, 525; *Page v. Carter*, 8 B. Mon. 192; *Mead v. Shea*, 92 N. Y. 122. Even though the other party gave no evidence. *Worsham v. Goar*, 4 Port. (Ala.) 441. For a review of the statutes and decisions upon this question see ante, chapter v., *The Right to Open and Close*.

² *Zehner v. Kepler*, 16 Ind. 290; *Young v. Haydon*, 3 Dana, 145.

³ *Tyre v. Morris*, 5 Harr. (Del.) 3; *Creager v. Blank*, 32 Ill. App. 615 (in this case the two principal arguments were waived). But see *Barden v. Briscoe*, 36 Mich. 254 (holding that there is no absolute right to produce such a result and that the matter rests in the discretion of the trial court).

It is not error to refuse to allow counsel who has consumed less than one half of his allotted time in making his opening argument to argue further after adverse counsel announces that he does not desire to make any argument. *Southern Kansas R. Co. v. Michaels*, 49 Kan. 388, 30 Pac. 408.

4. When to be asked.

A request for a ruling on the order in which counsel shall address the jury can properly be made only after the whole evidence is in,¹ and before the arguments are heard.²

¹ *Mead v. Shea*, 92 N. Y. 122, 124.

² *McKibbin v. Folds*, 38 Ga. 235, 239.

5. Number of counsel.

Only one counsel on each side is heard¹ as a matter of right,² except that where several defendants appear by separate attorneys and have separate counsel they will each be heard, unless their interests are in unison, in which case the court may require them to select one of the counsel to be heard for all.³

¹ 2 Tidd, Pr. 2d Am. ed. (From 8th London ed.) 909; *Graham*, Pr. 742; New York rule 29 of 1896.

² In the absence of express statutory regulation the number of counsel who may be heard on each side rests in the discretion of the trial court. *Carruthers v. McMurray*, 75 Iowa, 173, 39 N. W. 255.

Each defendant who presents a separate and independent defense is entitled to be represented by counsel in opening the case and addressing the jury. *Lyman v. Fidelity & C. Co.* 65 App. Div. 27, 72 N. Y. Supp. 4.

If there are several attorneys, the order of argument may be regulated by the court. *Stevens v. Friedman*, 58 W. Va. 78, 51 S. E. 132; *Simonds v. Cash*, 136 Mich. 558, 99 N. W. 754; *Conrad v. Cleveland, C. C. & St. L. R. Co.* 34 Ind. App. 133, 72 N. E. 489; *Hackney v. Delaware & A. Teleg. & Teleph. Co.* 69 N. J. L. 335, 55 Atl. 252; *Collins v. Clark*, 30 Tex. Civ. App. 341, 72 S. W. 97; *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244, 94 Am. St. Rep. 864, 70 Pac. 498.

³ *Sodousky v. McGee*, 4 J. J. Marsh. 267.

6. Length of argument.

The length of time to be occupied may be limited by the court in the exercise of a sound discretion.¹ For an abuse of the discretion an exception lies.²

¹ *Tidd*, Pr. 2d Am. ed. (from 8th London ed.) 909; *Graham*, Pr. 742: New 304; *Foster v. Magill*, 119 Ill. 75, 8 N. E. 771; *Louisville & N. R. Co. v. Earl*, 94 Ky. 368, 22 S. W. 607; *Skeen v. Mooney*, 8 Utah, 157, 30 Pac. 363.

In Iowa, the court is prohibited by statute from imposing any limitations as to time. *Carruthers v. McMurray*, 75 Iowa, 173, 39 N. W. 255; *Citizens' Street R. Co. v. Huffer*, 26 Ind. App. 575, 60 N. E. 316; *St. Louis & S. F. R. Co. v. Vanzego*, 71 Kan. 427, 80 Pac. 944; *Cobb Chocolate Co. v. Knudson*, 207 Ill. 452, 69 N. E. 816; *Elgin v. Nofs*, 212 Ill. 20, 72 N. E. 43; *Hansell-Elcock Foundry Co. v. Clark*, 214 Ill. 399, 73 N. E. 787; *Reagan v. St. Louis Transit Co.* 180 Mo. 117, 79 S. W. 435; *Seymour v. Phillips*, 61 Neb. 282, 85 N. W. 72; *Ray v. Pecos & N. T. R. Co.* 40 Tex. Civ. App. 99, 88 S. W. 466. *Christiansen v. William Graver Tank Works*, 223 Ill. 142, 79 N. E. 97, 7 A. & E. Ann. Cas. 69.

² *White v. People*, 90 Ill. 117, 32 Am. Rep. 12 (crim case); *Senior v. Brogan*, 66 Miss. 178, 6 So. 649 (error to limit argument for the personal convenience of the presiding judge); *Zweitusch v. Lowry*, 57 Ill. App. 106.

In a case involving an important and complicated question of fact, the court limited the summing up to fifteen minutes on each side, and directed the jury to proceed promptly and find a verdict, intimating that it was necessary for the judge to leave town on a specified train. The evidence was not analyzed, nor did the jury receive instructions as to the serious questions involved. The jury returned a verdict for the defendant, after being out thirty-five minutes. A new trial was granted, it being held that the case did not receive from the trial

judge the consideration to which the litigants were entitled. *Warren v. Rogers*, 66 App. Div. 252, 72 N. Y. Supp. 758.

7. Asking jury to take notes.

It is irregular to allow counsel to procure jurors to take notes of his calculations or other statements in argument, and to permit them to take out memoranada made on counsel's suggestion.¹

¹ *Indianapolis & St. L. R. Co. v. Miller*, 71 Ill. 463 (reversing judgment for this and other errors). *Contra*, *Tift v. Towns*, 63 Ga. 237; *Lilly v. Griffin*, 71 Ga. 535. The jury cannot, however, be required to do so, and it will not be allowed if attended with delay or undue consumption of time.

8. Scope of argument.

a. In general.—Counsel may, in his own manner, discuss any facts in evidence, and their application to the law as stated by the court.¹ Counsel also has a right to argue to the jury upon facts as to which there is a conflict of evidence, if there be evidence to go to the jury,² or on facts as to which evidence has been received without objection, although the evidence may have been incompetent.³ But the argument should be confined to vital issues.⁴

¹ *Louisville Gas Co. v. Kentucky Heating Co.* 132 Ky. 435, 111 S. W. 374; *Missouri, K. & T. R. Co. v. Hibbitts*, 49 Tex. Civ. App. 419, 109 S. W. 228.

² *Logan v. Monroe*, 20 Me. 257.

³ *Free v. State*, 1 McMull. L. 494 (criminal case).

⁴ *Wrynn v. Downey*, 27 R. I. 454, 4 L.R.A.(N.S.) 615, 114 Am. St. Rep. 63, 63 Atl. 401, 8 A. & E. Ann. Cas. 912.

b. Comments on evidence. (1) *In general.*—Counsel has a right to comment on the bias or interest of a witness;¹ on the fact that a person shown to be an important witness for the adverse party and within reach was not called on his behalf;² and that the adverse party failed to appear as a witness in his own behalf;³ or that he failed to put in evidence documents shown to be within his power and to contain relevant evidence.⁴ Counsel may discuss the weight and sufficiency of evidence, and

the consideration which it should receive.⁵ But evidence improperly admitted cannot be made the basis of argument.⁶

¹ *Central R. Co. v. Mitchell*, 63 Ga. 173; *Birmingham Nat. Bank v. Bradley*, 116 Ala. 142, 23 So. 53; *Morehouse v. Heath*, 99 Ind. 509.

² *Western & A. R. Co. v. Morrison*, 102 Ga. 319, 40 L.R.A. 84, 29 S. E. 104; *Gavigan v. Scott*, 51 Mich. 373, 16 N. W. 769; *Sesler v. Montgomery*, 78 Cal. 486, 3 L.R.A. 653, 19 Pac. 686, 21 Pac. 185; *Huckshold v. St. Louis, I. M. & S. R. Co.* 90 Mo. 548, 2 S. W. 794; *Gray v. Burk*, 19 Tex. 228; *Missouri P. R. Co. v. White*, 80 Tex. 202, 15 S. W. 808; *McKim v. Foley*, 170 Mass. 426, 49 N. E. 625 (handwriting experts consulted as to the genuineness of a disputed signature). So the fact that a witness present and aiding in the conduct of the trial by the party in whose favor he was called was not examined to contradict the adverse party on a subject peculiarly within his knowledge, is a proper subject for comment. *Grubbs v. North Carolina Home Ins. Co.* 108 N. C. 472, 13 S. E. 236.

Where the witnesses testified on a former trial the fact that they are not shown to be important will not, standing alone, require a reversal of the judgment. *Cook v. Standard Life & Acci. Ins. Co.* 86 Mich. 554, 49 N. W. 474.

The rule does not apply where the adverse party has unsuccessfully employed the usual means to procure a witness's attendance. *Mitchell v. Tacoma R. & Motor Co.* 9 Wash. 120, 37 Pac. 341. And it is error to comment on the failure to call a witness who was equally available to both parties.

Hundley v. Chadick, 109 Ala. 575, 19 So. 845. And counsel may not refer to nor comment upon the failure of the adverse party to consent or insist that her physician disclose facts which are privileged. *Kelley v. Highfield*, 15 Or. 277, 14 Pac. 744. Nor may counsel comment upon the failure of the adverse party to call her counsel who under a rule of court could only testify by leave of court or by withdrawing from participating further in the trial of the cause. *Freeman v. Fogg*, 82 Me. 408, 19 Atl. 907.

³ *Hudson v. Jordan*, 108 N. C. 10, 12 S. E. 1029; *Lynch v. Peabody*, 137 Mass. 92. Even where the omission was pursuant to stipulation. *Hurd v. Marple*, 10 Ill. App. 418.

⁴ *Huntsman v. Nichols*, 116 Mass. 521; *Bunce v. McMahon*, 6 Wyo. 24, 42 Pac. 23. For the rule in Maine see *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547.

Counsel may comment upon a party's failure to produce documents in compliance with an order for their production. *Williams v. Cleveland, C. C. & St. L. R. Co.* 102 Mich. 537, 61 N. W. 52. But the refusal to produce books of account is not a proper subject for comment, where the court has properly refused to require their intro-

duction in evidence. *Martin Brown Co. v. Perrill*, 77 Tex. 199, 13 S. E. 975; *Boyle v. Smithman*, 146 Pa. 255, 23 Atl. 397.

⁵ *Gregg v. C. M. Barnes Co.* 110 Ill. App. 238; *Montgomery County v. Putnam*, 122 Mich. 581, 81 N. W. 573; *Heltzen v. Union R. Co.* 26 R. I. 576, 28 Atl. 918.

⁶ *Houston & T. C. R. Co. v. Patterson*, — Tex. Civ. App. —, 57 S. W. 675.

(2) *On form of deposition.*—The mode in which interrogatories put to a witness are framed and put is a proper subject of comment by counsel.¹

¹ *Smiley v. Burpee*, 5 Allen. 568.

(3) *On objections and rulings.*—Counsel has no right to comment to the jury on the objection of the opposite party to evidence and the judge's ruling thereon.¹

¹ *Mitchell v. Borden*, 8 Wend. 570.

(4) *Counter explanations.*—It is not error to allow counsel of a party, whose course in the nonproduction of evidence promised in his opening has been commented upon by the adverse counsel, to state the reasons for such course.¹

¹ *Blake v. People*, 73 N. Y. 586. So a challenge to show why certain evidence was not produced will justify the court in permitting adverse counsel to explain its absence. *King v. Rea*, 13 Colo. 69, 21 Pac. 1084.

c. Referring to the pleadings.—It is not error to allow counsel to refer to or read from the pleadings for the purpose of showing the jury what are the questions in issue.¹

¹ *Tisdale v. Delaware & H. Canal Co.* 116 N. Y. 416, 22 N. E. 700; *Rowe v. Comley*, 1 N. Y. City Ct. Rep. 466, 2 N. Y. Civ. Proc. Rep. 424 (saying that a party has the right in summing up to refer to the pleadings); *Knight v. Russ*, 77 Cal. 410, 19 Pac. 698 (holding that counsel has the right to read his entire complaint). Nor need the pleading be put in evidence before it may be so used by counsel for the adverse party. *Holmes v. Jones*, 121 N. Y. 461, 24 N. E. 701. *Contra*, *Mullen v. Union Cent. L. Ins. Co.* 182 Pa. 150, 37 Atl. 988.

But not where the pleading has been superseded by amendment and is not in evidence. *Payne v. Kings County Mfg. Co.* 2 Hun, 673. Nor where it has been withdrawn. *Riley v. Iowa Falls*, 83 Iowa, 761, 50

N. W. 33. Nor is the fact that a pleading has been amended by setting up additional or more specific defense a proper subject for comment. Taft v. Fisk, 140 Mass. 250, 54 Am. Rep. 459, 5 N. E. 621. But a party may read his pleadings and assert that he relies upon his case as pleaded, where adverse counsel has stated that he has changed his position to one that cannot be recovered upon or defended because not pleaded. Chicago, B. & Q. R. Co. v. Levy, 57 Ill. App. 365.

Pleadings are before the court without formal introduction, and may be read and commented on by counsel. Foley v. Young Men's Christian Asso. 92 N. Y. Supp. 781. Contra, Johnston v. Johnston, — Tex. Civ. App. —, 67 S. W. 123.

And plaintiff may read defendant's pleadings. Coyne v. Avery, 189 Ill. 378, 59 N. E. 788; Nicholson v. Merritt, 23 Ky. L. Rep. 2281, 67 S. W. 5. But see Louisville & N. R. Co. v. Hull, 113 Ky. 561, 57 L.R.A. 771, 68 S. W. 433; Demelman v. Burton, 176 Mass. 363, 57 N. E. 665.

As to the right generally to read to the jury pleadings which have not been put in evidence, see ante chapter XIV. The Use of the Pleadings.

d. Stating what is not in evidence.—If counsel states as facts matters which are not in evidence, the adverse party may interpose, and if the court fails or refuses to check the abuse an exception lies.¹

¹Union Compress Co. v. Wolf, 63 Ark. 174, 37 S. W. 877; Birmingham Nat. Bank v. Bradley, 116 Ala. 142, 23 So. 53; Schlotter v. State, 127 Ind. 493, 27 N. E. 149; Hall v. Wolff, 61 Iowa, 559, 16 N. W. 710; Ross v. Detroit, 96 Mich. 447, 56 N. W. 11; Rolfe v. Rumford, 66 Me. 564, and cases cited; Smith v. Smith, 106 N. C. 498, 11 S. E. 188; Dew v. Reid, 52 Ohio St. 519, 40 N. E. 718 (error to permit counsel to read to the jury over objection from a deposition taken in the case but not put in evidence); Holden v. Pennsylvania R. Co. 169 Pa. 1, 32 Atl. 103 (error to refuse a request for the withdrawal of a juror because of improper statements by counsel not sustained by any evidence); Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582; Festner v. Omaha & S. W. R. Co. 17 Neb. 280, 22 N. W. 557.

If counsel states facts not in evidence, or misstates evidence, such statements are ground for reversal of the judgment. Stein v. Brooklyn, Q. C. & S. R. Co. 62 Misc. 309, 114 N. Y. Supp. 791; Horton v. Terry, 126 App. Div. 479, 110 N. Y. Supp. 646; Williamson v. Hirsh, S. & Co. 147 Ill. App. 500; Partin & O. Co. v. Scott, 137 Ill. App. 454; Kentucky Wagon Mfg. Co. v. Dugancics, — Ky. —, 113 S. W. 128.

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Counsel who persistently misstates evidence should be disciplined by the court. *Cooley v. Eastern Wire-Bound Box Co.* 75 N. H. 529, 77 Atl. 936.

It is equally objectionable to comment upon evidence which has been excluded (*Southern R. Co. v. Shaw*, 31 C. C. A. 70, 58 U. S. App. 201, 86 Fed. 865; *Cook v. Doud*, 14 Colo. 483, 23 Pac. 906; *Miller v. Dunlap*, 22 Mo. App. 97); or to state what counsel would have been able to prove had not the adverse party objected and the court excluded the evidence. *Haynes v. Trenton*, 108 Mo. 123, 18 S. W. 1003; *Festner v. Omaha & S. W. R. Co.* 17 Neb. 280, 22 N. W. 557. But dates fixed by the record of the court may be stated to the jury as facts. *Andrews v. Graves*, 1 Dill, 108, Fed. Cas. No. 376.

e. Aspersions; arousing prejudice.—Counsel should not use language calculated to humiliate and degrade the adverse party, without foundation in the evidence, or language calculated to arouse prejudice in the jury, irrelevant to the case.¹

¹ *Fry v. Bennett*, 3 Bosw. 200; *Coble v. Coble*, 79 N. C. 589, 26 Am. Rep. 338; *Cleveland, C. C. & St. L. R. Co. v. Newlin*, 74 Ill. App. 638; *Mainard v. Reider*, 2 Ind. App. 115, 28 N. E. 196; *Magoon v. Boston & M. R. Co.* 67 Vt. 177, 31 Atl. 156.

Counsel have no right to attempt to excite the prejudice or arouse the sympathy of the jury. *Whaley v. Vannatta*, 77 Ark. 238, 91 S. W. 191, 7 A. & E. Ann. Cas. 228; *Conley v. Redwine*, 109 Ga. 640, 77 Am. St. Rep. 398, 35 S. E. 92; *Chicago City R. Co. v. Math*, 114 Ill. App. 350; *Belcher v. Ballou*, 124 Iowa, 507, 100 N. W. 474; *Louisville & N. R. Co. v. Carter*, 27 Ky. L. Rep. 748, 86 S. W. 685; *Wells v. Moses*, 87 Minn. 432, 92 N. W. 334; *Hopkins v. Hopkins*, 132 N. C. 25, 43 S. E. 506; *Halsey v. Bell*, — Tex. Civ. App. —, 62 S. W. 1088; *Davis v. Alexander City*, 137 Ala. 206, 33 So. 863; *Garritty v. Rankin*, — Tex. Civ. App. —, 55 S. W. 367.

Comments on financial condition of parties has been held improper. *Louisville, H. & St. L. R. Co. v. Morgan*, 110 Ky. 740, 62 S. W. 736; *Illinois C. R. Co. v. Proctor*, 122 Ky. 92, 89 S. W. 714; *Dallas Consol. Electric Street R. Co. v. Black*, 40 Tex. Civ. App. 415, 89 S. W. 1087; *Cox v. Continental Ins. Co.* 119 App. Div. 682, 104 N. Y. Supp. 421.

But counsel may refer to standing and wealth of a party, where such reference is pertinent to the issues. *McKinne v. Lane*, 230 Ill. 544, 120 Am. St. Rep. 338, 82 N. E. 878. See also *Chicago Union Traction Co. v. Arnold*, 131 Ill. App. 599; *Patton v. Lund*, 114 Iowa. 201, 86 N. W. 296; *Graves v. Bonness*, 97 Minn. 278, 107 N. W. 163; *Hersey v. Hutchins*, 70 N. H. 130, 46 Atl. 33; *Gilman v. Laconia*, 71

N. H. 212, 51 Atl. 631; *St. Louis, I. M. & S. R. Co. v. Boback*, 71 Ark. 427, 75 S. W. 473.

Where counsel persistently, in the opening and during trial and summing up, made allusions to occurrences on a former trial intended to create prejudice, it was held error sufficient to justify a reversal of the judgment. *Walter v. Joline*, 136 App. Div. 426, 120 N. Y. Supp. 1025.

It was held error to state that defendant corporation was wealthy and prosperous, and that a heavy verdict had been rendered against it in a similar case. *Pullman Co. v. Pennock*, 118 Tenn. 565, 102 S. W. 73.

Referring to the character and value of a party's dress is improper. *Emery Dry Goods Co. v. DeHart*, 130 Ill. App. 244.

Error to tell jury in personal injury action that plaintiff had a wife and children. *McCarthy v. Spring Valley Coal Co.* 232 Ill. 473, 83 N. E. 957.

Asserting that defendant corporation is a gigantic monopoly is improper. *Stewart v. Metropolitan Street R. Co.* 72 App. Div. 459, 76 N. Y. Supp. 540.

Attack on corporations is improper. *Tutwiler Coal, Coke & I. Co. v. Nail*, 141 Ala. 374, 37 So. 634; *Western & A. R. Co. v. Cox*, 115 Ga. 715, 42 S. E. 74; *People ex rel. Esper v. Detroit & S. Pl. Road Co.* 125 Mich. 366, 84 N. W. 290; *Johnson v. Detroit & M. R. Co.* 135 Mich. 353, 97 N. W. 760; *Kinne v. International R. Co.* 100 App. Div. 5, 90 N. Y. Supp. 930; *Hillman v. Detroit United R. Co.* 137 Mich. 184, 100 N. W. 399; *Galveston, H. & S. A. R. Co. v. Smith*, 100 Tex. 267, 98 S. W. 240; *Texas C. R. Co. v. Parker*, 33 Tex. Civ. App. 514, 77 S. W. 42; *Benoit v. New York C. & H. R. R. Co.* 94 App. Div. 24, 87 N. Y. Supp. 951.

Parties, including character and conduct, are however, legitimate subjects of comment. *Miller v. Nuckolls*, 77 Ark. 64, 4 L.R.A.(N.S.) 149, 113 Am. St. Rep. 122, 91 S. W. 759, 7 A. & E. Ann. Cas. 110; *Salem v. Webster*, 192 Ill. 369, 61 N. E. 323; *Cincinnati Times-Star Co. v. France*, 22 Ky. L. Rep. 1666, 61 S. W. 18; *Wheeler v. Detroit Electric R. Co.* 128 Mich. 656, 87 N. W. 886; *Scullin v. Wabash R. Co.* 184 Mo. 695, 83 S. W. 760; *Geiger v. Payne*, 102 Iowa, 581, 69 N. W. 554, 71 N. W. 571; *Huber v. Miller*, 41 Or. 103, 68 Pac. 400.

And it has been held not prejudicial error to call plaintiffs "monumental liars." *Green & Sons v. Lineville Drug Co.* 167 Ala. 372, 52 So. 433.

But it was held error to call plaintiff "a Jew horse dealer" (*Hyman v. Kirt*, 153 Mich. 113, 116 N. W. 536); to characterize engineers and firemen of defendant railroad company as murderers (*Orendorf v. New York C. & H. R. R. Co.* 119 App. Div. 638, 104 N. Y. Supp. 222, to assert that defendant exerted undue political influence at Washington (*Strickland v. New York C. & H. R. R. Co.* 88 App. Div. 367, 84 N. Y. Supp. 655); and to allege that defendant telegraph

company was more ready to deliver messages to prominent persons than to others (*Kirby v. Western U. Teleg. Co.* 77 S. C. 404, 122 Am. St. Rep. 580, 58 S. E. 10).

f. Reference to protection of defendant by insurance.—It has been held error for counsel in a negligence case to state to the jury that the defense is being conducted by an insurance company,¹ or to suggest, directly or indirectly, that defendant is protected by insurance.²

¹ *Haigh v. Edelmeyer & M. Hod Elevator Co.* 123 App. Div. 376, 107 N. Y. Supp. 936.

² *Trent v. Lechtman Printing Co.* 141 Mo. App. 437, 126 S. W. 238; *Hordern v. Salvation Army*, 124 App. Div. 674, 109 N. Y. Supp. 131; *Manigold v. Black River Traction Co.* 81 App. Div. 381, 80 N. Y. Supp. 861; *George A. Fuller Co. v. Darragh*, 101 Ill. App. 664; *Walsh v. Wilkes Barre*, 215 Pa. 226, 64 Atl. 407; *Lone Star Brewing Co. v. Voith*, — Tex. Civ. App. —, 84 S. W. 1100; *Prewitt-Spurr Mfg. Co. v. Woodall*, 115 Tenn. 605, 90 S. W. 623; *Coe v. Van Why*, 33 Colo. 315, 80 Pac. 894, 3 A. & E. Ann. Cas. 552.

But see *Shane v. National Biscuit Co.* 186 N. Y. 514, 78 N. E. 1112; *McTague v. Dowst*, 51 App. Div. 206, 64 N. Y. Supp. 949.

g. Use of document not in evidence.—It is error to allow counsel to use with the jury documents that have not been put in evidence.¹

¹ *Koelges v. Guardian L. Ins. Co.* 57 N. Y. 638 (reading from pamphlet proved to have been issued by defendant); *McKeever v. Weyer*, 11 N. Y. Week. Dig. 258 (exhibiting cartoon or caricature); *Union Cent. L. Ins. Co. v. Cheever*, 36 Ohio St. 201, 38 Am. Rep. 573; *Stoudenmire v. Harper*, 81 Ala. 242, 1 So. 857 (memorandum which was improperly used to refresh recollection); *Zube v. Weber*, 67 Mich. 52, 34 N. W. 264. But counsel may use a diagram not formally in evidence in discussing the testimony of an adverse witness who used it in aid of his testimony. *East Tennessee, V. & G. R. Co. v. Watson*, 90 Ala. 41, 7 So. 813.

h. Document not formally read.—It is not indispensable that a document put in evidence should have been actually read or handed to the jury before closing the evidence. But the court may allow it to be read during the argument, the adverse party being then allowed to give evidence in rebuttal or explanation, if surprised.¹

The judge has power to allow a document which proves itself to be produced on the argument, if the omission to do so before is excused, and the adverse party not prejudiced.²

¹ *Harter v. Seaman*, 3 Blackf. 27; *Binder v. State*, 5 Iowa, 457; *O'Reilly v. Duffy*, 105 Mass. 243; *Carlyon v. Lannan*, 4 Nev. 156; *s. p.* *Clapp v. Wilson*, 5 Denio, 285 (trial before referee). Compare, as to the right to have it go to the jury in the same way, *Duke v. Cahawba* Nav. Co. 10 Ala. 82, 44 Am. Dec. 472.

² *Bank of Charleston v. Emeric*, 2 Sandf. 718.

i. Misuse of evidence.—Evidence admitted for a specific purpose counsel cannot use for a purpose for which it would have been inadmissible.¹

¹ *Coleman v. People*, 55 N. Y. 81; *Dilleber v. Home L. Ins. Co.* 10 N. Y. Week. Dig. 180; *Cole v. Cole*, 5 N. Y. Week. Dig. 453; *Waldron v. Waldron*, 156 U. S. 361, 39 L. ed. 453, 15 Sup. St. Rep. 383 (error to use evidence in direct violation of the restriction placed by the court on its use, whether or not the evidence was admissible for all purposes).

j. Nonsuited cause of action.—If plaintiff is nonsuited as to one of several causes of action he cannot use evidence which was directly relevant only to the nonsuited cause of action, in support of the other.¹

¹ *Meyer v. Cullen*, 54 N. Y. 392.

k. Reading medical and other scientific books.—It is error to allow counsel in addressing the jury to read statements from a book of inductive science,¹ unless what is so read has been received in evidence.

It is not enough that the book has been shown by expert testimony to be a standard work.²

¹ *People v. Wheeler*, 9 Pac. Coast L. J. 581, 14 Rep. 111; *Yoe v. People*, 49 Ill. 410; *Washburn v. Cuddihy*, 8 Gray, 430; *Boyle v. State*, 57 Wis. 472, 46 Am. Rep. 41, 15 N. W. 827, and cases cited. And see notes to *Union P. R. Co. v. Yates*, 40 L.R.A. 553, and *Ashworth v. Kittredge*, 59 Am. Dec. 178.

There is an exception where counsel avoids reading statements of fact and confines himself to borrowing argument which he might properly have

used if it had originated with himself. *Jones v. Doe ex dem. Little Blue River Regulator Baptist Church, Smith (Ind.)* 47, Mr. Moak's article in 24 Alb. L. J. (sound, though questioned in 24 Alb. L. J. 284). "Reason is neither more nor less than reason because it happens to be read from a book." *Hovey, J. in Cory v. Silcox*, 6 Ind. 39. *Legg v. Drake*, 1 Ohio St. 286, Approved in *Union Cent. L. Ins. Co. v. Cheever*, 36 Ohio St. 201, 38 Am. Rep. 573.

² *Stilling v. Thorp*, 54 Wis. 528, 41 Am. Rep. 60, 11 N. W. 906.

A medical book may be used in framing questions to an expert, but it cannot be read to the jury. *Brown v. Springfield Traction Co.* 141 Mo. App. 382, 125 S. W. 236.

l. Reading previous proceedings in the cause.—Counsel has not a right to read to the jury or comment upon previous proceedings in the same cause¹ except that he may quote the opinion of an appellate court on a question of law only as matter of argument.²

¹ *Bell v. McMaster*, 29 Hun, 272; *Griebel v. Rochester Printing Co.* 24 App. Div. 288, 48 N. Y. Supp. 505; *Scott v. Scott*, 124 Ind. 66, 24 N. E. 666; *Baker v. Madison*, 62 Wis. 137, 22 N. W. 141, 583; *Good v. Mylin*, 13 Pa. 538; *Illinois C. R. Co. v. Jolly*, 119 Ky. 452, 84 S. W. 330; *Martin v. Courtney*, 81 Minn. 112, 83 N. W. 503; *Olney v. Boston & M. R. Co.* 73 N. H. 85, 59 Atl. 387. For the Georgia rule under statute, see *Douglass v. Boynton*, 59 Ga. 283.

Thus it is error to allow counsel to read to the jury the charge on a former trial (*Butler v. Slam*, 50 Pa. 456), or the trial judge's opinion on a former trial as to the admissibility of evidence (*Crawford v. Morris*, 5 Gratt. 90), or to allow opinion overruling demurrer to be read in which the judge indicates his opinion on a question of fact which the jury must decide. *Pres Pub. Co. v. McDonald*, 26 L.R.A. 531, 11 C. C. A. 155, 26 U. S. App. 167, 63 Fed. 238. So it is error to read to the jury the record of a change of venue (*Campbell v. Maher*, 105 Ind. 83, 4 N. E. 911), or virtually to bring the record of a change of venue before the jury while contending with the court as to the propriety of its use. *Kansas City, Ft. S. & M. R. Co. v. Sokal*, 61 Ark. 130, 32 S. W. 497. Nor has counsel a right to read to the jury and comment upon the facts set forth in an affidavit for continuance made by adverse counsel at a previous term. *Louisville, N. O. & T. R. Co. v. VanEaton*, — Miss. —, 14 So. 267. *Contra*, *Hanners v. McClelland*, 74 Iowa, 318, 37 N. W. 389. And it is error to permit counsel to read the opinion of the appellate court as to the weight or credibility of the evidence (*Allaire v. Allaire*, 39 N. J. L. 113), or to read the comment of the appellate court upon the facts. *Hudson v. Hudson*, 90 Ga. 581, 16 S. E. 349; *Laughlin v. Grand Rapids Street R. Co.*

80 Mich. 154, 44 N. W. 1049; Railroad Co. v. Stewart, 54 Ohio St. 667, 47 N. E. 1116.

It is error for counsel to state that three separate juries of the county have found a disputed question of fact in his favor. Atwood v. Brooks, 4 Tex. App. Civ. Cas. (Willson) 130, 16 S. W. 535. But it is not error to refer to the fact that on the first trial the adverse party introduced no witnesses. Dahlstrom v. St. Louis, I. M. & S. R. Co. 108 Mo. 525, 18 S. W. 919.

² Allaire v. Allaire, 39 N. J. L. 113, 114. ("Plainly, counsel, in his address to the jury, can, for the purpose of presenting his views of the law of his case, call to his aid and quote the language delivered from the bench." Per Beasley, Ch. J.)

In State v. Hoyt, 46 Conn. 333, 338, reading the whole opinion was sanctioned in a criminal case where the facts seemed necessary to understand the law, and the jury are judges of law and fact; s. p. Noble v. M'Clintock, 6 Watts & S. 58, explained in Good v. Mylin, 13 Pa. 538.

m. Reference to verdicts in similar cases.—It is not proper for counsel to refer to verdicts in other cases.¹

¹ Quincy Gas & Electric Co. v. Baumann, 203 Ill. 295, 67 N. E. 807; Chicago, I. & L. R. Co. v. Martin, 28 Ind. App. 468, 63 N. E. 247.

n. Stating or reading the law.—Counsel has the right to state his views of the law to the jury by way of argument of the questions of fact to be submitted to them, except that he is not entitled to argue against any ruling already made upon the trial, and provided that it be understood that the jury are to take the law from the instructions of the judge, and not from counsel.¹

Allowing counsel against objection to go beyond this limit in reading from law books is error.²

¹ Ransone v. Christian, 56 Ga. 351; Fosdick v. VanArsdale, 74 Mich. 302, 41 N. W. 931; Kean v. Detroit Copper & Brass Rolling Mills, 66 Mich. 277, 33 N. W. 395. Contra, Sullivan v. Royer, 72 Cal. 248; 13 Pac. 655. Counsel may state his opinion as to the law, but cannot positively assert that such is the law. Chicago Consol. Traction Co. v. Kinare, 138 Ill. App. 636. And it is error to allow counsel's incorrect statement of the method of arriving at the measure of damages to go to the jury. Alabama G. S. R. Co. v. Carroll, 28 C. C. A. 207, 52 U. S. App. 442, 84 Fed. 772; Storrie v. Marshall, — Tex. Civ. App. —, 27 S. W. 224. And permitting counsel to instruct the jury as to

the impropriety of a quotient verdict is objectionable, though not reversible error, since they are not thereby directed how they shall find their verdict. *Missouri, K. & T. R. Co. v. Steinberger*, 6 Kan. App. 585, 51 Pac. 623.

In California it is discretionary with the trial court to permit counsel to read and comment upon the instructions previously settled by the court. *Boreham v. Byrne*, 83 Cal. 23, 23 Pac. 212. But under a statute giving a party the right to read to the jury, as the law in the case, instructions submitted by him to the court and marked by it "given," counsel cannot construe such instructions in argument. *Scott v. Scott*, 124 Ind. 66, 24 N. E. 666. Nor should counsel comment upon the law wholly outside of the instructions of the court, though such comment will not require a reversal, where the facts of the case clearly warrant such an instruction if asked. *Dean v. Chandler*, 44 Mo. App. 338. In Washington the court may, in its discretion, refuse to permit counsel to read statutes or judicial decisions to the jury. *Ryan v. Lambert*, 49 Wash. 649, 96 Pac. 232.

² In some jurisdictions it seems to be the right of counsel to read to the jury from the books of law for the purpose of aiding him in presenting his views of the law. *Reg. v. Courvoisier*, 9 Car. & P. 362; *Norfolk & W. R. Co. v. Harman*, 83 Va. 553, 8 S. E. 251; and see *Allaire v. Allaire*, 39 N. J. L. 113. In other states the practice is not permitted (*Baldwin's Appeal*, 44 Conn. 37; *Richmond's Appeal*, 59 Conn. 226, 22 Atl. 82; *Hudson v. Hudson*, 90 Ga. 581, 16 S. E. 349; *Sullivan v. Royer*, 72 Cal. 248, 13 Pac. 655; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501, 83 Am. Dec. 756; *Porter v. Choen*, 60 Ind. 338; *Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129),—especially where the decision proposed to be read is entirely irrelevant (*Mullen v. Reining*, 72 Wis. 388, 39 N. W. 861), nor does the fact that a decision is sought to be read only by way of illustration render the practice proper. *Chicago v. McGiven*, 78 Ill. 347. In still other jurisdictions the matter rests in the direction of the trial court. *Gregory v. Ohio River R. Co.* 37 W. Va. 606, 16 S. E. 819; *Williams v. Brooklyn Elev. R. Co.* 126 N. Y. 96, 26 N. E. 1048; *Lyon v. Jones*, 86 Tex. 492, 25 S. W. 694; *Gilbertson v. Miller Min. & Smelting Co.* 4 Utah, 46, 5 Pac. 699; *State v. Klinger*, 46 Mo. 224. But the practice is not to be commended. *Steffenson v. Chicago, M. & St. P. R. Co.* 48 Minn. 285, 51 N. W. 610. And it is error to permit such a course where the matter proposed to be read is calculated to have the effect of evidence. *Galveston, H. & S. A. R. Co. v. Wesch*, 85 Tex. 593, 22 S. W. 957; *Ricketts v. Chesapeake & O. R. Co.* 33 W. Va. 433, 7 L.R.A. 354, 10 S. E. 801. And it is error to permit counsel to read irrelevant decisions of a foreign court without instructing the jury as to the purposes for which they are introduced and without informing them that it is their duty to look to the court for the law so far as applicable to the case. *Slaughter v. Metropolitan Street R. Co.* 116 Mo. 269, 23 S. W. 760. In Texas (*Missouri, K. & T. R. Co. v. Smith*, — Tex. Civ. App. —, 101 S. W.

453) the court may permit or refuse the reading of authorities in argument to jury. The practice of reading law text-books, decisions, etc., to the jury was disapproved in *Hughes v. General Electric Light & P. Co.* 107 Ky. 485, 54 S. W. 723; *St. Louis Clothing Co. v. J. D. Hail Dry Goods Co.* 156 Mo. 393, 56 S. W. 1112; *Houston & T. C. R. Co. v. Gee*, 27 Tex. Civ. App. 414, 66 S. W. 78; *Lewter v. Lindley*, — Tex. Civ. App. —, 89 S. W. 784; *Newport News & O. P. R. & Electric Co. v. Bradford*, 100 Va. 231, 40 S. E. 900; *Filley v. Christopher*, 39 Wash. 22, 109 Am. St. Rep. 853, 80 Pac. 234; *Ray v. Chesapeake & O. R. Co.* 57 W. Va. 333, 50 S. E. 413; *Hughes v. Chicago*, St. P. M. & O. R. Co. 122 Wis. 258, 99 N. W. 897; *Martin v. Courtney*, 81 Minn. 112, 83 N. W. 503; *Chicago, I. & S. R. Co. v. Martin*, 28 Ind. App. 468, 63 N. E. 247. But the custom was approved in *Cahaba Southern Min. Co. v. Pratt*, 146 Ala. 245, 40 So. 943; *Coyne v. Avery*, 189 Ill. 378, 59 N. E. 788; *Vocke v. Chicago*, 208 Ill. 192, 70 N. E. 325; *Gulf, C. & S. F. R. Co. v. Bell*, 24 Tex. Civ. App. 579, 58 S. W. 614.

See also upon this question note to *Union P. R. Co. v. Yates*, 40 L.R.A. 553.

o. Retaliatory statements or remarks.—If an improper line of discussion by counsel is provoked by similar remarks,¹ or is replied to in like manner,² it is no just ground for complaint.

¹ *Alabama G. S. R. Co. v. Hill*, 93 Ala. 524, 9 So. 722; *Galvin v. Meridian Nat. Bank*, 129 Ind. 439, 28 N. E. 847; *Stratton v. Dole*, 45 Neb. 472, 63 N. W. 875. Contra, *Tucker v. Henniker*, 41 N. H. 317, 93 Am. Dec. 425.

² *Moore v. Moore*, 73 Tex. 382, 11 S. W. 396.

9. Interruption by adverse counsel.

Counsel has a right to interpose, during the argument of adverse counsel, to object to his misstating the evidence or transcending the limits of argument.¹

¹ *Long v. State*, 12 Ga. 293, 330; *Elgin, J. & E. R. Co. v. Fletcher*, 128 Ill. 619, 21 N. E. 577; *Western U. Teleg. Co. v. Wingate*, 6 Tex. Civ. App. 394, 25 S. W. 439 (holding it error for counsel to ask the jury either directly or by implication to consider such an objection as evidence against the party making it on the merits of his case).

Indeed, while it is the duty of the court to prevent improper statements by counsel in the argument, the opposing counsel should object and except to such improper remarks at the time they are made. *Union P. R. Co. v. Field*, (Kan.) 69 C. C. A. 536, 137 Fed. 14; *Miller v. Nuckolls*, 77 Ark. 64, 4 L.R.A.(N.S.) 149, 113 Am. St. Rep. 122, 91 S. W. 759, 7 A. & E. Ann. Cas. 110; *McDonald v. Champion Iron & Steel Co.*

140 Mich. 401, 103 N. W. 829; *Beaman v. Martha Washington Min. Co.* 23 Utah, 139, 62 Pac. 631; *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 70 Neb. 766, 98 N. W. 44; *Bond v. Bean*, 72 N. H. 444, 101 Am. St. Rep. 686, 57 Atl. 340; *Texas C. R. Co. v. Pledger*, 36 Tex. Civ. App. 248, 81 S. W. 755; *Eckhart & S. Mill. Co. v. Schaefer*, 101 Ill. App. 500; *St. Louis Southwestern R. Co. v. Dickens*, — Tex. Civ. App. —, 56 S. W. 124; *Baxter v. Krainik*, 126 Wis. 421, 105 N. W. 803; *Keck v. Bode*, 23 Ohio C. C. 413; *Wagner v. Hazle Twp.* 215 Pa. 219, 64 Atl. 405; *Eppstein v. Missouri P. R. Co.* 197 Mo. 720, 94 S. W. 967; *Farnandis v. Great Northern R. Co.* 41 Wash. 486, 5 L.R.A. (N.S.) 1086, 111 Am. St. Rep. 1027, 84 Pac. 18; *Quincy Gas & Electric Co. v. Baumann*, 203 Ill. 295, 67 N. E. 807; *Leu v. St. Louis Transit Co.* 106 Mo. App. 329, 80 S. W. 273; *Stewart v. Metropolitan Street R. Co.* 72 App. Div. 459, 76 N. Y. Supp. 540; *Fishblatt v. New York City R. Co.* 51 Misc. 648, 99 N. Y. Supp. 836; *Portland Gold Min. Co. v. Flaherty*, 49 C. C. A. 361, 111 Fed. 312, 21 Mor. Min. Rep. 555; *Brzozowski v. National Box Co.* 104 Ill. App. 338; *English v. Anderson*, 75 Ark. 577, 88 S. W. 583; *Louisville & N. R. Co. v. Smith*, 27 Ky. L. Rep. 257, 84 S. W. 755; *German-American Ins. Co. v. Harper*, 70 Ark. 305, 67 S. W. 755.

10. Right of judge to regulate argument.

The court may and should regulate the argument of counsel,¹ and it is proper for the court, of its own motion, to interpose in restraint of counsel transgressing the rules.² If counsel is making an improper argument, the court may stop him or may permit him to proceed, and correct the error in the charge.³

¹ *Chicago & M. Electric R. Co. v. Judge*, 135 Ill. App. 377; *Hathaway v. Detroit, T. & M. Co.* 124 Mich. 610, 83 N. W. 598; *Oliver v. Jessup*, 137 Mich. 642, 100 N. W. 900.

² *Melvin v. Easley*, 46 N. C. (1 Jones L.) 386, 62 Am. Dec. 171; *Tucker v. Henniker*, 41 N. H. 317, 323; *St. Louis & S. E. R. Co. v. Myrtle*, 51 Ind. 566, 577 and cases cited; *Elgin, J. & E. R. Co. v. Fletcher*, 128 Ill. 619, 21 N. E. 577; *Amperse v. Fleckenstein*, 67 Mich. 247, 34 N. W. 564; *Frank v. Humphreys*, 24 S. C. 325.

A request by counsel to read irrelevant matter in his argument to the jury should be denied by the court on its own motion, instead of asking opposing counsel if they are willing to consent thereto, thus forcing them to make objection. *Birmingham Nat. Bank v. Bradley*, 116 Ala. 142, 23 So. 53.

And where the court has of its own motion checked counsel in the course of an improper argument, it is error to fail to stop counsel for the adverse party from arguing on the same matter, even if no objection be interposed. *Jenkins v. Hankins*, 98 Tenn. 545, 41 S. W. 1028.

Counsel who persistently misstates evidence should be disciplined by the court. *Cooley v. Eastern Wire-Bound Box Co.* 75 N. H. 529, 77 Atl. 936.

² *Sayles v. Quinn*, 196 Mass. 492, 82 N. E. 713.

11. Withdrawal of remarks curing error.

An abuse of the right of argument constitutes no ground for exception, where the improper remarks are withdrawn, or their effect upon the minds of the jury has been removed by some action of court or counsel.¹

¹ *Matts v. Borba*, — Cal. —, 37 Pac. 159; *Washington & G. R. Co. v. Patterson*, 9 App. D. C. 423; *Towner v. Thompson*, 82 Ga. 740, 9 S. E. 672; *Joliet Street R. Co. v. Caul*, 143 Ill. 177, 32 N. E. 389; *Nicks v. Chicago, St. P. & K. C. R. Co.* 84 Iowa, 27, 50 N. W. 222; *Strowger v. Sample*, 44 Kan. 298, 24 Pac. 425; *Nolan v. Johns*, 126 Mo. 159, 28 S. W. 492; *Eickhoff v. Eikenbary*, 52 Neb. 332, 72 N. W. 308; *Galveston, H. & S. A. R. Co. v. Duelin*, 86 Tex. 450, 25 S. W. 406; *Rea v. Harrington*, 58 Vt. 181, 2 Atl. 475; *Graves v. Smith*, 7 Wash. 14, 34 Pac. 213.

If improper statements by counsel in argument are withdrawn they cannot be used as the basis of a valid exception. *Kilpatrick v. Grand Trunk R. Co.* 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531; *Covington & C. Bridge Co. v. Smith*, 28 Ky. L. Rep. 529, 89 S. W. 674; *Christensen v. Lambert*, 67 N. J. L. 341, 51 Atl. 702; *Cleveland City R. Co. v. Roebuck*, 22 Ohio C. C. 99, 12 Ohio C. D. 262; *Galveston, H. & S. A. R. Co. v. Nicholson*, — Tex. Civ. App. —, 57 S. W. 693; *The Fair v. Hoffmann*, 209 Ill. 330, 70 N. E. 622; *McKnight v. Detroit & M. R. Co.* 135 Mich. 307, 97 N. W. 772; *Baker v. Independence*, 93 Mo. App. 165; *University of Illinois v. Spalding*, 71 N. H. 163, 62 L.R.A. 817, 51 Atl. 731; *International & G. N. R. Co. v. Mercer*, — Tex. Civ. App. —, 78 S. W. 562; *Southern Indiana R. Co. v. Fine*, 163 Ind. 617, 72 N. E. 589. But see *Wolfe v. Minnis*, 74 Ala. 386; *Baker v. Madison*, 62 Wis. 137, 22 N. W. 141, 583.

The mere formal announcement by the court that counsel's objection to improper argument is sustained is not sufficient. *Andrews v. Chicago, M. & St. P. R. Co.* 96 Wis. 348, 71 N. W. 372; *McKenna v. McKenna*, 118 Ill. App. 240.

The error may generally be cured, however, by the charge. *Ft. Smith Lumber Co. v. Cathey*, 74 Ark. 604, 86 S. W. 806; *Maddox v. Morris*, 110 Ga. 309, 35 S. E. 170; *Collins Park & B. R. Co. v. Ware*, 112 Ga. 663, 37 N. E. 975; *Pittsburgh, C. C. & St. L. R. Co. v. Kinnare*, 203 Ill. 388, 67 N. E. 826; *Shaw v. Chicago & G. T. R. Co.* 123 Mich. 629, 49 L.R.A. 308, 81 Am. St. Rep. 230, 82 N. W. 618; *Pierce v. Brennan*, 88 Minn. 50, 92 N. W. 507; *Chilson v. Houston*, 9 N. D. 498, 84 N. W. 345; *Dougherty v. Pittsburgh R. Co.* 213 Pa. 346, 62 Atl. 926; *International*

& G. N. R. Co. v. Dalwigh, — Tex. Civ. App. —, 56 S. W. 136; Chicago & E. I. R. Co. v. Zapp, 209 Ill. 339, 70 N. E. 623; Sweeney v. New York C. & H. R. R. Co. 83 App. Div. 565, 81 N. Y. Supp. 1112.

Though it may be so serious that no subsequent action can remove the prejudice. Galveston, H. & S. A. R. Co. v. Kutac, 72 Tex. 643, 11 S. W. 127; McHenry Coal Co. v. Sneddon, 98 Ky. 684, 34 S. W. 228. The rule in New Hampshire requires a verdict to be set aside for unwarranted remarks of counsel in argument, unless the trial judge finds as a fact that the jury were not influenced thereby or that the effect upon their minds was wholly removed. Bullard v. Boston & M. R. Co. 64 N. H. 27, 5 Atl. 838.

Counsel's persistence in arguing outside the record after objection by opposite counsel and admonition from the court will require reversal. Wilburn v. St. Louis, I. M. & S. R. Co. 48 Mo. App. 224; Rudolph v. Landwerlen, 92 Ind. 34.

12. Amending pleadings during argument.

Under a statute permitting pleadings to be amended "on" the trial, an amendment may be allowed during the argument. On the trial means before the close of it.¹

¹ Franklin F. Ins. Co. v. Findlay, 6 Whart. 483, 39 Am. Dec. 430.

XXIII.—THE INSTRUCTIONS.

A. GENERAL RULES.

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2. Power of court; necessity of request.
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16. Referring to pleadings.
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 - a. In general.
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[The statutes existing in many of the states, restraining the judge's instructions, are so diverse and so diversely construed, and so well understood each in their own locality, that I have not thought it best to take the necessary space to state them; and I have been confirmed in this by the impression that they

chiefly are due to causes that may not be generally permanent, and will be likely to give way in course of time.

In respect to "special verdicts" and "special questions," the reader will find much confusion in the language of the reports, answers to special questions being often called special verdicts. As the two proceedings are entirely distinct (although putting special questions is a convenient substitute for asking a special verdict), it may be useful here to make clear my use of these expressions. A special verdict, properly so-called, is a finding of facts, with conclusion in the alternative, that if upon these facts the law is for plaintiff, the jury find for plaintiff, if upon these facts it is for defendant, the jury find for defendant. The jury have, in certain cases, a right to find thus specially on all or any of the issues, and this enables them sometimes to agree in appearance and be discharged, while, in reality, disagreeing, those in favor of an absolute verdict one way being content to accompany it with a special verdict which those opposed to the general verdict think will vindicate their view.

The putting of special questions is an analogous mode of requiring the jury to find on any facts in issue; and though it may have a similar effect it has great advantage in defining the pivotal facts so as to enable the court to apply the law with more justice than a general verdict would.

The finding of the jury in either case is, in a general sense, a "special" verdict; but it is more convenient, for clearness in stating the rules here, to confine the term "special verdict" to what was known as such at common law; and to designate answers given under the more modern method of putting questions, as "special findings."]

A. GENERAL RULES.

1. In general.

The office of an instruction is to explain the facts and to declare what rules of law will apply to any set of facts which may be found on the evidence.¹ A charge must be considered according to its entirety, and not according to isolated paragraphs,² and must be construed with reference to the law and the evidence and the actual issues.³

¹ *St. Louis Southwestern R. Co. v. Cleland*, 50 Tex. Civ. App. 499, 110 S. W. 122.

- ² *Clary v. Isom*, 56 Fla. 236, 47 So. 919; *Atlantic Coast Line R. Co. v. Dees*, 56 Fla. 127, 48 So. 28; *Florida R. Co. v. Sturkey*, 56 Fla. 196, 48 So. 34; *Atlantic Coast Line R. Co. v. Jones*, 132 Ga. 189, 63 S. E. 834; *Colbeck v. Sampsell*, 140 Ill. App. 566; *American Sheet & Tin Plate Co. v. Bucy*, 43 Ind. App. 501, 87 N. E. 1051; *Revis v. Raleigh*, 150 N. C. 348, 63 S. E. 1049; *Missouri, K. & T. R. Co. v. Snow*, 53 Tex. Civ. App. 184, 115 S. W. 631; *McCormick v. Columbia Electric Street R. Light & P. Co.* 85 S. C. 455, 67 S. E. 562; *Chicago, R. I. & P. R. Co. v. Johnson*, 25 Okla. 960, 27 L.R.A.(N.S.) 879, 107 Pac. 662.
- ³ *Southern P. Co. v. Hall*, 41 C. C. A. 50, 100 Fed. 760; *Slack v. Harris*, 200 Ill. 96, 65 N. E. 669; *Bickel v. Martin*, 115 Ill. App. 367; *Yazoo & M. Valley R. Co. v. Williams*, 87 Miss. 344, 39 So. 489, the language of the instructions should be in its ordinary meaning); *Harman v. Maddy Bros.* 57 W. Va. 66, 49 S. E. 1009; *Donk Bros. Coal & Coke Co. v. Peton*, 192 Ill. 41, 61 N. E. 330; *Atlantic Coast Line R. Co. v. Taylor*, 125 Ga. 454, 54 S. E. 622; *Malott v. Crow*, 90 Ill. App. 628; *Choctaw, O. & G. R. Co. v. Tennessee*, 191 U. S. 326, 48 L. ed. 201, 24 Sup. Ct. Rep. 99; *Macon v. Holcomb*, 205 Ill. 643, 69 N. E. 79; *Bristow v. Atlantic Coast Line R. Co.* 72 S. C. 43, 51 S. E. 529; *Rosenstein v. Fair Haven & W. R. Co.* 78 Conn. 29, 60 Atl. 1061; *Edwards v. Chicago & A. R. Co.* 94 Mo. App. 36, 67 S. W. 950; *McCormick Harvesting Mach. Co. v. Hiatt*, 4 Neb. (Unof.) 587, 95 N. W. 627.

2. Power of court; necessity of request.

In the absence of a statute to the contrary the judge has power to instruct the jury *sua sponte*,¹ but it is usually held to be in his discretion whether to do so or not, if neither party request it.²

If a party desires an instruction, he should make timely request therefor.³

- ¹ *Thistle v. Frostburg Coal Co.* 10 Md. 129; *Stumps v. Kelley*, 22 Ill. 140; *York v. Maine C. R. Co.* 84 Me. 117, 18 L.R.A. 60, 24 Atl. 790; *Hatt v. Nay*, 144 Mass. 186, 10 N. E. 807.

In Mississippi, a statute forbids the judge to charge except upon request. *Archer v. Sinclair*, 49 Miss. 343.

In Iowa, a justice of the peace has no power to charge the jury in a case on trial before him. *St. Joseph Mfg. Co. v. Harrington*, 53 Iowa, 380, 5 N. W. 568.

In Alabama, a charge by the court of its own motion upon the effect of the evidence is expressly forbidden by statute. (Code 1896, § 3326.) *Mayer v. Thompson-Hutchinson Bldg. Co.* 116 Ala. 634, 22 So. 859. Even though the credibility of the evidence be submitted to the jury. *Parker v. Daughtry*, 111 Ala. 529, 20 So. 362.

² This is the undoubted rule of practice as to submitting to the jury a particular point, or particularizing or making more definite the points submitted; the courts agreeing with practical unanimity that partial nondirection, or omission to charge as to a particular issue, or mere generalization, indefiniteness, ambiguousness and the like, constitute no reversible error in the absence of a specific request for more specific and comprehensive instructions. *Pennock v. Dialogue*, 2 Pet. 1, 7 L. ed. 327, affirming 4 Wash. C. C. 538, Fed. Cas. No. 10,941; *Williams v. Simons*, 16 C. C. A. 628, 36 U. S. App. 16, 70 Fed. 40, and cases cited; *Backus v. Fort Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445 and cases cited; *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378, 11 So. 733; *Chandler v. Lazarus*, 55 Ark. 312, 18 S. W. 181; *Nichol v. Laumeister*, 102 Cal. 658, 36 Pac. 925; *Highlands v. Raine*, 23 Colo. 295, 47 Pac. 283; *Lutton v. Vernon*, 62 Conn. 1, 23 Atl. 1020, 27 Atl. 589; *Lungren v. Brownlie*, 22 Fla. 491; *Norman v. Georgia Loan & T. Co.* 92 Ga. 295, 18 S. E. 27; *Chicago & A. R. Co. v. Esten*, 78 Ill. App. 326, affirmed in 178 Ill. 192, 52 N. E. 954; *Baltimore & O. S. W. R. Co. v. Conoyer*, 149 Ind. 524, 48 N. E. 352, 49 N. E. 452; *Reizenstein v. Clark*, 104 Iowa, 287, 73 N. W. 588; *Reamer v. Columbia*, 5 Kan. App. 543, 47 Pac. 186; *Turner v. King*, 98 Ky. 253, 260, 32 S. W. 941, 38 S. W. 405 (where it was said: "In a criminal case it is the duty of the court to give the whole law of the case, but in a civil action the court is not required, unless called on to do so, to give instructions embracing every theory of the plaintiff's cause of action that is or may be supported by the testimony, or that of the defense, and if the instructions given are otherwise objectionable, the fact the court has omitted to give to the jury every instruction authorized affords no ground for a reversal"); *Carter v. Augusta*, 84 Me. 418, 24 Atl. 892; *Buzzell v. Emerton*, 161 Mass. 176, 36 N. E. 796; *Ziebarth v. Nye*, 42 Minn. 541, 44 N. W. 1027; *Barth v. Kansas City Elev. R. Co.* 142 Mo. 535, 44 S. W. 778 (where it was said that "In civil cases it is not the duty of the trial court to instruct of its own motion if the parties neglect to ask proper instructions"); *Kelley v. Cable Co.* 7 Mont. 70, 14 Pac. 633; *Weber v. Whetstone*, 53 Neb. 371, 73 N. W. 695; *Allison v. Hagan*, 12 Nev. 38; *Dow v. Merrill*, 65 N. H. 107, 18 Atl. 317; *Haupt v. Pohlmann*, 16 Abb. Pr. 301, 307, 1 Robt. 121; *Quinby v. Carhart*, 133 N. Y. 579, 30 N. E. 972; *Thompson v. Western U. Teleg. Co.* 107 N. C. 449, 12 S. E. 427; *Cleveland Rolling Mill Co. v. Corrigan*, 46 Ohio St. 283, 3 L.R.A. 385, 20 N. E. 466; *Pennsylvania Co. v. Rossman*, 13 Ohio C. C. 111, 7 Ohio C. D. 119; *Johnson v. Hibbard*, 29 Or. 184, 41 Atl. 327, and cases cited; *Strother v. South Carolina & G. R. Co.* 47 S. C. 375, 25 S. E. 272; *Winn v. Sanborn*, 10 S. D. 642, 75 N. W. 201; *Maxwell v. Hill*, 89 Tenn. 584, 15 S. W. 253, and cases cited; *Maverick v. Maury*, 79 Tex. 435, 15 S. W. 686; *Box v. Kelso*, 5 Wash. 360, 31 Pac. 973; *Kliegel v. Aitken*, Abbott, Civ. Jur. T.—41.

94 Wis. 432, 35 L.R.A. 249, 59 Am. St. Rep. 900, 69 N. W. 67; *Bunce v. McMahon*, 6 Wyo. 24, 42 Pac. 23.

So, also, in some states, as to submitting the case to the jury without any charge whatever. *Berry v. Texas & N. O. R. Co.* 72 Tex. 620. 10 S. W. 726; *Taft v. Wildman*, 15 Ohio, 125. See also *Stuckey v. Fritsche*, 77 Wis. 329, 46 N. W. 59, where it was held that a statute requiring instructions when given on request to be given in writing, unless the giving of them in writing is waived by the parties, does not require the judge to charge the jury in every case, whether requested to do so or not, but was enacted only for the purpose of requiring written instructions when requested. In this case the judge submitted the case to the jury without any charge whatever, and, as no request for a charge was made, there was held to be no ground for complaint.

So, that an instruction was oral instead of in writing, as required by law, was no ground for reversal when no definite request was made for written charge, and the verdict included nothing that the prevailing party was not entitled to, see *Perkins v. Marrs*, 15 Colo. 262, 25 Pac. 168.

On the other hand, there are cases which hold it to be the duty of the judge to present to the jury the substantial issues in the cause and state to them the principles of law governing the rights of the parties, irrespective of whether any specific instructions are requested by counsel or not. *Barton v. Gray*, 57 Mich. 622, 24 N. W. 638; *Central R. Co. v. Harris*, 76 Ga. 502; *Upton v. Paxton*, 72 Iowa, 299, 33 N. W. 773; *Donahue v. Windsor County Mut. F. Ins. Co.* 56 Vt. 379. So, also, by statute in North Carolina (Code § 395); *Tucker v. Satterthwaite*, 120 N. C. 118, 27 S. E. 45.

That a general request that the judge shall so charge can add no force whatever to the judge's obligation in this respect, see *Hanover F. Ins. Co. v. Stoddard*, 52 Neb. 745, 73 N. W. 291. And where the judge has failed of his duty in this respect, and it is apparent from the record that the jury probably took a wrong view of the law, a new trial will be awarded. *York Park Bldg. Asso. v. Barnes*, 39 Neb. 834, 58 N. W. 440.

³ *Jones v. Seymour*, 95 Ark. 593, 130 S. W. 560; *Sandberg v. Borstadt*, 48 Colo. 96, 109 Pac. 419; *Mitchell v. Boyce*, — Tex. Civ. App. —, 120 S. W. 1016; *Suiter v. Chicago, R. I. & P. R. Co.* 84 Neb. 256, 121 N. W. 113; *Thomas v. Williams*, 139 Wis. 467, 121 N. W. 148; *Pye v. Pye*, 133 Ga. 246, 65 S. E. 424; *Warrington v. Kallaner*, 135 Mo. App. 5, 115 S. W. 492.

3. State statutes in United States courts.

State laws prescribing the manner in which the judge shall discharge his duty in charging the jury, or the papers which

he will permit to go to them in their retirement, or the requiring the jury to answer special interrogatories in addition to their general verdict, do not apply to the courts of the United States.¹

¹ *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286; *United States v. Train*, 12 Fed. 852.

For these regulations the local statutes should be consulted. In the absence of any regulation requiring it, the judge's instructions need not be reduced to writing, except to the extent necessary for enabling counsel to except. *Smith v. Crichton*, 33 Md. 103, 108.

4. Right of request.

A party has a right to submit a question of law arising on undisputed facts or upon a hypothetical statement within the scope of the evidence, and to have the instruction of the court given to the jury thereon; and it is error to refuse to listen to a timely request so to do.¹

¹ *Chapman v. McCormick*, 86 N. Y. 479; *Missouri, K. & T. R. Co. v. McGlamory*, 89 Tex. 635, 35 S. W. 1058; *Sutton v. Dana*, 15 Colo. 98, 25 Pac. 90.

The right of counsel to present requests to charge was considered in *O'Neil v. Dry Dock, E. B. & B. R. Co.* 129 N. Y. 125, 29 N. E. 84, and the rule stated above was reiterated, but was held to be inapplicable to that particular case.

And it is error to refuse a requested instruction because not included among the written requests presented to the judge before his charge, in accordance with a direction to that effect, where it is upon a material point which the appellant might reasonably anticipate would be covered by the charge. *Gallagher v. McMullin*, 7 App. Div. 321, 40 N. Y. Supp. 222.

5. Requiring written request; time, signature, etc.

The courts generally have power, either by statute, rule of court, or under the practice settled by adjudicated cases, to require that instructions asked for be presented before argument made to the jury,¹ or before the general charge to the jury,² and in writing;³ and, in some states, there are statutes requiring them to be numbered⁴ and signed by the parties asking them, or their counsel.⁵

But, notwithstanding such a limit of time, counsel acting in

good faith has a right, after the judge has instructed the jury and before they have retired, to request him to correct an error or supply a deficiency.⁶

¹ *Manhattan L. Ins. Co. v. Francisco*, 17 Wall. 672, 678, 21 L. ed. 698, 700; *Chicago v. Fitzgerald*, 75 Ill. App. 174; *Craig v. Frazier*, 127 Ind. 286, 26 N. E. 842; *Lake Erie & W. R. Co. v. Brafford*, 15 Ind. App. 655, 43 N. E. 882, 44 N. E. 551; *Ela v. Cockshott*, 119 Mass. 416, 418; *Re Keohane*, 179 Mass. 69, 60 N. E. 406; *Root v. Boston Elev. R. Co.* 183 Mass. 418, 67 N. E. 365; *Ward v. Albermarle & R. R. Co.* 112 N. C. 168, 16 S. E. 921 (where it is held that requests must be presented at or before the close of the evidence, notwithstanding silence of the Code (§ 415) in relation thereto. See also cases there cited); *Caldwell v. Brown*, 9 Ohio C. C. 691, 6 Ohio C. D. 694; *Batdorff v. Fehler*, 6 Sadler (Pa.) 559, 9 Atl. 468. According to *Shober v. Wheeler*, 113 N. C. 370, 18 S. E. 328, it is discretionary with the judge whether he will consider or ignore requests handed to him out of time, and that he grants or refuses a request after argument begun affords no ground for complaint to the other side. But according to *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572, it is improper to refuse an instruction asked, on the ground that it was not presented in time, in the absence of any rule of court in writing and of record, limiting the time within which instructions shall be presented. The opinion is silent, however, as to when the request was, in fact, submitted. See also *Heligmann v. Rose*, 13 L.R.A. 272, note, for cases on when requests are properly submitted.

And giving an instruction in response to a question by a juror after the other instructions had been given is not a violation of a rule of court that instructions will not be examined unless presented before the commencement of the final argument, except where the rule will work injustice, the question of the juror presenting, in fact, such an exception as was contemplated by the rule. *Arnold v. Phillips*, 59 Ill. App. 213.

A request of counsel for defendant, while plaintiff was making his closing speech, that the court instruct the jury upon the law of the case, was held premature and properly refused, in *Richmond & M. R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901.

In Ohio, not only must the request be made before argument, but, if requested, the instruction must be given before argument. *Monroeville v. Root*, 54 Ohio St. 523, 44 N. E. 237. But it is not error for the court in its final charge to give charges submitted with request that they be made part of the charge, but without request that they be given before argument of counsel. *Toledo v. Higgins*, 12 Ohio C. C. 646, 7 Ohio C. D. 29.

² Thus, in *Utah*, an instruction not presented to the court before the

charge to the jury is given is properly refused. *Comp. Laws*, § 3362; *Flint v. Nelson*, 10 Utah, 261, 37 Pac. 479.

Request for instruction after regular charge to jury comes too late. *Chicago v. Le Moyne*, 56 C. C. A. 278, 119 Fed. 662.

But, in Tennessee, counsel should first hear the general charge and then make such requests as in their opinion are right and proper in extension or modification. And requests for special or additional instructions made before any charge has been given, none of which are requested afterward, are properly refused. *Railway Cos. v. Hendricks*, 88 Tenn. 710, 13 S. W. 696, 14 S. W. 488. So, too, where they are submitted at the conclusion of the evidence and no request for additional instructions is made after the general charge. *Chesapeake O. & S. W. R. Co. v. Foster*, 88 Tenn. 671, 13 S. W. 694, 14 S. W. 428. It is usual, however, for counsel by oral argument or written statement, sometimes both, to present their views of the law of the case in advance of the general charge. That is a proper practice, and instead of being condemned, it is to be encouraged; yet such presentation is not to be treated as a request for an additional instruction, and made ground for reversal if not adopted by the trial judge.

³ *N. C. Code*, § 415; *Kan. Gen. Stat.* 1897, chap. 95, § 285; *Manhattan L. Ins. Co. v. Francisco*, 17 Wall. 672, 21 L. ed. 698; *Ricketts v. Birmingham Street R. Co.* 85 Ala. 600, 5 So. 353; *Chicago v. Fitzgerald*, 75 Ill. App. 174; *Tays v. Carr*, 37 Kan. 141, 14 Pac. 456; *Caldwell v. Brown*, 9 Ohio C. C. 691, 6 Ohio C. D. 694.

And a statutory requirement that the request be in writing applies to a requested instruction for a direction of a verdict. *Swift & Co. v. Fue*, 167 Ill. 443, 47 N. E. 761.

Good practice requires that counsel desiring to request instructions should present their requests to the judge in separate and distinct propositions, fairly and legibly written, before the judge begins his charge.

If the presentation of requests is delayed until after the judge has charged the jury, he may not unreasonably require them to be presented orally, or by reading them, he responding to each as read; or he may, in his discretion, require them to be first submitted to the adverse counsel, and then charge those that are consented to and determine whether or not to charge those that are not consented to.

The court is not bound to comply with an oral request to modify a written charge where, upon reading it to the jury in its exact language, the counsel presenting it states that if he so requested in writing it was a clerical error, and proceeds to state the alleged error, and the court for the purpose of understanding it requests him to reduce the modification to writing, and he fails to do so. *Savannah, T. & I. of H. R. Co. v. Beasley*, 94 Ga. 142, 21 S. E. 285.

⁴ **For** example, see *Kan. Gen. Stat.* 1897, chap. 95, § 285; *Mason v. Sieglitz*, 22 Colo. 320, 44 Pac. 588.

⁵ For instance, see N. C. Code, § 415, Kan. Gen. Stat. 1897, chap. 95, § 285; *Craig v. Frazier*, 127 Ind. 286, 26 N. E. 842; *Lake Erie & W. R. Co. v. Brafford*, 15 Ind. App. 655, 43 N. E. 882, 44 N. E. 551; *Mason v. Sieglitz*, 22 Colo. 320, 44 Pac. 588.

That requests should be numbered and signed, see *Collett v. State*, 156 Ind. 64, 59 N. E. 168; *Morisette v. Howard*, 62 Kan. 463, 63 Pac. 756; *Chicago Live Stock Commission Co. v. Fix*, 15 Okla. 37, 78 Pac. 316; *Thornton-Thomas Mercantile Co. v. Bretherton*, 32 Mont. 80, 80 Pac. 10; *Moore v. Brown*, 27 Tex. Civ. App. 208, 64 S. W. 946.

And that an unsigned request may properly be refused, see *Texas & P. R. Co. v. Mitchell*, — Tex. Civ. App. —, 26 S. W. 154.

But where a request is adopted and made the charge of the court by the judge's marking it "given" and signing it officially, the objection that it was not signed by counsel asking it is without merit. *Galveston, H. & S. A. R. Co. v. Neel*, — Tex. Civ. App. —, 26 S. W. 788.

The object in requiring prayers for instructions to be numbered and signed is not for the information or guidance of the jury, but for the convenience of the court and the protection of the parties litigant in the matter of preserving their objections and exceptions. If a party omits this requirement, or suffers the opposing party to do so without objecting in apt time, he will not be heard afterwards to complain of the omission. The trial court is not bound to entertain an objection that instructions are not numbered and signed when the same is presented for the first time on a motion for a new trial; nor will the appellate court consider such an objection on appeal or writ of error, unless it appears that timely objection was made in the court below. *Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348, and cases cited.

⁶ *Crippen v. Hope*, 38 Mich. 344; *Brick v. Bosworth*, 162 Mass. 334, 39 N. E. 36; s. p. *Chapman v. McCormick*, 86 N. Y. 479. See also *Further Instructions*, *infra*, § 65.

And it is error to refuse a proper request, although not in writing, to qualify the charge given, where such qualification would relieve the charge of error, and without it the charge does not fully and accurately present the law. *Americus, P. & L. R. Co. v. Luckie*, 87 Ga. 6. 13 S. E. 105.

And a necessary and proper instruction, requested after an argument on each side has been made to the jury, is improperly refused where it was overlooked by counsel before the argument, unless the opposite side will be unduly prejudiced by giving it. *Wills v. Tanner*, 13 Ky. L. Rep. 741, 18 S. W. 166.

And a rule of court requiring requests to charge to be made before the general charge, was held in *Bradley v. Drayton*, 48 S. C. 234, 26 S. E. 613, not to forbid a judge from stating a correct legal proposition upon a point which had either been overlooked or insufficiently stated to the jury in the general charge, although the request therefor was not made until after the general charge.

So, a statute empowering the judge to instruct the jury at the conclusion of the evidence and before arguments of counsel does not forbid an instruction to disregard an assertion by counsel in argument as to which there is no evidence, after the argument has been commenced, or even after the jury have retired. *Bogges v. Metropolitan Street R. Co.* 118 Mo. 328, 23 S. W. 159, 24 S. W. 210.

6. Right of counsel to see.

Counsel has a right to see or hear the requests to charge which are presented by his adversary.¹

¹ This right is essential to secure a fair trial, both because no communication in the course of the trial should be received by the judge from either side in exclusion of the other, and because the omission to comply with a proper request of the adversary is not unfrequently fatal to a just and otherwise regular verdict. The right stated in the text is recognized by *Tinkham v. Thomas*, 2 Jones & S. 237.

But an Indiana statute, requiring the parties desiring special instructions to reduce them to writing numbered and signed, and delivered them to the court before the argument commences, was held, in *Walker v. Johnson*, 6 Ind. App. 600, 33 N. E. 367, 34 N. E. 100, not to have been designed for the purpose of affording opposing counsel opportunity to examine the instructions asked before the argument commences, but was merely to afford the court an opportunity to examine them before giving, modifying, or refusing them. If it is desired to know in advance of the argument what instructions the court proposes to give, either of its own motion or the motion of opposing counsel, counsel must proceed under the provisions of another statute, and request the court to indicate what instructions are to be given.

7. Ruling on requests.

a. In general.—The court may reject a requested instruction which is not correct as an entirety,¹ even though modification or explanation would remove the defects and make it applicable to the case.²

And it is proper to reject a requested instruction which proceeds upon a view of the law, and presents questions entirely different from and inconsistent with those embraced in correct instructions given.³

So, too, as a general rule, the court is not obliged to give instructions in the language precisely as framed and submitted, however correct they may be, but may, in lieu thereof, give instructions prepared by himself covering, as he views the case,

all the questions of law presented upon which it is necessary and advisable to instruct the jury,⁴ unless it is otherwise expressly provided by statute.⁵

But it is error for the court to reject instructions sound in law and applicable to the evidence,⁶ unless, in lieu thereof, other correct instructions so prepared by the court are given⁷ or the principles urged are substantially embodied in the court's charge already given.⁸

¹ *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386; *Charter v. Lane*, 62 Conn. 121, 25 Atl. 464; *Atlanta v. Buchanan*, 76 Ga. 585; *McCammon v. Cunningham*, 108 Ind. 545, 9 N. E. 455; *Dickson v. Randal*, 19 Kan. 212; *Tower v. Haslam*, 84 Me. 86, 24 Atl. 587; *Baltimore & O. R. Co. v. Schultz*, 43 Ohio St. 270 (where it is held that if the party is not entitled to the instruction in the very form in which it is requested, it is not error to refuse it); *Burnham v. Logan*, 88 Tex. 1, 29 S. W. 1067; *Amsden v. Atwood*, 69 Vt. 527, 38 Atl. 263; *Richmond & D. R. Co. v. Burnett*, 88 Va. 538, 14 S. E. 372. According to *Marlborough v. Sisson*, 23 Conn. 55, however, the court may grant the request so far as it is correct.

Under the system of practice prevailing in Missouri, it is only when, by statutory enactment, instructions are required to be given, that it is error to refuse to do so, however correctly they may present the law and however much they may be authorized by the evidence. *Kansas City Suburban Belt R. Co. v. Kansas City, St. L. & C. R. Co.* 118 Mo. 599, 24 S. W. 478.

² *Alabama G. S. R. Co. v. Moody*, 92 Ala. 279, 9 So. 238; *Condiff v. Kansas City, Ft. S. & G. R. Co.* 45 Kan. 256, 25 Pac. 562; *City Nat. Bank v. Burns*, 68 Ala. 267, 44 Am. Rep. 147; *Dempsey v. Reinsedler*, 22 Mo. App. 43; *Bishop v. Goodhart*, 135 Pa. 374, 19 Atl. 1026; *Bartlett v. Beardmore*, 77 Wis. 356, 46 N. W. 494. Contra, *Ward v. Churn*, 18 Gratt. 801, 98 Am. Dec. 749; *Carrico v. West Virginia C. & P. R. Co.* 35 W. Va. 389, 14 S. E. 12, where it is held that such an instruction should not be refused, but should be given with such explanation of its meaning as will insure its being understood by the jury in the proper sense, unless the instruction is inherently defective.

³ *Waggaman v. Nutt*, 88 Md. 265, 41 Atl. 154.

⁴ *Texas & P. R. Co. v. Cody*, 166 U. S. 606, 41 L. ed. 1132, 17 Sup. Ct. Rep. 703; *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L.R.A. 283, 13 S. W. 801; *O'Rourke v. Vennekohl*, 104 Cal. 254, 37 Pac. 930; *Hill v. Corcoran*, 15 Colo. 270, 25 Pac. 171; *Ryan v. Bristol*, 63 Conn. 26, 27 Atl. 309; *Chicago v. Moore*, 139 Ill. 201, 28 N. E. 1071; *Conlon v. Oregon Short Line R. Co.* 23 Or. 499, 32 Pac. 397; *Rouse v. Downs*, 5 Kan. App. 549, 47 Pac. 982; *Dorey v. Metropolitan L. Ins. Co.* 172 Mass. 234, 51 N. E. 974; *Naples v. Raymond*, 72 Me. 213; *Chandler*

v. DeGraff, 25 Minn. 88; Lewis v. Rice, 61 Mich. 97, 27 N. W. 867; Archer v. Sinclair, 49 Miss. 343; Lau v. W. B. Grimes Dry Goods Co. 38 Neb. 215, 56 N. W. 954; Rublee v. Belmont, 62 N. H. 365; Fath v. Thompson, 58 N. J. L. 188, 33 Atl. 391; Morehouse v. Yeager, 71 N. Y. 594; Leavering v. Smith, 115 N. C. 385, 20 S. E. 446; Long v. Reid, 4 Pa. Dist. R. 71; Wade v. Columbia Electric Street R. Light & P. Co. 51 S. C. 296, 29 S. E. 233; Scoville v. Salt Lake City, 11 Utah, 60, 39 Pac. 481; Reed v. Newcomb, 64 Vt. 49, 23 Atl. 589. Contra, Gottstein v. Seattle Lumber & Commercial Co. 7 Wash. 424, 35 Pac. 133; Trezevant v. Rains, — Tex. Civ. App. —, 25 S. W. 1092; Jordan v. Benwood, 42 W. Va. 312, 36 L.R.A. 519, 26 S. E. 266; Blankenship v. Chesapeake & O. R. Co. 94 Va. 449, 27 S. E. 20 (citing 4 Minor, 3d ed. §§ 1084, 1085).

Indeed, the preparation of a charge by the judge may often have the advantage of furnishing the jury with a terse, consecutive, and logical statement of the law applicable to the case, in place of the loose, disjointed, and obscure presentation of the law which often results from giving instructions in the form in which they are prepared and submitted by counsel.

If the court do this, it should embody in the charge, and in some sufficient form specifically, and not by vague generalities so prepared, either literally or in substance, all proper instructions asked by counsel. *District of Columbia v. Gray*, 1 App. D. C. 500; *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329, 18 N. E. 804. And so prepare his charge as to avoid all inconsistencies, and not necessitate the indulgence of the presumption that the jury were able to reconcile the apparent inconsistencies or penetrate the obscurities of the charge. *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L.R.A. 283, 13 S. W. 801.

But refusal to give a request to charge, which is legal and adjusted to a distinct matter in issue affecting the result of the suit, is ground for a new trial, according to *Snowden v. Waterman*, 105 Ga. 384, 31 S. E. 110, where the case is a close one under the evidence, and the issue as to which the instruction was asked was a most vital one, although in principle, and in general and more abstract terms, the requested instruction may be covered by other instructions given by the court.

And if for want of time the judge is not able to prepare and give, in his general charge, that clear and succinct statement of the law most desirable for the consideration of the jury, requests to charge which state the law correctly, and in such clear, terse, and comprehensive manner as to be most easily understood by the jury, should be given in the language in which they are presented. *Cook v. Brown*, 62 Mich. 473, 29 N. W. 46.

Thus, in South Dakota, a statute requires that all instructions asked for shall be given or refused without modification or change, unless the modification or change be consented to by counsel; and to read an instruction, as an instruction requested by one of the parties, in language

substantially different from that requested, is a direct violation of that statute. But it seems that if the judge has any doubt as to the propriety of a request he may mark it "refused" and cover the same ground by an instruction of his own. *Peart v. Chicago, M. & St. P. R. Co.* 8 S. D. 431, 66 N. W. 814, 8 S. D. 634, 67 N. W. 837. Whether the judge may not refuse a request which correctly declares the law if, in its own charge, the same point is covered by a proper instruction (see *Informing jury as to effect of verdict,—on costs,—on imprisonment, infra*, § 53), or whether it may not modify a request and give such modified instructions as its own (see note 1 to § 8, *infra*, are different questions.

And, in Wisconsin, a statute requires the court to give instructions asked, "without change or modification, the same as asked, or refuse each in full;" but this does not forbid a change or modification necessary to conform the instruction to the law. *Eldred v. Oconto Co.* 33 Wis. 134. Otherwise, however, if the change or modification should affect injuriously the right of the party asking the instruction.

So, in Alabama, a statute requires that charges moved for by either party in writing must be given or refused in the terms in which they are written. *Alabama G. S. R. Co. v. Moody*, 92 Ala. 279, 9 So. 238.

⁶ Thus, in South Carolina, the Constitution requires the circuit judge to "declare the law;" and this is held to mean that he shall declare the law applicable to the case before him. And to refuse requests which, taken in connection with the facts as shown by the evidence, embody that law, is a fatal dereliction of that duty. *Wagener v. Parrott*, 51 S. C. 489, 29 S. E. 240.

A requested instruction which supplies an omission of the general charge, as to a material point, is improperly rejected. *Burnham v. Logan*, 88 Tex. 1, 29 S. W. 1067.

⁷ See notes 4 and 5, *supra*.

⁸ *Richmond & D. R. Co. v. Burnett*, 88 Va. 538, 14 S. E. 372. See also *Informing Jury as to Effect of Verdict,—on Costs,—on Imprisonment, infra*, § 53.

b. Complex request.—When instructions are asked in the aggregate, or a series of propositions is presented as one request, the whole may properly be rejected by the court if there is anything exceptionable in either of them,¹ or if either of them as presented requires any modification or amendment.²

¹ *Mann Boudoir Car Co. v. Dupre*, 21 L.R.A. 289, 54 Fed. 646; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898, and cases cited; *Williamson v. Tobey*, 86 Cal. 497, 25 Pac. 65; *Charter v. Lane*, 62 Conn. 121, 25 Atl. 464; *Birmingham v. Pettit*, 21 D. C. 209; *Baker v. Chatfield*, 23 Fla. 540, 2 So. 822; *Wilcox v. Mims*, 95 Ga. 564, 20

S. E. 382; North Chicago Street R. Co. v. Williams, 140 Ill. 275, 29 N. E. 672, affirming 40 Ill. App. 590; Wimbish v. Hamilton, 47 La. Ann. 246, 16 So. 856; Tower v. Haslam, 84 Me. 86, 24 Atl. 587; Kelly v. State, 51 Neb. 572, 71 N. W. 299; Consolidated Traction Co. v. Chenoweth, 58 N. J. L. 416, 34 Atl. 817, affirmed in 61 N. J. L. 554, 35 Atl. 1067; Caldwell v. Murphy, 11 N. Y. 416; McGee v. Wells, 52 S. C. 472, 30 S. E. 602; United States v. Musser, 4 Utah, 153, 7 Pac. 389; Good v. Knox, 64 Vt. 97, 23 Atl. 520; Croft v. Northwestern S. S. Co. 20 Wash. 175, 55 Pac. 42.

² Bagley v. Smith, 10 N. Y. 489, 61 Am. Dec. 756.

c. Modifying, limiting, and qualifying requests.—The court have power to modify, limit, or qualify a request to charge, so as to obviate objections raised and conform the instructions to their own view of the law;¹ but it cannot be demanded, as matter of right, that the court do this,² for the court may, if it is considered desirable, reject the request altogether.³

Nor is the court required to strike from a requested instruction the part which renders it defective, and charge the remainder.⁴

¹ Van Gunden v. Virginia Coal & I. Co. 8 U. S. App. 229, 52 Fed. Rep. 838, 3 C. C. A. 294; Mathieson Alkali Works v. Mathieson, 80 C. C. A. 129, 150 Fed. 241; Dunham v. Cox, 81 Conn. 268, 70 Atl. 1033; Evans v. Givens, 22 Fla. 476; Atlantic Coast Line R. Co. v. Odum, 5 Ga. App. 780, 63 S. E. 1126; Libby, McN. & L. v. Scherman, 146 Ill. 540, 34 N. E. 801; Koshinski v. Illinois Steel Co. 231 Ill. 198, 83 N. E. 149; Ramey v. Baltimore & O. S. W. R. Co. 235 Ill. 502, 85 N. E. 639; Sherfey v. Evansville & T. H. R. Co. 121 Ind. 427, 23 N. E. 273; Moore v. Chicago, B. & Q. R. Co. 65 Iowa, 505, 22 N. W. 650; Evans v. Lafayette, 29 Kan. 736; South Covington & C. Street R. Co. v. Core, 29 Ky. L. Rep. 836, 96 S. W. 562; Stubbs v. Boston & N. Street R. Co. 193 Mass. 513, 79 N. E. 795; Shulz v. Shulz, 113 Mich. 502, 71 N. W. 854; Bartlett v. Hawley, 38 Minn. 308, 37 N. W. 342; Archer v. Sinclair, 49 Miss. 343; Boggess v. Metropolitan Street R. Co. 118 Mo. 328, 23 S. W. 159, 24 S. W. 210; Ballard v. Chicago, R. I. & P. R. Co. 51 Mo. App. 453; Horne v. People's Bank, 108 N. C. 109, 12 S. E. 840; Alexander v. Richmond & D. R. Co. 112 N. C. 720, 16 S. E. 896; Graves v. Jackson, 150 N. C. 383, 64 S. E. 128; Yardley v. Cuthbertson, 108 Pa. 395, 1 Atl. 765; Knobloch v. Germania Sav. Bank, 50 S. C. 259, 27 S. E. 962 (where it is held that modifying an erroneous request, and thus freeing it of some of its faults, without other change, is not ground for reversal at the instance of the one preferring the request, even though, as modified, it is not entirely correct); Missouri P. R. Co. v. Williams, 75 Tex. 4, 12 S. W. 835; Industrial

Lumber Co. v. Bivens, 47 Tex. Civ. App. 396, 105 S. W. 831; Grace v. Dempsey, 75 Wis. 313, 43 N. W. 1127; Speight v. Rocky Mountain Bell Teleph. Co. 36 Utah, 483, 107 Pac. 742; Miller v. Fireman's Fund Ins. Co. 6 Cal. App. 395, 92 Pac. 332. Otherwise by statute in Alabama. Alabama G. S. R. Co. v. Moody, 92 Ala. 279, 9 So. 238 (holding that a statute providing that "charges moved for by either party in writing must be given or refused in the terms in which they are written" does not prevent the judge giving an oral explanatory charge, but does prohibit him from qualifying, limiting, or modifying the charge requested; and that the explanatory charge must, in its purpose and effect, merely simplify or relieve the charge of involvement or obscurity, or prevent misunderstanding and misapplication).

The modification should be appended to the requested charge, and in such a manner as to show the precise charge and the precise modification and to make the whole intelligible to the jury, so that no injury may result to the party making the request. Missouri P. R. Co. v. Williams, 75 Tex. 4, 12 S. W. 835.

And it should be applicable to the facts. Chesapeake & O. R. Co. v. Yost, 16 Ky. L. Rep. 834, 29 S. W. 326.

But it must not deny the party what he is entitled to. Mallonee v. Duff, 72 Md. 283, 19 Atl. 708.

In New Mexico, a statute empowers the court to modify instructions asked, indicating the modifications by such words as "changed thus," but prohibits any modification by any interlineation or erasure. This statute, however, was held, in Denver & R. G. R. Co. v. Harris, 3 N. M. 114, 2 Pac. 369, to be directory merely; and an erasure, although a clear violation of the statute, was held to be no such irregularity as required reversal, inasmuch as no prejudice resulted from it. In North Dakota, it is held that an instruction must be given or refused as requested. Landis v. Fyles, 18 N. D. 587, 120 N. W. 566.

And, in Ohio, a statute forbids the judge from orally qualifying, modifying, or in any manner explaining to the jury a requested instruction which is given. Caldwell v. Brown, 9 Ohio C. C. 691, 6 Ohio C. D. 694. The court may of course refuse it, if the instruction could not properly be given; and, even if it is good law, if the proposition of law should afterward be embodied in the court's general charge.

² Rolfe v. Rich, 149 Ill. 436, 35 N. E. 352; Rogers v. Leyden, 127 Ind. 55, 26 N. E. 210; Missouri P. R. Co. v. Cullers, 81 Tex. 382, 13 L.R.A. 542, 17 S. W. 19. Especially where the qualification itself would be erroneous. Tobin v. Omnibus Cable Co. — Cal. —, 34 Pac. 124. In Columbia & P. S. R. Co. v. Hawthorne, 3 Wash. Terr. 353, 19 Pac. 25, objection was made that modifications were not made to certain numbered instructions; but it was held enough that the modifications were given in other instructions practically embracing those refused.

³ Keenan v. Missouri State Mut. Ins. Co. 12 Iowa, 126; Vaughan v. Porter,

16 Vt. 266; Rogers v. Leyden, 127 Ind. 50, 26 N. E. 210; Murray v. Woodson County, 58 Kan. 1, 48 Pac. 554.

⁴ Mitchell v. Charleston Light & P. Co. 45 S. C. 146, 31 L.R.A. 577, 22 S. E. 767.

d. Marking instructions "given" or "refused."—Statutes in several states make it the duty of the judge to mark each requested instruction "given" or "refused;"¹ and, although they are sometimes held to be mandatory,² it is usually sufficient if there is a substantial compliance with these statutes.³

But mere omission to so mark instructions is not fatal error if it can be ascertained which were given and which were refused.⁴ Nor is it error to omit to mark instructions "given" if they were in fact given,⁵ or to omit to mark "refused" an instruction which was in fact rejected.⁶ Otherwise, however, of failure to mark "refused" on an instruction refused, which should have been given.⁷

¹ For example, see Alabama Code, § 2756. And see the various Codes and statutes for other like statutes.

² Tyree v. Parham, 66 Ala. 424; Peart v. Chicago, M. & St. P. R. Co. 8 S. D. 431, 66 N. W. 814, 8 S. D. 634, 67 N. W. 837.

They are generally, however, regarded as directory merely. Turley v. Griffin, 106 Iowa, 161, 76 N. W. 660. And see cases in notes following.

³ As where the judge writes "refused" on the first of several sheets fastened together, on each of which is written the instruction requested. Harvey v. Tama County, 53 Iowa, 228, 5 N. W. 130; McDonald v. Fairbanks, 161 Ill. 124, 43 N. E. 783; Lawrenceville Cement Co. v. Parker, 21 N. Y. Civ. Proc. Rep. 263, 15 N. Y. Supp. 577.

Or writes "the foregoing are all refused" at the bottom of the last sheet. Territory v. Baker, 4 N. M. 236, 13 Pac. 30.

And an instruction, or a series of instructions, headed, "Instructions given by the court on its own motion," and so placed in the record as to be clearly separate and distinguishable from the instructions presented by the parties, is a sufficient compliance with the Nebraska statute. Gillen v. Riley, 27 Neb. 158, 42 N. W. 1054.

Under the Alabama statute the presiding judge, in marking a charge "given" or "refused," is required only to sign his name thereto, and not in addition to attach thereto the title "Judge." Kennedy v. Smith, 99 Ala. 83, 11 So. 665.

⁴ Harrigan v. Turner, 65 Ill. App. 469.

⁵ World's Columbian Exposition v. Bell, 76 Ill. App. 591; Cleveland, C. C.

& *St. L. R. Co. v. Huston*, 75 Ill. App. 651; *Turley v. Griffin*, 106 Iowa, 161, 76 N. W. 660.

Nor is failure to so mark instructions given fatal error, notwithstanding a subsequent statute providing that neglect or refusal by the court to perform any duty enjoined by the preceding sections (which includes so marking instructions) shall be fatal error, where the appellant excepted to the instructions given by noting his exceptions on the instructions themselves, although he specially excepted to the failure of the court to so mark them. *Eickhoff v. Eikenbary*, 52 Neb. 332, 72 N. W. 308.

And a party whose requested charges were properly refused and afterwards given by the consent of his adversary and marked "given by consent," cannot complain because they were so given and so marked. *Kansas City, M. & B. R. Co. v. Sanders*, 98 Ala. 293, 13 So. 57; *Kansas City, M. & B. R. Co. v. Phillips*, 98 Ala. 159, 13 So. 65.

⁶ *McDonald v. Fairbanks*, 161 Ill. 124, 43 N. E. 783. Failure to so mark an instruction refused amounting to the same thing as if so marked. *Clapp v. Martin*, 33 Ill. App. 438.

⁷ *Calef v. Thomas*, 81 Ill. 478.

If the presiding judge should refuse on request to express in writing the giving or refusal of instructions, and the party aggrieved should reserve an exception, the error would be cause of reversal, for the judge would have denied a right the statute confers, and deprived the party of the opportunity of revising in an appellate tribunal the correctness or incorrectness of the instructions. But the mere failure of the judge from inadvertence to indorse the instructions, the party complaining not directing attention to the failure, and taking no exception at the time of its occurrence, will not be heard on error to complain of it. *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831.

8. Amended or substituted requests.

After unreasonable requests have been rejected, it may still be error to refuse to listen to specific requests which would have been proper if made alone in the first instance.¹

¹ *DeBost v. Albert Palmer Co.* 35 Hun, 386.

9. Requiring the charge to be in writing.

a. *In general.*—In the absence of any express statutory or constitutional requirement in relation thereto, whether or not the charge to the jury shall be in writing is discretionary with the trial court.¹

¹ *Baer v. Rooks*, 2 C. C. A. 76, 4 U. S. App. 399, 50 Fed. 898; *Gulf, C. &*

S. F. R. Co. v. Campbell, 1 C. C. A. 293, 4 U. S. App. 133, 49 Fed. 354.

Where the instruction is definite, and contains sound views of the law applicable to the case and intelligible to the jury, it can make no essential difference whether it is communicated to them in writing or orally. It is true that in the trial of causes and the exposition of the law to the jury, the reduction of the instruction to writing is certainly more formal, less liable to hasty error, and may enable the court the better to mature their views, and more distinctly and formally to express them to the jury, as a general rule; but still the law may be sufficiently expounded to the jury through oral instructions. No doubt the court would not hesitate, where it was requested, and deemed by counsel to be material, to embody their views in writing, in advance of any oral communication to the jury. This matter, however, is left to the sound discretion of the trial court, and is not the subject of review.

But when verbal instructions are given to the jury, it is certainly the right of the party who desires to except thereto to have them reduced to writing, as was done in *Smith v. Crichton*, 33 Md. 103, so that they may be reviewed on appeal; and where that is done it is no good cause of complaint that the court in its discretion chose in the first instance to charge the jury orally.

In Illinois instructions must be in writing. *Chicago Hydraulic Press Brick Co. v. Campbell*, 116 Ill. App. 322; *Landt v. McCullough*, 218 Ill. 607, 75 N. E. 1069.

b. Statutes.—In many of the states, however, statutes or constitutional provisions make it the duty of the court to reduce to writing the charge or general instructions to the jury,¹ if required by either party;² and, although there are cases in which these statutes have been held to be directory merely,³ they are generally held to be mandatory and must be strictly complied with.⁴ Hence to charge orally,⁵ despite a proper request for a written charge,⁶ is error requiring a reversal of the judgment,⁷ unless the requirement has been waived by consent⁸ or otherwise.⁹

Whether it is essential to the validity of a written charge, within the sense of these statutes, that the judge giving it shall himself have written every part of it, is contested.¹⁰

¹In Wisconsin, the judge must, before giving the same to the jury, reduce to writing and give as written his charge and instructions to the jury, unless a written charge be waived by counsel at the commencement of the trial, and except that the charge or instruction

may be given orally if taken down by the official stenographer. Sanborn & B. Stat. (Wis.) 1898, § 2853.

And, in Michigan, the court's charge must be in writing. How. Anno. Stat. § 6481.

So, in Nebraska, unless waived, and the waiver entered of record. Neb. Comp. Stat. chap. 19, §§ 52 et seq. Prior to the passage of this statute, however, the practice of giving oral instructions was the rule, although either party had the right to require the judge to reduce his instructions to writing; and some of the judges prior thereto, for greater certainty, almost invariably did instruct in writing. The statute, however, was passed to make the duty compulsory. *Yates v. Kinney*, 23 Neb. 648, 37 N. W. 590. See also cases in note 5, *infra*.

² For example, see 2 Kan. Gen. Stat. 1897, chap. 95, § 285; Ark. Const. art. 7, § 23; Mansf. Dig. § 5131.

³ *Parker v. Chancellor*, 78 Tex. 527; *Toby v. Heidenheimer*, 1 Tex. App. Civ. Cas. (White & W.) 439. Contra, *Levy v. McDowell*, 45 Tex. 220.

According to *Scheuing v. Yard*, 88 Pa. 286, neglect or omission of the judge to reduce to writing his answers to points presented in writing and read them to the jury before they retire, is not available error, although the statute undoubtedly makes it the judge's duty so to do, but does not declare that the omission shall be fatal error.

⁴ The words of the court on such occasions are too weighty and decisive in their influence on the jury to be omitted. A particular turn of expression, given perhaps at random, may be decisive of the rights of the parties. The proper construction of the statute therefore is that the whole charge should be in writing; and that it should be given literally as it is thus written. *Rising-Sun & V. Turnp. Co. v. Conway*, 7 Ind. 187.

In *Southern Exp. Co. v. Van Meter*, 17 Fla. 783, 35 Am. Rep. 107, the judge had refused instructions requested by the defendant and orally charged the jury. Subsequently, and before the jury retired, written instructions offered by the plaintiff were given to the jury, the court stating that they were substantially the oral charge he had given and that he adopted them as his instructions. This was held to be a substantial compliance with the statute requiring the instructions to be wholly in writing.

In *Powers v. Hazleton & L. R. Co.* 33 Ohio St. 429, the court, after reading a written charge to the jury, added an unwritten remark to which, just as soon as the jury had retired, exception was taken because not in writing; whereupon the judge recalled the jury, added the remark in writing to the charge, and read it to the jury. And this action of the court was sustained on appeal.

And in *Harvey v. Tama County*, 53 Iowa, 228, 5 N. W. 130, instructions written in pencil were held a sufficient compliance with the statute.

⁵ *Penberthy v. Lee*, 51 Wis. 261, 8 N. W. 116; *Hartwig v. Gordon*, 37 Neb. 657, 56 N. W. 324.

⁶ *National Lumber Co. v. Snell*, 47 Ark. 407, 1 S. W. 708; *Wettengel v. Denver*, 20 Colo. 552, 39 Pac. 343; *Bradway v. Waddell*, 95 Ind. 170; *Rich v. Lappin*, 43 Kan. 666, 23 Pac. 1038; *Scruton v. Hall*, 6 Kan. App. 714, 50 Pac. 964; *Louisville & N. R. Co. v. Banks*, 17 Ky. L. Rep. 1065, 33 S. W. 627 (Civil Code, § 317, subsec. 5); *Jenkins v. Wilmington & W. R. Co.* 110 N. C. 442, 15 S. E. 193; *Equitable F. Ins. Co. v. Trustees C. P. Church*, 91 Tenn. 135, 18 S. W. 121; *Columbia Veneer & Box Co. v. Cottonwood Lumber Co.* 99 Tenn. 122, 41 S. W. 351 (Milliken & V. Code § 3672); *Householder v. Granby*, 40 Ohio St. 430.

And failure of the court to put its charge in writing as required by statute is not excused by the fact that it was impracticable to do so in the time within which it was necessary to conclude the trial. *Jenkins v. Wilmington & W. R. Co.* 110 N. C. 438, 15 S. E. 193.

⁷ There are cases, however, which hold that failure to charge in writing is not such an error as will reverse if it is manifest that no injury could result to the party complaining. *Greathouse v. Summerfield*, 25 Ill. App. 296; *Walsh v. St. Louis Drayage Co.* 40 Mo. App. 339. *Contra*, *Shafer v. Stinson*, 76 Ind. 375. And see notes 5 and 6, *supra*.

⁸ *Edwards v. Smith*, 16 Colo. 529, 27 Pac. 809; *Gaynor v. Pease Furnace Co.* 51 Ill. App. 292; *Fitzgerald v. Fitzgerald*, 16 Neb. 413, 20 N. W. 269; *Ohio & M. R. Co. v. Sauer*, 4 Ohio C. C. 466, 2 Ohio C. D. 653; *Stringham v. Cook*, 75 Wis. 589, 44 N. W. 777.

⁹ As by silence, or failure to object at the time, or failure to request that the charge be in writing. *Anderson v. State*, 34 Ark. 257; *Southern Exp. Co. v. Van Meter*, 17 Fla. 783, 35 Am. Rep. 107; *Southerland v. Hanken*, 56 Ind. 343; *Jaqua v. Cordesman & E. Co.* 106 Ind. 141, 5 N. E. 907; *Head v. Langworthy*, 15 Iowa, 235; *Bird & M. Map Co. v. Jones*, 27 Kan. 177; *Davis v. Wilson*, 11 Kan. 74; *Garton v. Union City Nat. Bank*, 34 Mich. 279; *Frye v. Ferguson*, 6 S. D. 392, 61 N. W. 161.

Failure to except to the direction of the court to the official stenographer to take down and write out the charge was held, in *Shafer v. Stinson*, 76 Ind. 374, not to be a waiver of the right of the party to have the charge in writing on proper requests being made.

¹⁰ Thus, *Sellers v. Greencastle*, 134 Ind. 645, 34 N. E. 534, holds that reading to the jury a statute as part of the charge without incorporating into the charge the statute as read violates such a statute. *Contra*, *Swartwout v. Michigan Air Line R. Co.* 24 Mich. 389. See also *Burns v. State*, 89 Ga. 527, 15 S. E. 748, where the judge wrote the number of the section in the charge at the place where it was read, followed by the word "read," and read the section verbatim from the Code itself.

On the other hand, it has been held that the judge may write part, and *Abbott*, Civ. Jur. T.—42.

adopt the charge of another judge in part, or wholly. *Ohio & M. R. Co. v. Sauer*, 4 Ohio C. C. 466, 2 Ohio C. D. 653. Or incorporate extracts from law or other books, dictate the whole to an amanuensis, before delivery, and read from his copy (*Barkman v. State*, 13 Ark. 706), or have it printed and read from slips.

The main idea to be considered (whether it be in the handwriting of the judge or in that of another), according to *Householder v. Granby*, 40 Ohio St. 430, is, Did the judge adopt it as his charge in the case and was it in such form that the jury could read it in their retirement in case they have misapprehended during its reading by the court?

c. What must be in writing.—Statements of rules of law governing the matters in issue, or the amount of recovery, are instructions within the terms of these statutes.¹

¹ *Harvey v. Keegan*, 78 Ill. App. 475; *Bradway v. Waddell*, 95 Ind. 170 (error to charge orally as to nominal damages). So held of an instruction that the jury must try the case upon the sworn evidence of witnesses, independent of their knowledge of facts known to them, but not proved, and that such knowledge is not to influence them. *Equitable F. Ins. Co. v. Trustees C. P. Church*, 91 Tenn. 135, 18 S. W. 121, And see notes 5 and 6, of preceding section.

But the court certainly has the right to orally rule upon the admissibility of evidence, or upon any other question that may arise in the course of the trial, and to give its opinion as to the law governing the same. *Fruchey v. Eagleson*, 15 Ind. App. 88, 43 N. E. 146. Or to state orally the purpose for which evidence is admitted. *Farmer v. Thrift*, 94 Iowa, 374, 62 N. W. 804. Or that certain facts stated are admitted. *Hinekley v. Horazdowsky*, 133 Ill. 359, 8 L.R.A. 492, 24 N. E. 421.

So he may orally instruct the jury to disregard evidence, as to the form of the verdict, and the like. *Bradway v. Waddell*, 95 Ind. 170, and cases cited; *Illinois C. R. Co. v. Wheeler*, 149 Ill. 525, 36 N. E. 1023. Contra, as to form of verdict. *Burns v. State*, 89 Ga. 527, 15 S. E. 748 (criminal case).

And general remarks to the jury as to their duties as jurors, and not relating particularly to the case on trial, need not be in writing. *Moore v. Platteville*, 78 Wis. 644, 47 N. W. 1055.

An oral statement that an instruction read to the jury was read by mistake, and that they should not consider it, was held not to be an oral instruction, in *Wall v. State ex rel. Kendall*, 10 Ind. App. 530, 38 N. E. 190. So, also, in *Dodd v. Moore*, 91 Ind. 522, of an oral statement that the "plaintiff has requested some instructions which are in writing, and I will read them first, and I read them as the law." See also, *Ohio & M. R. Co. v. Stansberry*, 132 Ind. 533, 32 N.

E. 218, where the judge during the reading of the written charge stopped and said: "That is not correct; I'll read that again," and thereupon reread the instruction.

Nor need a direction that the jury retire and bring in a verdict covering the issues of the case, where they have brought in an informal verdict, be in writing. *Lehman v. Hawks*, 121 Ind. 541, 23 N. E. 670.

In Illinois and Georgia a peremptory instruction to find for one of the parties should be given in writing. *Kean v. West Chicago Street R. Co.* 75 Ill. App. 38, and cases cited; *Harris v. McArthur*, 90 Ga. 216, 15 S. E. 758. But an oral announcement to counsel in the presence of the jury that it would give such an instruction, followed by the instruction in writing, is not available error. *Brewer & H. Brewing Co. v. Boddie*, 162 Ill. 346, 44 N. E. 819.

But in Iowa, direction of a verdict is not an instruction in the sense of a statute requiring instructions to be in writing. *Leggett & M. Tobacco Co. v. Collier*, 89 Iowa, 144, 56 N. W. 417. And according to *Johnson v. Rider*, 84 Iowa, 50, 50 N. W. 36, a verbal direction to a jury which have rendered a verdict in gross violation of the charge, to retire a second time and return a verdict in accordance with the charge given them, is not available error.

d. Charge taken down by stenographer.—Whether or not it is a sufficient compliance with the statute that an oral charge is taken down by the official stenographer and subsequently reduced by him to writing is contested.¹

¹ It is sufficient by the express terms of the Wisconsin statute (*Sanborn & B. Stat.* 1898, § 2853). But it is not enough for the judge to certify in the bill of exceptions that the charge was oral and that the reporter had stated to the court that he had taken it down, but had lost it. *Penberthy v. Lee*, 51 Wis. 261.

In Nebraska, where the statute required all instructions to be in writing and filed with the clerk before being given to the jury, unless the writing is waived as provided by the statute, it seems that instructions given orally by consent may be taken down by the stenographer, but that they must be reduced to writing and filed with the clerk before the case is finally submitted to the jury, and that the filing is not waived by mere permission to give the instructions orally, as it is the duty of the stenographer to take down all oral proceedings in court and reduce the same to writing. *Yates v. Kinney*, 23 Neb. 648, 37 N. W. 590.

That it is not sufficient, see *Shafer v. Stinson*, 76 Ind. 374; *Crawford v. Brown*, 21 Colo. 272, 40 Pac. 692 (where the oral charge was taken down by the stenographer, and immediately reduced to writing and handed to the jury before their retirement); *Rich v. Lappin*, 43 Kan. 666, 23 Pac. 1038; *Bowden v. Achor*, 95 Ga. 243, 22 S. E. 254.

e. Charge subsequently reduced to writing.—So, also, there is conflict as to whether a statutory or constitutional requirement that the charge and instructions be in writing is satisfied by the subsequent reduction to writing of a charge or instructions given orally.¹

¹ Thus, in *National Lumber Co. v. Snell*, 47 Ark. 407, 1 S. W. 708, where an instruction given orally, despite a timely request that it be in writing, was subsequently, during argument, reduced to writing, and, after the argument read to the jury in connection with the other instructions, it was held that there was no error demanding a reversal.

But, according to *Toledo, W. & W. R. Co. v. Daniels*, 21 Ind. 256, it is not enough for the judge to set out in writing in the bill of exceptions, upon objection being made to the charge being oral, the mere words used by him in his verbal charge.

f. Oral explanations, modifications, additions, etc.—The court has no power under these statutes to explain, modify, add to, or otherwise change its written charge, except in writing.¹

¹ *Dorsett v. Crew*, 1 Colo. 18; *City Bank v. Kent*, 57 Ga. 283; *McEwen v. Morey*, 60 Ill. 32; *Bradway v. Waddell*, 95 Ind. 170; *Head v. Langworthy*, 15 Iowa, 235; *O'Donnell v. Segar*, 25 Mich. 367; *Hartwig v. Gordon*, 37 Neb. 657, 56 N. W. 324; *Currie v. Clark*, 90 N. C. 360; *Columbia Veencer & Box Co. v. Cottonwood Lumber Co.* 99 Tenn. 122, 41 S. W. 351.

So, in Alabama, the court cannot orally correct its written charge. *Louisville & N. R. Co. v. Hall*, 91 Ala. 112, 8 So. 371. Nor can it orally modify the charge. *Alabama G. S. R. Co. v. Moody*, 92 Ala. 279, 9 So. 238. But it may orally explain the charge. *Ibid.*

g. Numbering paragraphs of the charge.—Statutes sometimes make it the duty of the court to give its written charge in consecutively numbered paragraphs;¹ but mere failure so to do is not fatal to the charge unless prejudice has resulted therefrom,² and upon a timely objection an exception has been saved.³

¹ As, for example, N. M. Comp. Laws, § 2059.

² *Miller v. Preston*, 4 N. M. 396, 17 Pac. 565.

³ *Gibson v. Sullivan*, 18 Neb. 558, 26 N. W. 253.

h. Signing the charge.—Failure to comply with a statute requiring the charge to be signed by the court¹ is fatal to the charge if a timely and proper exception has been saved.²

¹ Unless there is such a statute to this effect it is no objection that the court has not signed its charge. *Hunter v. Parsons*, 22 Mich. 96.

In Iowa it was held error for the judge to neglect to sign the instructions. *Halley v. Tichenor*, 120 Iowa, 164, 94 N. W. 472.

² *Tyree v. Parham*, 66 Ala. 424; *Jones v. Greeley*, 25 Fla. 629, 6 So. 448. Contra, *Parker v. Chancellor*, 78 Tex. 524, 15 S. W. 157 (holding that no possible harm could result from the omission).

10. Form and style generally.

It belongs to the judicial office to exercise discretion as to the form and style in which to expound the law and comment on the facts,¹ so long as the court shall, in the exercise of that discretion, fairly and fully inform the jury of the rules and principles of the law applicable to the case by which they are to be guided in forming their verdict.²

And it is not error for the court in its charge to refer to other paragraphs thereof.³

¹ *Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348; *Noble v. Worthy*, 1 Ind. Terr. 458, 45 S. W. 137; *Continental Improv. Co. v. Stead*, 95 U. S. 161, 24 L. ed. 403. And unless there be error prejudicial to the party complaining it is no ground for complaint that another and better mode could have been adopted. *Gulf, C. & S. F. R. Co. v. Dunlap*, — Tex. Civ. App. —, 26 S. W. 655.

² So, whether the charge be but a single proposition, or several propositions set forth in one or more paragraphs or in the form of separate and distinct sentences which can be intelligently read only as a whole. *Terre Haute & I. R. Co. v. Eggmann*, 159 Ill. 550, 42 N. E. 970; *Atchison, T. & S. F. R. Co. v. Calvert*, 52 Kan. 547, 34 Pac. 976; *Gemmill v. Brown*, 25 Ind. App. 6, 56 N. E. 691; *Meyer v. Boepple Button Co.* 112 Iowa, 51, 83 N. W. 809.

Nor is the court called upon to adopt the categorical form which counsel choose to present to it. *Continental Improv. Co. v. Stead*, 95 U. S. 161, 24 L. ed. 403, and cases cited. See also, *Ruling on Requests*; in General, *supra*, § 7, a.

An instruction was held not to be erroneous merely because it began with the formula "the jury are instructed for the plaintiff," although the form was criticized as objectionable in *Illinois C. R. Co. v. Larson*, 152 Ill. 326, 38 N. E. 784.

But the court should refrain from the use of expressions calculated to ex-

cite prejudice and hostility in the minds of the jury against one party and sympathy for another, and not tending to induce a deliberate and impartial consideration and determination of the issues. *Hogan v. Central Park, N. & E. River R. Co.* 124 N. Y. 647, 26 N. E. 950 (error to so indulge).

³ *O'Leary v. German American Ins. Co.* 100 Iowa, 390, 69 J. W. 686.

11. Clearness, definiteness, and certainty.

The court's charge in chief and all instructions given by it, whether of its own motion or upon request of counsel, should be clear, definite, and certain;¹ but a mere slip of the tongue or pen,² or mere inexactness or looseness in its verbal structure,³ is not fatal to a charge or instruction otherwise unobjectionable, if the jury were not misled. Nor is verbosity, if, stripped of its verbiage, the charge still contains the essence of the law applicable to the facts.⁴

And it is incumbent upon the party making a request to charge the jury to put his proposition in clear, precise, and intelligible form, so that no reasonable ground can be left for misapprehension on the part of the jury; and an instruction ambiguous or unintelligible as requested may properly be refused.⁵

¹ *Chabert v. Russell*, 109 Mich. 571, 67 N. W. 902; *Glickson v. Shannon*, 88 Ill. App. 240; *Renner Bros. v. Thornburg*, 111 Iowa, 515, 82 N. W. 950; *Gaffney v. St. Paul City R. Co.* 81 Minn. 459, 84 N. W. 304; *Schrunk v. St. Joseph*, 120 Wis. 223, 97 N. W. 946; *Southern Coal & Coke Co. v. Swinney*, 149 Ala. 405, 42 So. 808; *Dederick v. Central R. Co.* 74 N. J. L. 424, 65 Atl. 833; *Gulf. C. & S. F. R. Co. v. Garrett*, — Tex. Civ. App. —, 98 S. W. 657.

Charges to the jury should, if possible, be plain, simple, and easily understood. They should be free from obscurity, involvement, ambiguity, metaphysical intricacy, and tendency to mislead. A charge obnoxious to any of these objections should always be refused, even though, on dissection, it may assert a correct legal proposition. The office and purpose of charges are to enlighten the jury, and to aid them in arriving at a correct verdict, as plain common-sense men. In other words, they should be made up of plain propositions of law, applicable to the tendency or varying tendencies of the evidence, and they should go no further. *Louisville & N. R. Co. v. Hall*, 87 Ala. 708, 4 L.R.A. 710, 6 So. 277.

And it is error to so qualify an instruction correct as requested as to render it ambiguous and of doubtful meaning,—especially where the case is a close one from a legal standpoint. *Chabert v. Russell*, 109 Mich. 571, 67 N. W. 902.

- But** a charge is not objectionable for generalization and abstractions merely leading up to the statement of the law determining the rights and responsibilities of the parties on the issues of fact involved. *West Memphis Packet Co. v. White*, 99 Tenn. 256, 38 L.R.A. 427, 48 S. W. 583.
- 2 Where** a charge is so exceptional in the prominence given by repetition to the correct principle that to hold that the jury could have been misled by what was evidently a slip of the tongue or pen on the part of the court would be to impute to the members of the jury such a want of ordinary capacity as would prove them unfit for services as jurors, a new trial is properly refused. *Smith v. King*, 62 Conn. 515, 26 Atl. 1059.
- 3 It** is not easy in the midst of a lengthy charge always to choose the best method of expressing an idea, or to speak with absolute accuracy; and it is enough if the language used is such that it may be freely assumed to have been correctly understood. *Davidson v. Kolb*, 95 Mich. 469, 55 N. W. 373.
- For** some illustrations of cases applying the rule as thus stated, see *Chattanooga, R. & C. R. Co. v. Owen*, 90 Ga. 265, 15 S. E. 853 (where the context showed the intended meaning of the inaccurate statement); *Exchange Nat. Bank v. Darrow*, 154 Ill. 107, 39 N. E. 974 (where, when taken in connection with the other instructions, the instruction complained of was fully explained); *Baltimore & P. R. Co. v. Cumberland*, 12 App. D. C. 598 (where, although to some extent misleading, the instruction was accompanied by an explanation so clear and ample as to leave no doubt as to its meaning); *Chicago & A. R. Co. v. Anderson*, 166 Ill. 572, 46 N. E. 1125 (where the difference between the words used and the proper words was so slight as to probably not mislead). See also *Berkson v. Kansas City Cable R. Co.* 144 Mo. 211, 45 S. W. 1119 (holding that obscurity or inaccuracy of expression is not material unless it substantially affects the merits of the action).
- The** same rule applies to the inadvertent misuse or confusion of terms. See, for example, *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269 (an action for negligent killing, the court in its charge using the word "plaintiff" instead of the word "decedent"); *Mann v. Higgins*, 83 Cal. 66, 23 Pac. 206 (where the court, in charging on the subject of preponderance of evidence, used the word "testimony" instead of "evidence"); *Southern Bell Teleph. & Teleg. Co. v. Jordan*, 87 Ga. 69, 13 S. E. 202 (where the court used the word "defendant" for "plaintiff," the context showing that plaintiff was really intended); *O'Connor v. Langdon*, 2 Idaho, 803, 26 Pac. 659 (where the court used the conjunctive "and" instead of the disjunctive "or"; the charge repeatedly and correctly stating the law); *Clifton v. Granger*, 86 Iowa, 573, 53 N. W. 316 (where the court in charging as to the rules for weighing testimony, used the word "him" instead of the words "him or her;" the charge being entirely plain and capable of

being understood as applying to all the witnesses of either sex). See also *Baltimore & O. S. W. R. Co. v. Faith*, 175 Ill. 58, 51 N. E. 107 (holding that the expressions "ordinary care" and "due care" are convertible terms, and that the use of one in one place, and of the other in another does not constitute error). But see *Alabama C. Coal & C. Co. v. Pitts*, 98 Ala. 285, 13 So. 135 (an action to recover for personal injuries, where the use of the word "direct" and "directly," instead of the appropriate word "approximate" and "approximately," when speaking of the cause of the injuries, was held error).

⁴ *Meibergen v. Smith*, 45 Kan. 405, 25 Pac. 881.

⁵ *Knobeloch v. Germania Sav. Bank*, 50 S. C. 259, 27 S. E. 962; *Colquhoun v. Wells, F. & Co.* 21 Nev. 459, 33 Pac. 977. But according to *Carrico v. West Virginia C. & P. R. Co.* 35 W. Va. 389, 14 S. E. 12, an ambiguous and obscure instruction, not really comprehended by the average juror, but correct upon one construction, should not be wholly refused, but should be properly modified or explained.

But it is not necessary that every possible opportunity for misapprehension be anticipated and guarded against when wording the proposition. Thus, rejection of a request containing a pertinent and material instruction not covered elsewhere in the charge, and not otherwise objectionable than as subject to a possible misapprehension and misapplication by the jury to the evidence, without explanation, was held error in *Parsons v. Lyman*, 71 Minn. 34, 73 N. W. 634, inasmuch as it was the duty of the court to give the explanation of its own motion, if not especially requested so to do by counsel.

And in *Blake v. Stump*, 73 Md. 160, 10 L.R.A. 103, 20 Atl. 788, it was held error to refuse a requested instruction, otherwise correct, because it repeated the same idea three times in different phraseology, the different clauses being coupled together by the word "or."

12. Argumentativeness.

Although it is irregular practice to formulate into legal propositions mere argument and inject them into a charge or instruction,¹ giving a charge or instruction objected to as being argumentative is not generally deemed fatal error if it embodies a correct legal proposition, and it is clear that the jury have not been misled.² Otherwise, however, if the charge or instruction is clearly misleading because of its argumentativeness,³ or is also essentially erroneous in other respects.⁴

But it is proper for the court to refuse a requested instruction which is objectionable for argumentativeness.⁵

¹ *Drainage Comrs. v. Illinois C. R. Co.* 158 Ill. 353, 41 N. E. 1073; *Birmingham Union R. Co. v. Hale*, 90 Ala. 8, 8 So. 142.

- See also *Case v. Chicago G. W. R. Co.* 147 Iowa, 747, 126 N. W. 1037 (where an argumentative instruction was held to be objectionable); *Kansas City, M. & B. R. Co. v. Henson*, 132 Ala. 528, 31 So. 590; *McClendon v. McKissack*, 143 Ala. 188, 38 So. 1020 (law abhors fraud); *Alabama G. S. R. Co. v. Sanders*, 145 Ala. 449, 40 So. 402;
- Gehm v. People*, 87 Ill. App. 158 (weight of testimony); *Chicago Title & T. Co. v. Ward*, 113 Ill. App. 327; *O'Dea v. Michigan C. R. Co.* 142 Mich. 265, 105 N. W. 746; *Johnson v. Atchison, T. & S. F. R. Co.* 117 Mo. App. 308, 93 S. W. 866; *Lumsden v. Chicago, R. I. & T. R. Co.* 28 Tex. Civ. App. 225, 67 S. W. 168; *Dallas v. McCullough*, — Tex. Civ. App. —, 95 S. W. 1121; *Cowie v. Seattle*, 22 Wash. 659, 62 Pac. 121.
- ² *Cook v. Rome Brick Co.* 98 Ala. 409, 12 So. 918; *Bray v. Ely*, 105 Ala. 553, 17 So. 180 (holding that giving or refusing argumentative instructions rests largely in the discretion of the trial court in Alabama, and cannot be revised on appeal); *Whaley v. Sloss-Sheffield Steel & I. Co.* 164 Ala. 216, 51 So. 419, 20 A. & E. Ann. Cas. 822; *Western & A. R. Co. v. Roberson*, 9 C. C. A. 646, 22 U. S. App. 187, 61 Fed. 592; *Postal Teleg. Cable Co. v. Lathrop*, 131 Ill. 575, 7 L.R.A. 474, 23 N. E. 583. See also *Steed v. Knowles*, 97 Ala. 573, 12 So. 75 (where it is held that, although an argumentative or misleading charge should not be given, if, as given, it asserts a correct proposition of law, is not entirely abstract, and its misleading tendencies might have been remedied by an explanatory charge if it had been requested, there is no ground of complaint); *Schaungut v. Udell*, 93 Ala. 302, 9 So. 550 (where it is said that if any modification or qualification is deemed necessary to prevent the apprehended misleading tendency of a charge objected to as argumentative, additional instructions should be asked).
- ³ *Morris v. Lachman*, 68 Cal. 109, 8 Pac. 799; *Cable v. Grier*, 45 Ill. App. 407; *Chisum v. Chesnutt*, — Tex. Civ. App. —, 36 S. W. 758; *Young v. Merkel*, 163 Pa. 513; *Payne v. Crawford*, 102 Ala. 387, 14 So. 854.
- ⁴ *Nelms v. Steiner Bros.* 113 Ala. 562, 22 So. 435; *Elston & W. Gravel Road Co. v. People*, 96 Ill. 584. See also *Gooding v. United States L. Ins. Co.* 46 Ill. App. 307 (where an argumentative charge summing up the evidence was held erroneous, summing up the evidence being forbidden by statute); *Drainage Comrs. v. Illinois C. R. Co.* 158 Ill. 353, 41 N. E. 1073 (where the charge was erroneous for being argumentative, and for singling out and giving prominence to special facts).
- ⁵ *Jones v. Alabama Mineral R. Co.* 107 Ala. 400, 18 So. 30; *McDonald v. International & G. N. R. Co.* 86 Tex. 1, 22 S. W. 939; *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999 (error not to refuse); *Flannery v. St. Louis, I. M. & S. R. Co.* 44 Mo. App. 396; *Mitchell v. Mitchell*, 80 Tex. 101, 15 S. W. 705; *Wieting v. Millston*, 77 Wis. 523, 46 N. W. 879; *Boyd v. Starbuck*, 18 Ind. App. 310, 47 N. E. 1079; *Whitlatch v. Fidelity & C. Co.* 21 App. Div. 124, 47 N. Y. Supp. 331.

There is no error in refusing an argumentative instruction, for the reason that instructions should be clear and concise, presenting only the point or matter of law on which the party presenting them may rely. If the party requesting them will not so frame the instruction, but, passing beyond the presentation of the point or matter of law, injects an argument of the case, the trial court does not err in refusing the instruction. *Wickes v. Walden*, 228 Ill. 56, 81 N. E. 798; *Florida East Coast R. Co. v. Welch*, 53 Fla. 145, 44 So. 250, 12 A. & E. Ann. Cas. 210. See cases just cited. See also *Bates v. Benninger*, 2 Cin. Super. Ct. Rep. 568, where the court, in condemning the practice of injecting an argument into a requested instruction, say "that it seems as if this objectionable practice has arisen from two purposes on the part of those who have adopted it: First, a determination to lose the case before the jury; and next, to reverse the result. The first always succeeds, the other rarely."

13. Consistency and harmony.

The charge and instructions given by the court, whether of its own motion or upon request of counsel, must be consistent and harmonious throughout;¹ and it is a generally recognized rule that to submit the case or an issue to the jury on a charge or instructions not so consistent and harmonious throughout, is an error imperatively demanding a reversal,² unless it is clearly shown that the jury were not misled³ to the prejudice of the party complaining.⁴

And some of the courts hold that it is the duty of the trial court, if needed, to so modify and harmonize the instructions requested by counsel as to present the law in its proper light,⁵ or to disregard them altogether, and submit the case to the jury on its general charge.⁶

¹ To give the jury two manifestly contradictory rules to apply to a controlling issue is to give them a license to follow on that point their own conceptions of justice outside the rules of law. This is exactly what the instructions by the court are intended to prevent. Their purpose is to give the jurors a definite view of the legal principles governing their action, which are binding on their consciences under their oaths as the law of the case before them. *Willmott v. Corrigan Consol. Street R. Co.* — Mo. —, 16 S. W. 500.

But two instructions, which in effect tell the jury that except as to allegations which are admitted, it is incumbent on the pleader to establish the allegations of his pleading, are not objectionable as contradictory. *Hamilton Buggy Co. v. Iowa Buggy Co.* 88 Iowa, 364, 55 N. W. 496.

² *King v. Post*, 12 Colo. 355, 21 Pac. 28; *Kankakee Stone & Lime Co. v.*

Kankakee, 128 Ill. 173, 20 N. E. 670 (holding that if it is impossible to say that the jury followed correct instructions, rather than incorrect ones, which were inconsistent, reversal is proper); **Haight v. Vallet**, 89 Cal. 245, 26 Pac. 897, and cases cited; **Brown v. McAllister**, 39 Cal. 573 (where it is said that if the instructions on a material point are contradictory, it is impossible for the jury to decide which should prevail; and it is equally impossible, after the verdict, to know that the jury were not influenced by the instruction which was erroneous, as one or the other must be, when two are repugnant); **Holt v. Spokane & P. R. Co.** 3 Idaho, 703, 35 Pac. 39, and cases cited; **Summerlot v. Hamilton**, 121 Ind. 87, 22 N. E. 973 (where it is held that if the instructions are contradictory and necessarily tend to confuse or mislead the jury, the error cannot be regarded as harmless); **Solomon v. City Compress Co.** 69 Miss. 327, 10 So. 446, 12 So. 339; **Willmott v. Corrigan Consol. Street R. Co.** — Mo. —, 16 S. W. 500, and cases cited (holding that conflicting instructions upon a material point constitute reversible error, unless under exceptional circumstances); **Martinowsky v. Hannibal**, 35 Mo. App. 70 (holding that contradiction and utter irreconcilability alone are enough to necessitate reversal); **Flick v. Gold Hill & L. M. Min. Co.** 8 Mont. 298, 20 Pac. 807; **Farmers Bank v. Harshman**, 33 Neb. 445, 50 N. W. 328; **Black v. Brooklyn City R. Co.** 108 N. Y. 640, 15 N. E. 389; **Missouri, K. & T. R. Co. v. Woods**, — Tex. Civ. App. —, 25 S. W. 741, and cases cited (holding that if conflicting charges are given, one of which is entirely erroneous, it will be presumed that the jury followed the erroneous charge); **Bleiler v. Moore**, 94 Wis. 385, 69 N. W. 164; **Williams v. Haid**, 118 N. C. 481, 24 S. E. 217; **Baker v. Ashe**, 80 Tex. 356, 16 S. W. 36.

Possibly some of these cases only go so far as to hold that, to produce this error, the conflicting instructions must be, the one accurate, and the other inaccurate.

But even though one of them be accurate, and the other equally correct as a legal proposition, but inaccurate as applied to the case, and plainly liable to misconception by the jury, the same result must, of necessity, follow, and the rule remain that such a charge constitutes error. **Strauss v. Phenix Ins. Co.** 9 Colo. App. 386, 48 Pac. 822; **Summerlot v. Hamilton**, 121 Ind. 87, 22 N. E. 973; **School Dist. v. Foster**, 31 Neb. 501, 48 N. W. 267.

See also **Blake v. Miller**, 135 Iowa, 1, 112 N. W. 158; **St. Louis, I. M. & S. R. Co. v. Hudson**, 95 Ark. 506, 130 S. W. 534; **Canton Lumber Co. v. Liller**, 112 Md. 258, 76 Atl. 415; **Rector v. Robins**, 74 Ark. 437, 86 S. W. 667; **Philadelphia & B. C. R. Co. v. Holden**, 93 Md. 417, 49 Atl. 625; **Hurst v. St. Louis & S. F. R. Co.** 117 Mo. App. 25, 94 S. W. 794; **Payne v. McCormick Harvesting Mach. Co.** 11 Okla. 318, 66 Pac. 287; **Williamson v. D. M. South & Co.** — Tex. Civ. App. —, 79 S. W. 51.

⁸ **As** where this clearly appears from an examination of all the instructions. **Rock Island & P. R. Co. v. Krapp**, 173 Ill. 219, 50 N. E. 663.

Or where it clearly appears from the special findings of the jury. *Bigelow v. Wygal*, 52 Kan. 619, 35 Pac. 200.

Or where the objection is based in part on what appears clearly to be a typographical error in the omission of a word, and it is a justifiable assumption, from a reading of the whole instruction, that the word was in the instruction as given by the court, but was omitted by an oversight of the printer. *Hamilton Buggy Co. v. Iowa Buggy Co.* 88 Iowa, 364, 55 N. W. 496.

⁴ *Dale v. Continental Ins. Co.* 95 Tenn. 38, 31 S. W. 266; *Farwell v. Cramer.* 38 Neb. 61, 56 N. W. 716; *Martin v. Fox*, 40 Mo. App. 664. So in *Barry v. Hannibal & St. J. R. Co.* 98 Mo. 62, 11 S. W. 308, although it was conceded that there was a seeming inconsistency in the instructions, the judgment was affirmed, inasmuch as it was so manifestly for the right party. According to *Nuckolls v. Gaut*, 12 Colo. 361, 21 Pac. 41, it must appear that the conflict might have injuriously affected the party complaining.

So held, in a libel suit, as to an instruction, stating that defendant was chargeable with negligence in not ascertaining that the article was untrue, and also that he had ascertained and knew its untruth, the undisputed testimony showing that the article was published after notice of its falsity. *Hatt v. Evening News Asso.* 94 Mich. 114, 119. 53 N. W. 952, 54 N. W. 766.

⁵ *Rock Island & P. R. Co. v. Krapp*, 173 Ill. 219, 50 N. E. 663.

The instructions asked by the different parties to an action generally proceed upon entirely different theories of the law applicable to the case, and they should be so modified and harmonized as to present the law in its proper light. *Kelley v. Cable Co.* 7 Mont. 77, 14 Pac. 633.

⁶ *Kelley v. Cable Co.* 7 Mont. 77, 14 Pac. 633; *Union P. R. Co. v. O'Brien.* 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618.

14. Defining and explaining technical terms.

The use of words which have a legal technical meaning should be avoided, or, if necessarily used, their meaning should be explained.¹

But it is not necessary to explain to the jury the meaning of ordinary words and phrases when they are used in their usual and conventional sense,² or when their meaning, as applied to the case on trial, is readily understood by the jury,³ and the party complaining has asked for no such explanation by the court.⁴

¹ *Kellar v. Shippee*, 45 Ill. App. 377; *Swift & Co. v. Rennard*, 128 Ill. App. 181; *Union Scale Co. v. Iowa Mach. & Supply Co.* 136 Iowa, 171, 113 N. W. 762; *Chicago v. Fields*, 139 Ill. App. 250; *Murray v. Geiser Mfg.*

Co. 79 Kan. 326, 99 Pac. 589; Atchison, T. & S. F. R. Co. v. Woodson, 79 Kan. 567, 100 Pac. 633; Coney Island Co. v. Dennan, 79 C. C. A. 375, 149 Fed. 687; Chambers v. Morris, 149 Ala. 674, 42 So. 549.

It is the safer rule to couch instructions in as plain language as the facts will permit, and where technical phrases are used, to explain them. Steinkamper v. McManus, 26 Mo. App. 51.

And words or terms from a foreign language having such legal technical meaning,—as, for instance the terms *de facto* and *de jure*,—should not be used without full explanation of their meaning. C. Aultman & Co. v. Connor, 25 Ill. App. 654. There is no presumption of either law or fact that jurors are either versed in the Latin language or acquainted with the meaning of law terms or maxims of the law that are derived from and expressed in a foreign language, no matter how familiar those terms and maxims may be to members of the bar. Of course this does not mean that the mere use of the Latin word or Latin term will render the instruction erroneous. But such words or terms, unless they are in general use among the common people, should not be so used without fully explaining their signification to the jury, and especially when the manner in which they are used and the prominence given them makes them the very gist of the instruction. C. Aultman & Co. v. Connor, 25 Ill. App. 654. But see Lake Erie & W. R. Co. v. Holderman, 56 Ill. App. 144, holding that the term “*prima facie*” has become sufficiently anglicized and understood to need no translation.

And a requested instruction containing a term having a technical meaning is properly refused if it omits to define the term. Whitney & S. Co. v. O'Rourke, 172 Ill. 177, 50 N. E. 242.

On the other hand there are words which, though not purely technical, have a certain well-defined meaning which it is the safer course to explain to the jury; but whose unexplained use will not warrant a reversal. As for example, the word “preponderance,” as applied to evidence. Steinkamper v. McManus, 26 Mo. App. 51; Morris v. Morton, 14 Ky. L. Rep. 360, 20 S. W. 287. Cases might arise, however, in which the use of this expression would be ground for reversal; and such was the opinion of Phillips, P. J., in Carson v. Porter, 22 Mo. App. 179, under the peculiar circumstances of that case, although it is not clear that the reversal was predicated upon that ground alone.

So the unexplained use of the phrase “burden of proof” was held not to be reversible error, in Miller v. Woodman-Todd Boot & Shoe Co. 26 Mo. App. 57.

And a party cannot complain unless he offers or asks for a definition. Louisville & E. R. Co. v. Vincent, 29 Ky. L. Rep. 1049, 96 S. W. 898; Bugg v. Holt, 29 Ky. L. Rep. 1208, 97 S. W. 29.

² Wimer v. Allbaugh, 78 Iowa, 79, 42 N. W. 587; Iowa State Sav. Bank v. Black, 91 Iowa, 490, 59 N. W. 283; Warder v. Henry, 117 Mo. 530, 23

S. W. 776; *Cottrill v. Krum*, 100 Mo. 397, 13 S. W. 753; *Wragge v. South Carolina & G. R. Co.* 47 S. C. 105, 33 L.R.A. 191, 25 S. E. 76.

Defining a word, in response to a request by the jury, if correctly defined, is not reversible error, although the word is one in common use. *Cobb v. Covenant Mut. Ben. Asso.* 153 Mass. 176, 10 L.R.A. 666, 26 N. E. 230.

³ *Louisville & N. R. Co. v. Ray*, 101 Tenn. 1, 46 S. W. 554; *Chaddick v. Haley*, 81 Tex. 617, 17 S. W. 233; *Hogshead v. State*, 120 Ind. 327, 22 N. E. 330.

Failure to correctly distinguish between terms possibly capable of being legally distinguished will not require a reversal, if the jury could not have been misled thereby. *Blythe v. Denver & R. G. R. Co.* 15 Colo. 333, 11 L.R.A. 615, 25 Pac. 702.

⁴ *Wimer v. Allbaugh*, 78 Iowa, 79, 42 N. W. 587; *Warder v. Henry*, 117 Mo. 530, 23 S. W. 776; *Wragge v. South Carolina & G. R. Co.* 47 S. C. 105, 33 L.R.A. 191, 25 S. E. 76; *Louisville & N. R. Co. v. Ray*, 101 Tenn. 1, 46 S. W. 554; *Chaddick v. Haley*, 81 Tex. 617, 17 S. W. 233.

B. INSTRUCTIONS AS TO PLEADINGS AND EVIDENCE.

15. Stating the issues; singling out, ignoring, and eliminating issues.

The court in giving a charge designed to cover the entire issues should embrace all the essential elements involved in the case.¹

The court may, however, single out and present to the jury an issue as the main controlling issue, if such is the fact.²

But it is a fatal error to omit or refuse to charge as to a material issue which is supported by evidence.³ Otherwise, however, as to an issue which has been eliminated from the case by withdrawal⁴ or otherwise.⁵

And if a request to charge improperly omits a material issue, the court may refuse it,⁶ or may modify it by supplying the omission.⁷

¹ *Plattsmouth v. Boeck*, 32 Neb. 297, 49 N. W. 167. See also *Willmott v. Corrigan Consol. Street R. Co.* 106 Mo. 535, 17 S. W. 490 (where it is held that an instruction which fails to present the issues clearly made is erroneous, if it is so given that the jury understand that they are to rely on it alone); *City & Suburban R. Co. v. Findley*, 76 Ga. 311 (where it is held to be the right and duty of the judge to state to the jury the several contentions of the parties, the only restriction being that he state them fairly to each side).

Stating the claim of a party is not a charge on facts. *Bryce v. Cayce*, 62 S. C. 546, 40 S. E. 948; *Atchison, T. & S. F. R. Co. v. Cuniffe*, — Tex. Civ. App. —, 57 S. W. 692; *McCann v. Ullman*, 109 Wis. 574, 85 N. W. 493.

Judge should not require the jury to determine what are the issues in the case. *Lodge v. Hampton*, 116 Ill. App. 414; *Erb v. German-American Ins. Co.* 112 Iowa, 357, 83 N. W. 1053.

An instruction should cover all issues and facts of the case, especially relating to the party affected by the instruction. *American Sheet & Tin Plate Co. v. Bucy*, 43 Ind. App. 501, 87 N. E. 1051; *Crane v. Congleton*, — Ky. —, 116 S. W. 341; *Louisiana & A. R. Co. v. Ratcliffe*, 88 Ark. 524, 115 S. W. 396. Court should state issues and theories of case. *Taylor v. McClintock*, 87 Ark. 243, 112 N. W. 405; *Baldwin v. Self*, 52 Tex. Civ. App. 509, 114 S. W. 427; *Evans v. Nail*, 1 Ga. App. 42, 57 S. E. 1020; *Chicago Union Traction Co. v. Hansen*, 125 Ill. App. 153; *Jaffi v. Missouri P. R. Co.* 205 Mo. 450, 103 S. W. 1026; *Missouri, K. & T. R. Co. v. Kyser*, 43 Tex. Civ. App. 322, 95 S. W. 747; *Sigel-Campion Live Stock Co. v. Holly*, 44 Colo. 582, 101 Pac. 68; *Southern R. Co. v. Wright*, 6 Ga. App. 172, 64 S. E. 703.

If a charge assumes to cover the entire case, it should do so in fact, and an omission of a material issue is error. *Delmar Oil Co. v. Bartlett*, 62 W. Va. 700, 59 S. E. 634; *Belvidere City R. Co. v. Bute*, 128 Ill. App. 620; *Flaherty v. St. Louis Transit Co.* 207 Mo. 318, 106 S. W. 15; *Capital City Brick & Pipe Co. v. Des Moines*, 136 Iowa, 243, 113 N. W. 835; *Purcell Cotton Seed Oil Mills v. Bell*, 7 Ind. Terr. 717, 104 S. W. 944; *Funston v. Hoffman*, 232 Ill. 360, 83 N. E. 917.

An instruction which tends to disparage and undervalue a defense made in entire good faith is improper. *Bachmeyer v. Mutual Reserve Fund Life Asso.* 87 Wis. 325, 58 N. W. 399.

In North Carolina, a statute requires that the issues arising upon the pleadings, material to be tried, shall be made up by the attorneys appearing and reducing to writing, or by the judge presiding, before or during the trial. Code, § 395. This statute is mandatory and binding equally upon the court and counsel, and it is the duty of the trial judge either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings; and in the absence of such issues, or admissions of record equivalent thereto, sufficient to reasonably justify, directly or by clear implication, a judgment rendered thereon, a new trial will be granted. *Tucker v. Satterthwaite*, 120 N. C. 118, 27 S. E. 45, and cases cited. But refusal to submit unnecessary and immaterial issues is not error. *Gilmore v. Bright*, 101 N. C. 382, 7 S. E. 751.

² *Dupuy v. Burkitt*, 78 Tex. 338, 14 S. W. 789; *Bowden v. Achor*, 95 Ga. 243, 22 S. E. 254; *General Electric Co. v. Black*, 19 Mont. 110, 47 Pac. 639.

So held where defendant in open court during the progress of the trial admitted all of plaintiffs' claims, except so much thereof as was attacked and affected by one of the pleas filed. *De Graffenreid v. Menard*, 103 Ga. 651, 30 S. E. 560.

But if there are two or more important issues, and there is any doubt as to which is the main one, or that any one of them is such, the court should not single out one and present it as the controlling one. *Bowden v. Achor*, 95 Ga. 243, 22 S. E. 254.

And undue prominence should not be given to the testimony of particular witnesses nor to particular issues. *Louisville & N. R. Co. v. Perkins*, 144 Ala. 325, 39 So. 305 (particular witnesses). See also *Mississippi C. R. Co. v. Hardy*, 88 Miss. 732, 41 So. 505; *Knox v. Knox*, 123 Iowa, 24, 98 N. W. 468 (particular evidence); *Alabama Midland R. Co. v. Thompson*, 134 Ala. 232, 32 So. 672 (single fact); *Campbell v. Bates*, 143 Ala. 338, 39 So. 144 (particular evidence); *Beyer v. Martin*, 109 Ill. App. 1 (particular facts); *Goodhue Farmers' Warehouse Co. v. Davis*, 81 Minn. 210, 83 N. W. 531 (particular witnesses); *Sanders v. North End Bldg. & L. Asso.* 178 Mo. 674, 77 S. W. 833 (particular witnesses); *Crossen v. Oliver*, 41 Or. 505, 69 Pac. 308 (particular evidence); *Farnandes v. Schiermann*, 23 Tex. Civ. App. 343, 55 S. W. 378 (particular witnesses); *Giddings v. Thompson*, — Tex. Civ. App. —, 92 S. W. 1043 (particular evidence); *Postal Teleg. Cable Co. v. Jones*, 133 Ala. 217, 32 So. 500 (particular fact); *Strehmann v. Chicago*, 93 Ill. App. 206; *Palfrey v. Texas C. R. Co.* 31 Tex. Civ. App. 552, 73 S. W. 411 (particular evidence); *Southern R. Co. v. Reaves*, 129 Ala. 457, 29 So. 594 (particular witness); *O'Neal v. Curry*, 134 Ala. 216, 32 So. 697 (single facts); *Seitz v. Starks*, 144 Mich. 448, 108 N. W. 354 (particular witness); *Tompkins v. Pacific Mut. L. Ins. Co.* 53 W. Va. 479, 62 L.R.A. 489, 97 Am. St. Rep. 1006, 44 S. E. 439 (particular witness); *Louisville R. Co. v. Hoskins*, 28 Ky. L. Rep. 124, 88 S. W. 1087; *Atterbury v. Chicago, I. & St. L. S. L. R. Co.* 134 Ill. App. 330; *Sangster v. Hatch*, 134 Ill. App. 340; *Eckels v. Cooper*, 136 Ill. App. 60.

3 *Earl Fruit Co. v. Curtis*, 116 Cal. 632, 48 Pac. 793; *Jackson School Twp. v. Shera*, 8 Ind. App. 330, 35 N. E. 842; *Bailey v. Tygart Valley Iron Co.* 10 Ky. L. Rep. 676, 10 S. W. 234; *Gamble v. Mullin*, 74 Iowa, 99, 36 N. W. 909; *Eureka Fertilizer Co. v. Baltimore Copper, Smelting & Roll Co.* 78 Md. 179, 27 Atl. 1035; *Hennig v. Globe Foundry Co.* 112 Mich. 616, 71 N. W. 956; *Levy v. Cunningham*, 56 Neb. 348, 76 N. W. 882; *Patterson v. Westchester Electric R. Co.* 26 App. Div. 336, 49 N. Y. Supp. 796; *Holmes v. Whitaker*, 23 Or. 319, 31 Pac. 705; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314; *Dignan v. Spurr*, 3 Wash. 309, 25 Pac. 529.

Where issue is joined on the plea, even though it be a bad one, and the proofs tend to establish its truth, the court must submit the issue and the proof to the jury, and if the effect of the charge as given is to au-

thorize a recovery without regard to this issue, the error is fatal. *Aniston Lime & Coal Co. v. Lewis*, 107 Ala. 535, 18 So. 326.

A material issue of fact cannot be withdrawn from the jury. *Morrill v. McNeill*, 3 Neb. (Unof.) 220, 91 N. W. 602; *Farmers' State Bank v. Spencer*, 12 Okla. 597, 73 Pac. 297; *National Bank v. Baltimore & O. R. Co.* 99 Md. 661, 105 Am. St. Rep. 321, 59 Atl. 134; *Mitchell v. Third Ave. R. Co.* 62 App. Div. 371, 70 N. Y. Supp. 1118; *Sovereign Camp, W. W. v. Welch*, 16 Okla. 188, 83 Pac. 547.

⁴ *Whalen v. Chicago*, R. I. & P. R. Co. 75 Iowa, 563, 39 N. W. 894; *Dupuy v. Burkitt*, 78 Tex. 338, 14 S. W. 789; *Jones v. Missouri P. R. Co.* 31 Mo. App. 614. See also *Heller v. Chicago & G. T. R. Co.* 109 Mich. 62, 66 N. W. 667 (where it is held to be the duty of the court to charge the jury as to which of several grounds set up in his declaration plaintiff is entitled to recover upon, and to eliminate the others); *Crawford v. Georgia P. R. Co.* 86 Ga. 5, 12 S. E. 176 (where it is held incumbent on the court to charge upon only such phases of plaintiff's cause of action as the evidence applies to and plaintiff insists upon at the trial).

⁵ *Henion v. New York*, N. H. & H. R. Co. 25 C. C. A. 223, 51 U. S. App. 157, 79 Fed. 903; *New Haven Lumber Co. v. Raymond*, 76 Iowa, 225, 40 N. W. 820; *Bugbee v. Kendrick*, 132 Mass. 349; *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671.

Thus, a request to charge a point of defense which has been waived by counsel is properly refused. *Fry v. Central Vermont R. Co.* 65 Vt. 242, 26 Atl. 954; *Moses v. Katzenberger*, 84 Ala. 95, 4 So. 237.

And it is error to submit an issue raised by allegations of a complaint which have been stricken out on demurrer. *Gulf, C. & S. F. R. Co. v. Frederickson*, — Tex. —, 19 S. W. 124.

⁶ *Savannah & W. R. Co. v. Phillips*, 90 Ga. 829, 17 S. E. 82; *Chicago & W. I. R. Co. v. Flynn*, 154 Ill. 448, 40 N. E. 332, affirming 54 Ill. App. 387; *Cottrell v. Piatt*, 101 Iowa, 231, 70 N. W. 177; *Reiser v. Portere*, 106 Mich. 102, 63 N. W. 1041; *Stewart v. Outhwaite*, 141 Mo. 562, 44 S. W. 326; *Carruth v. Harris*, 41 Neb. 789, 60 N. W. 106; *Wooters v. Hale*, 83 Tex. 563, 19 S. W. 134.

But if there be an issue, among others, the evidence with respect to which is inconsistent with the physical facts in the case, no error is committed by eliminating such issue from the case or in ignoring it in the instructions. *Gardner v. St. Louis & S. F. R. Co.* 135 Mo. 90, 36 S. W. 214 (where an instruction as requested embracing such an issue was refused, and an instruction given ignoring it).

⁷ *Petefish v. Watkins*, 124 Ill. 384, 16 N. E. 248; *McCarty v. Scanlon*, 187 Pa. 495, 41 Atl. 345.

16. Referring to pleadings.

The court should not refer the jury to the pleadings for in-
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formation as to what the issues are,¹ unless by consent of the parties.²

There are cases, however, which, although not commending the practice, do not regard it as so vicious as to be fatal to the charge unless prejudice has actually resulted therefrom.³

And still others approve the practice as a proper one.⁴

¹ *Bryan v. Chicago*, R. I. & P. R. Co. 63 Iowa, 464, 19 N. W. 295; *Hollis v. State Ins. Co.* 64 Iowa, 454, 21 N. W. 774; *Britton v. St. Louis*, 120 Mo. 437, 25 S. W. 366 (recognizing and approving the rule prohibiting this practice, but holding that the instruction complained of was not open to that objection); *Reese v. Hershey*, 163 Pa. 253, 29 Atl. 907; *East Tennessee, V. & G. R. Co. v. Lee*, 90 Tenn. 570, 18 S. W. 268.

It is the province of the court to determine the issues and state them to the jury, and not leave them to ascertain the effect of the pleadings or the issues which they present. *Myer v. Moon*, 45 Kan. 580, 26 Pac. 40.

The difficulty which even judges of learning and experience often encounter in defining the issues as joined in the pleadings is argument sufficient in support of the rule. It surely would not conduce to a full and fair trial if jurors, inexperienced in such matters, were left to determine the issues from the pleadings. The necessity of the judge defining the issues is too apparent to be questioned, and, however pressing the demands may be upon the time of the court, a plan and concise statement of the issues should always be given to the jury. *Burns v. Oliphant*, 78 Iowa, 456, 43 N. W. 289.

Although pleadings which are couched in untechnical language may be given to the jury to enable them to understand the issues involved, if the language used in the pleading is technical and not such as the jury will be likely to understand clearly, the issues should be presented in the language of the court. *Robinson v. Berkey*, 100 Iowa, 136, 69 N. W. 434, and cases cited. But it seems that if the pleadings contain a plain statement of the issues, the court may use the language of the pleadings.

² *Burns v. Oliphant*, 78 Iowa, 456, 43 N. W. 289 (where, although it is said that a statement of the issues ought not to be omitted, it is held that a party who has consented to the omission cannot afterwards be heard to complain of it).

³ *Texas & P. R. Co. v. Tankersley*, 63 Tex. 57; *Chicago, S. F. & C. R. Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931 (holding that an instruction referring to certain items of damages as set out in a bill of particulars did not probably mislead the jury, though disapproving the practice). And in *Hall v. Carter*, 74 Iowa, 364, 37 N. W. 956, where the pleading was read as a part of, but not incorporated in the charge (the

statute requiring the charge to be in writing), the practice was condemned, but reversal was not based on this ground, inasmuch as the special findings returned by the jury indicated that they fully understood the issues.

So held in *Myer v. Moon*, 45 Kan. 580, 26 Pac. 40, where the issues were stated by the court, and the jury were only referred to the petition to ascertain the undisputed terms of the contract for whose violation recovery was sought and the misrepresentations alleged to have been made by the defendant when making the contract.

An instruction given on request which distinctly informed the jury what the facts were "as alleged in the complaint," was approved in *Lake Shore & M. S. R. Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476.

And a reference by the court to the petition and amendments thereto for a fuller statement of the several items of damages claimed by plaintiff, following a brief statement of those items, was held no error, in *Lanning v. Chicago, B. & Q. R. Co.* 68 Iowa, 502, 27 N. W. 478.

4 *North Chicago City R. Co. v. Gastka*, 27 Ill. App. 518, and cases cited; *Clouser v. Ruckman*, 104 Ind. 588, 4 N. E. 202 (holding so doing to be no error, as the pleadings are, in contemplation of law, always before the jury): *Baltzer v. Chicago, M. & N. R. Co.* 89 Wis. 257, 60 N. W. 617.

That pleadings may be used in giving instructions, see *Union Gold Min. Co. v. Crawford*, 29 Colo. 511; 69 Pac. 600, 22 Mor. Min. Rep. 213; *Blair-Baker Horse Co. v. First Nat. Bank*, 164 Ind. 77, 72 N. E. 1027; *Woodruff v. Hensley*, 26 Ind. App. 592, 60 N. E. 312; *Macon Consol. Street R. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756; *Chicago & A. R. Co. v. Harrington*, 192 Ill. 9, 61 N. E. 622; *Central R. Co. v. Bannister*, 195 Ill. 48, 62 N. E. 864; *Graybill v. Chicago, M. & St. P. R. Co.* 112 Iowa, 738, 84 N. W. 946; *Hartpence v. Rogers*, 143 Mo. 623, 45 S. W. 650; *Franklin v. Atlanta & C. Air Line R. Co.* 74 S. C. 332, 54 S. E. 578; *Bering Mfg. Co. v. Femelat*, 35 Tex. Civ. App. 36, 79 S. W. 869; *Illinois C. R. Co. v. Smith*, 111 Ill. App. 177.

17. Separate defenses.

If a defense in abatement is joined in the same answer with a defense in bar, the plaintiff may require that the jury be instructed to render separate verdicts.¹

¹ *Gardner v. Clark*, 21 N. Y. 399, 401.

18. Superfluous allegation.

A plaintiff is entitled to go to the jury on a cause of action on contract substantially alleged and supported by evidence,

notwithstanding a failure to prove commingled allegations of tort.¹

¹ *Graves v. Waite*, 59 N. Y. 156. Contra, under N. Y. Code Civ. Proc. § 549, subd. 4, when the tort is a fraud in contracting or incurring the liability, such as constitutes a ground of arrest.

19. Limiting to issues and evidence.

It is improper for the court, in making a statement of the case, to present any issue unless it is raised by the pleadings, and evidence tending to establish it has been adduced.¹

But it is not improper to refuse an instruction which as requested is outside the issues and evidence.²

As to whether it is proper to submit to the jury an issue raised by evidence admitted without objection, though the issue is not raised by the pleadings, the cases are not in harmony.³

But it is error to submit to the jury, as a disputed question of fact for their determination, an issue which has been admitted by the pleadings,⁴ or one which is established by the uncontradicted evidence.⁵

¹ *Alabama C. Coal & C. Co. v. Pitts*, 98 Ala. 285, 13 So. 135; *Bertelson v. Chicago, M. & St. P. R. Co.* 5 Dak. 313, 40 N. W. 531; *Savannah, F. & M. R. Co. v. Tiedeman*, 39 Fla. 196, 22 So. 658; *Jacksonville, T. & K. W. R. Co. v. Galvin*, 29 Fla. 636, 16 L.R.A. 337, 11 So. 231; *Louisville & N. R. Co. v. Spinks*, 104 Ga. 692, 30 S. E. 968; *Holt v. Spokane & P. R. Co.* 3 Idaho, 703, 35 Pac. 39; *Lebanon Light, Heat & Power Co. v. Griffin*, 139 Ind. 476, 39 N. E. 62; *Miller v. Chicago, M. & St. P. R. Co.* 76 Iowa, 318, 41 N. W. 28; *Gilmore v. Swisher*, 59 Kan. 172, 52 Pac. 426; *Mundle v. Hill Mfg. Co.* 86 Me. 400, 30 Atl. 16; *Nugent v. Kauffman Mill Co.* 131 Mo. 241, 33 S. W. 428 (where it is said that issues cannot be raised and disposed of by instructions, which are not made by the pleadings); *Moss v. North Carolina R. Co.* 122 N. C. 889, 29 S. E. 410 (even though it announces a correct abstract proposition of law); *Woodward v. Oregon R. & Nav. Co.* 18 Or. 289, 22 Pac. 1076; *Gulf, C. & S. F. R. Co. v. Johnson*, 91 Tex. 569, 44 S. W. 1067; *Holt v. Pearson*, 12 Utah, 63, 41 Pac. 560; *Comegys v. American Lumber Co.* 8 Wash. 661, 36 Pac. 1087; *Higgins v. Minaghan*, 78 Wis. 602, 11 L.R.A. 138, 47 N. W. 941.

² *Gibson v. Sterling Furniture Co.* 113 Cal. 1, 45 Pac. 5; *Rives v. Jordan*, 99 Ga. 80, 24 S. E. 857; *Baltimore & O. S. W. R. Co. v. Tripp*, 175 Ill. 251, 51 N. E. 833; *Tinsley v. Fruits*, 20 Ind. App. 534, 51 N. E. 111; *Hamilton v. Thoen*, 97 Iowa, 737, 66 N. W. 166; *Brent v. Long*, 99 Ky. 245, 35 S. W. 640; *Lindsey v. Leighton*, 150 Mass. 285, 22 N. E.

901; *Sykes v. City Sav. Bank*, 115 Mich. 321, 73 N. W. 369; *Perine v. Grand Lodge A. O. U. W.* 48 Minn. 82, 50 N. W. 1022; *Brown v. Walker*, — Miss. —, 11 So. 724; *Fischen v. Thomas*, 9 Mont. 52, 22 Pac. 450; *Hanover F. Ins. Co. v. Stoddard*, 52 Neb. 745, 73 N. W. 291; *Woodbury v. Butler*, 67 N. H. 545, 38 Atl. 379; *Kane v. New York, N. H. & H. R. Co.* 132 N. Y. 160, 30 N. E. 256; *Gandy v. Orient Ins. Co.* 52 S. C. 224, 29 S. E. 655; *Texas & P. R. Co. v. Johnson*, 90 Tex. 304, 38 S. W. 520, 14 Tex. Civ. App. 566, 37 S. W. 973; *Lawson v. Thompson*, 10 Utah, 462, 37 Pac. 732, and cases cited; *Sprague v. Fletcher*, 69 Vt. 69, 37 L.R.A. 840, 37 Atl. 239; *Barker v. Ring*, 97 Wis. 53, 72 N. W. 222.

But it is no reason for rejecting an instruction pertinent to the issues, that it goes further than the issues required, in asking to have submitted a question which the adverse party is not entitled to have submitted. *Long-Bell Lumber Co. v. Stump*, 30 C. C. A. 260, 57 U. S. App. 546, 86 Fed. 574.

* That it is proper, see *Denver & R. G. R. Co. v. Rosuck*, 7 Colo. App. 288, 43 Pac. 456; *Atlanta Consol. Street R. Co. v. Owings*, 97 Ga. 663, 33 L.R.A. 798, 25 S. E. 377 (holding that if the evidence has been allowed without objection to go to the jury, it is proper, if not incumbent, on the court to tell the jury what they are to do with it); *Blum v. Whitworth*, 66 Tex. 350, 1 S. W. 108 (holding that the court did not err in charging the jury in accordance with the interpretation thus put upon the pleadings, and acted upon by the parties). And in *Fox v. Utter*, 6 Wash. 299, 33 Pac. 354, where there was a variance between the cause of action stated by the complaint and the evidence, but not between the issue raised by the answer and the evidence, the court deemed the cause of action stated to be binding, and charged accordingly; but it was held on appeal that, inasmuch as the variance was disregarded by both parties (the case in fact being tried on the theory raised by the answer), the charge ought to have been on the facts, rather than the letter of the complaint.

And that it is error to refuse so to charge, see *Madison v. Missouri P. R. Co.* 60 Mo. App. 599.

But that issues so raised cannot be submitted, see *Gulf of California Nav. Co. v. State Investment & Ins. Co.* 70 Cal. 586, 12 Pac. 473; *Doggett v. Simms*, 79 Ga. 252, 4 S. E. 909; *Atchison, T. & S. F. R. Co. v. Miller*, 39 Kan. 419, 18 Pac. 486; *Glass v. Gelvin*, 80 Mo. 300; *McCready v. Phillips*, 44 Neb. 790, 63 N. W. 7; *Roberts v. Drehmer*, 41 Neb. 306, 59 N. W. 911; *Coos Bay R. Co. v. Siglin*, 26 Or. 387, 38 Pac. 338, and cases cited.

To do so, however, may be harmless error if from the whole record the evidence and charge do not seem to have influenced or affected the verdict. *Atchison, T. & S. F. R. Co. v. Miller*, 39 Kan. 419, 18 Pac. 486.

† *Burke v. Mascarich*, 81 Cal. 302, 22 Pac. 673.

⁵First Nat. Bank v. Hanover Nat. Bank, 13 C. C. A. 313, 32 U. S. App. 29, 66 Fed. 34; Illinois C. R. Co. v. Davidson, 12 C. C. A. 118, 24 U. S. App. 354, 64 Fed. 301.

And that such an instruction may be properly refused, see *Shields v. Orr Extension Ditch Co.* 23 Nev. 349, 47 Pac. 194; *Leak v. Rio Grande Western R. Co.* 9 Utah, 246, 33 Pac. 1045.

20. Conforming to facts in evidence.

The charge and instructions, whether given by the court of its own motion or upon request, should be so framed as to conform to the facts in evidence.¹ And it is error to give a charge or instruction not so framed, no matter how correct the principle of law announced may be;² but not if it is clear that the jury were not in fact misled thereby, to the prejudice of the complaining party,³ or if there is evidence calling for the charge or instruction.⁴

But it is not error to refuse a charge or instruction not based on the facts proved.⁵ Otherwise, however, if there is evidence calling for such a charge or instruction.⁶

¹The charge of the court should not be mere abstract propositions of law, but should be confined to the law applicable to the facts of the case which the evidence tends to establish, and the attention of the jury should be called to the controlling point or points of the case. *Pittsburgh & W. Coal Co. v. Estievenard*, 53 Ohio St. 43, 40 N. E. 725. *Central R. Co. v. Bond*, 111 Ga. 13, 36 S. E. 299; *St. Louis Southwestern R. Co. v. Connally*, — Tex. Civ. App. —, 93 S. W. 206; *Boltz v. Miller*, 23 Ky. L. Rep. 991, 64 S. W. 630; *Clapper v. Mendell*, 96 Mo. App. 40, 69 S. W. 669; *Bronk v. Binghamton R. Co.* 79 App. Div. 269, 79 N. Y. Supp. 577; *Troy Min. Co. v. Thomas*, 15 S. D. 238, 88 N. W. 106; *Texas & P. R. Co. v. Short*, — Tex. Civ. App. —, 58 S. W. 56; *Saveland v. Western Wisconsin R. Co.* 118 Wis. 267, 95 N. W. 130; *Chicago, I. & E. R. Co. v. Pattison*, 26 Ind. App. 295, 59 N. E. 688; *Floralta Saw Mill Co. v. Smith*, 55 Fla. 447, 46 So. 332; *Diefenthaler v. Hall*, 116 Ill. App. 422; *Taylorville v. Stafford*, 196 Ill. 288, 63 N. E. 624; *Nashville, C. & St. L. R. Co. v. Walley*, 147 Ala. 697, 41 So. 134; *McMahon v. Chicago City R. Co.* 239 Ill. 334, 88 N. E. 223; *Baker v. North Jersey Street R. Co.* 77 N. J. L. 336, 72 Atl. 434; *Sperry v. Union R. Co.* 129 App. Div. 594, 114 N. Y. Supp. 286; *Barton v. Odessa*, 109 Mo. App. 76, 82 S. W. 1119.

See also *Chicago v. O'Malley*, 196 Ill. 197, 63 N. E. 652; *Rarden v. Cunningham*, 136 Ala. 263, 34 So. 26.

But see, for a contrary rule, *Chicago City R. Co. v. Anderson*, 193 Ill. 9, 61 N. E. 999.

Every point of law submitted for the determination of the court should be reasonably consistent with the evidence, and in such comprehensive manner that the deduction made therefrom, notwithstanding the force of the other evidence in the cause, is the logical, legal conclusion from the facts assumed. Each point submitted is to be taken as a distinct, independent proposition; and the answer to it may be a simple affirmation or negation of it, or the answer may be accompanied with such qualification as is requisite to a correct exposition of the law. When a case comes up for review, no fact not covered by the hypothesis set forth in the point can be assumed, except such as is embraced by necessary implication. If this were not so the court might, in some cases, affirm the points on both sides; and, whilst in the answers on one side or the other, the true rule might be given, the jury would be allowed to grope in the dark in search of it, with equal chances to arrive at a wrong or a right result. In such case the assumption of certain facts that are not stated would, if known, show the correct rulings on both sides; but the misleading tendency is such as to be manifest error. If these well-established rules of practice are applied to the instructions given to the jury, and the conclusion cannot be other than that they were misleading to the jury, reversal is imperative. *Sidney School Furniture Co. v. Warsaw School Dist.* 130 Pa. 76, 18 Atl. 604.

- ² *Alabama Mineral R. Co. v. Marcus*, 115 Ala. 389, 22 So. 135; *Bevens v. Barnett*, — Ark. —, 22 S. W. 160; *Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co.* 114 Cal. 100, 45 Pac. 1047; *Denver & R. G. R. Co. v. Spencer*, 25 Colo. 9, 52 Pac. 211; *Aznoc v. Conway*, 72 Iowa, 568, 34 N. W. 422; *Atchison, T. & S. F. R. Co. v. Whitbeck*, 57 Kan. 729, 48 Pac. 16; *Baltimore City Pass R. Co. v. Nugent*, 86 Md. 349, 39 L.R.A. 161, 38 Atl. 779; *Williams v. Petoskey*, 108 Mich. 260, 66 N. W. 55; *Rugland v. Tollefsen*, 53 Minn. 267, 55 N. W. 123; *Nixon v. Hannibal & St. J. R. Co.* 141 Mo. 425, 42 S. W. 942; *Holmes v. Jones*, 121 N. Y. 461; 24 N. E. 701, reversing 50 Hun, 345, 3 N. Y. Supp. 156; *Fulp v. Roanoke & S. R. Co.* 120 N. C. 525, 27 S. E. 74; *Baltimore & O. R. Co. v. Few*, 94 Va. 82, 26 S. E. 406; *Nye v. Kelly*, 19 Wash. 73, 52 Pac. 528; *Oliver v. Ohio River R. Co.* 42 W. Va. 703, 26 S. E. 444.
- ³ *Home Protection v. Whidden*, 103 Ala. 203, 15 So. 567; *Hill v. Finigan*, 77 Cal. 267, 19 Pac. 494; *Chicago & A. R. Co. v. Pontiac*, 169 Ill. 155, 48 N. E. 485.

So held where the objectionable charge was followed by a lucid explanation applying the law to the specific facts of the case. *Spring v. Schenck*, 106 N. C. 153, 11 S. E. 646.

Or where, although objectionable in part, considered as a whole the charge clearly and concretely advised the jury concerning the evidence applicable to the issues. *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848.

Or where the verdict was clearly for the right party on the evidence.
Mandell v. Fulcher, 86 Ga. 166, 12 S. E. 469.

⁴ Atlanta Consol. Street R. Co. v. Keeny, 99 Ga. 266, 33 L.R.A. 824, 25 S. E. 629; Hanchett v. Jordan, 43 Minn. 149, 45 N. W. 617.

So held, also, however inadequate or of little weight the evidence may appear to the court. Reusens v. Lawson, 96 Va. 285, 31 S. E. 528.

⁵ Lazarus v. Phelps, 156 U. S. 202, 39 L. ed. 397, 15 Sup. Ct. Rep. 271; Birmingham Union R. Co. v. Smith, 90 Ala. 60, 8 So. 86; Trabing v. California Nav. & Improv. Co. 121 Cal. 137, 53 Pac. 644; Heinberg v. Cannon, 36 Fla. 601, 18 So. 714; Flanagan v. Scott, 102 Ga. 399, 31 S. E. 23; Crane Co. v. Tierney, 175 Ill. 79, 51 N. E. 715; Noe v. Chicago, B. & Q. R. Co. 76 Iowa, 360, 41 N. W. 42; Markland v. McDaniel, 51 Kan. 350, 20 L.R.A. 96, 32 Pac. 1114; Pillsbury v. Sweet, 80 Me. 392, 14 Atl. 742; Cook v. Gill, 83 Md. 177, 34 Atl. 248; Cain v. Mead, 66 Minn. 195, 68 N. W. 840; Kansas City Suburban Belt R. Co. v. Kansas City, St. L. & C. R. Co. 118 Mo. 599, 24 S. W. 478; Mulville v. Pacific Mut. L. Ins. Co. 19 Mont. 95, 47 Pac. 650; Pease Piano Co. v. Cameron, 56 Neb. 561, 76 N. W. 1053; Humphreys v. Woodstown, 48 N. J. L. 588, 7 Atl. 301; Missouri P. R. Co. v. Lamothe, 76 Tex. 219, 13 S. W. 194.

It is the duty of the judge to instruct the jury upon every question of law involved in the case; but not to answer points that raise questions in these merely, or that rest upon the assumption of a fact of which there is not such evidence as to justify the jury in finding it. Hefner v. Chambers, 121 Pa. 84, 15 Atl. 492.

⁶ Norwood & B. Co. v. Andrews, 71 Miss. 641, 16 So. 262; Thompson v. Western U. Teleg. Co. 106 N. C. 549, 11 S. E. 269.

21. Burden of proof.

It is error to instruct the jury that plaintiff, by giving evidence of a prima facie case, has shifted the burden of proof to defendant.¹

But if plaintiff has given evidence such as to raise a legal presumption of the existence of the fact alleged, it is not error for the court to instruct the jury that, in weighing the whole evidence together, they may consider that the plaintiff has given prima facie evidence in support of his case and such as is conclusive, if uncontradicted, and that this must be contradicted or disproved by a preponderance of evidence on the part of defendant, or the plaintiff is entitled to recover.²

¹ Heinemann v. Heard, 62 N. Y. 448; Jones v. Prospect Mountain Tunnel Co. 21 Neb. 339, 31 Pac. 642; Atkinson v. Goodrich Transp. Co. 69 Wis. 15, 31 N. W. 164 (a negligence case, in which this question is

considered at length and many cases are collated and discussed); *Missouri P. R. Co. v. Bartlett*, 81 Tex. 42, 16 S. W. 638 (holding such a charge to be upon the weight of the evidence). See also *Blunt v. Barrett*, 124 N. Y. 117, 26 N. E. 318, and *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871 (applying the same principle to affirmative defenses).

And that it is proper to refuse a request to so charge, see *Spencer v. Citizens' Mut. L. Ins. Asso.* 142 N. Y. 505, 37 N. E. 617; *Bogie v. Nolan*, 96 Mo. 85, 9 S. W. 14. See also *Home Ben. Asso. v. Sargent*, 142 U. S. 691, 35 L. ed. 1160, 12 Sup. Ct. Rep. 332 (holding that, in an action on a life policy in which the defense is suicide, the introduction in evidence by defendant of the proofs of death which show death to have been self-inflicted does not shift the burden on plaintiff to show that the assured did not commit suicide, where the proofs of death and evidence are not inconsistent with the theory of accidental killing).

² *Crane v. Morris*, 6 Pet. 598, 620, 8 L. ed. 514, 522; *Kelly v. Jackson*, 6 Pet. 622, 631, 8 L. ed. 523, 526; *Heilman v. Lazarus*, 12 Abb. N. C. 19, see less fully 90 N. Y. 672, in full, 65 How. Pr. 95. See also cases cited in note, 1 *supra*.

This rule does not apply when that which is claimed to be a *prima facie* case rests on testimony which raises a question of credibility of witnesses for the jury.

22. Presumption of law.

It is error to refuse to state to the jury what is the presumption of law on a material point in the absence of proof, though the adverse party has already introduced evidence sufficient to sustain a verdict contrary to such presumption, if such evidence be not sufficient to require the jury to find contrary to the presumption.¹

¹ *Potter v. Chadsey*, 16 Abb. Pr. 146.

A statute prohibiting a judge from charging on a matter of fact does not forbid his instructing them that a presumption arising in the case is entitled to great weight. *Durant v. Burt*, 98 Mass. 161.

But instructions as to presumptions should be so framed as not to confuse or mislead the jury by neglecting to discriminate between disputable and indisputable presumptions, nor to give them as a presumption, without qualification, that which only justifies an inference either way, that is to say, which is only a presumption of fact.

23. Presumption of fact.

In a state in which it is the practice of the state courts to indicate the opinion of the judge as to what inferences are fair-

ly deducible from the testimony, it is proper for courts of the United States to do the same.¹

¹ *Mitchell v. Harmony*, 13 How. 115, 130, 14 L. ed. 75, 82. But *Nudd v. Barrows*, 91 U. S. 426, 23 L. ed. 286, holds that a presiding judge of a Federal court may comment on the evidence and express his opinion upon a question of fact irrespective of what may be the practice in the state court wherein the Federal court is sitting. See, also, *infra*, § 31, note 3. And in *Pennsylvania Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L.R.A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413, affirmed on rehearing, 38 L.R.A. 70, 19 C. C. A. 316, 43 U. S. App. 75, 73 Fed. 653, it is held that a charge as to presumptions is more or less in the nature of comment on the evidence, the scope of which is within the discretion of the presiding judge.

24. Assuming specific fact.

A peremptory instruction to the jury as to a specific fact is not erroneous, if the evidence respecting it is of such a conclusive character as would compel the court, in the exercise of a sound legal discretion to set aside a verdict in opposition to such evidence,¹ or if the fact has been unequivocally admitted by the parties, either in their pleading, or at the trial, or otherwise.² Otherwise, however, if the fact be a disputed one concerning which the evidence is conflicting;³ or if there is no evidence concerning it;⁴ or if the evidence shows that it does not exist.⁵

But after the judge has made a full and fair charge he is not bound, though requested by counsel, to instruct the jury for which party to find if they find one way or the other as to particular facts in the case.⁶

¹ As where the evidence leaves no room for dispute as to the existence of the fact. *Montclair v. Dana*, 107 U. S. 162, 27 L. ed. 436, 2 Sup. Ct. Rep. 403; *Long v. Booe*, 106 Ala. 570, 17 So. 716; *Hauk v. Brownell*, 120 Ill. 161, 11 N. E. 416; *Noble v. White*, 103 Iowa, 352, 72 N. W. 556; *Rice v. Rankans*, 101 Mich. 378, 59 N. W. 660; *Alabama & V. R. Co. v. Phillips*, 70 Miss. 14, 11 So. 602; *Ragan v. Kansas City & S. E. R. Co.* 144 Mo. 623, 46 S. W. 602 (especially if the evidence is record evidence); *Wurdeman v. Schultz*, 54 Neb. 404, 74 N. W. 951; *Riley v. Salt Lake Rapid Transit Co.* 10 Utah, 428, 37 Pac. 681. Otherwise, according to some authorities, if the only evidence in regard to the matter is that of an interested party who says he does not know whether such is the fact or not. *Pryor v. Portsmouth Cattle Co.* 6 N. M. 44, 27 Pac. 327. Or his testimony shows self-contradiction

and inconsistencies. *Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760.

- ² *Long v. Booe*, 106 Ala. 570, 17 So. 716; *Lee v. O'Quin*, 103 Ga. 355, 30 S. E. 356; *Louisville, E. & St. L. Consol. R. Co. v. Utz*, 133 Ind. 265, 32 N. E. 881; *McDermott v. Abney*, 106 Iowa, 749, 77 N. W. 505; *McGuire v. Lawrence Mfg. Co.* 156 Mass. 324, 31 N. E. 3; *Mooney v. York Iron Co.* 82 Mich. 263, 46 N. W. 376; *Taylor v. Scherpe & K. Architectural Iron Co.* 133 Mo. 349, 34 S. W. 581; *Bullis v. Presidio Min. Co.* 75 Tex. 540, 12 S. W. 397; *Pellardis v. Journal Printing Co.* 99 Wis. 156, 74 N. W. 99; *Hamilton v. Great Falls Street R. Co.* 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

But an instruction as to a disputed point must not assume that the point is conceded by one party merely because he has not rebutted his adversary's testimony respecting it. *Palmer v. McMaster*, 10 Mont. 390, 25 Pac. 1056.

- ³ *Estis v. Goodbar*, — Ark. —, 19 S. W. 973; *Swigart v. Hawley*, 140 Ill. 186, 29 N. E. 883; *Anderson v. Moore*, 108 Ill. App. 106; *Long v. Osborn*, 91 Iowa, 160, 59 N. W. 14; *Metropolitan Street R. Co. v. McClure*, 58 Kan. 109, 48 Pac. 566; *Hull v. St. Louis*, 138 Mo. 618, 42 L.R.A. 753, 40 S. W. 89; *Wilkinson v. Johnson*, 83 Tex. 392, 18 S. W. 746; *Kaufer v. Walsh*, 88 Wis. 63, 59 N. W. 460.

That it is proper for the court to refuse such an instruction, see *Hill v. McKay*, 94 Cal. 5, 29 Pac. 406; *Hannah v. Connecticut River R. Co.* 154 Mass. 529, 28 N. E. 682; *Eiseman v. Heine*, 2 App. Div. 319, 37 N. Y. Supp. 861; *Owens v. Snell*, 29 Or. 483, 44 Pac. 827; *Bentley v. Standard F. Ins. Co.* 40 W. Va. 729, 23 S. E. 584.

For other cases holding that province of jury must not be invaded by instructions that assume facts, see *Montgomery Street R. Co. v. Shanks*, 139 Ala. 489, 37 So. 166 (assuming defendant's negligence and denying plaintiff's contributory negligence); *Southern R. Co. v. Douglass*, 144 Ala. 351, 39 So. 268 (assuming that accident occurred within limits of a town); *Western Coal & Min. Co. v. Jones*, 75 Ark. 76, 87 S. W. 440 (assuming negligence in preparing and firing blast in specified manner); *Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521 (assuming that plaintiff adjusted the machine that caused the injury); *Caruthers v. Balsley*, 89 Ill. App. 559 (assuming that seller intended warranty); *Elwood v. Chicago City R. Co.* 90 Ill. App. 397 (assuming that plaintiff did not exercise due care); *Feitl v. Chicago City R. Co.* 211 Ill. 279, 71 N. E. 991 (assuming that deceased was driving on track in front of car at time of accident); *Selensky v. Chicago G. W. R. Co.* 120 Iowa, 113, 94 N. W. 272 (assuming that plaintiff knew that track she was about to cross was completely obstructed); *McGrew v. O'Donnell*, 28 Ky. L. Rep. 1366, 92 S. W. 301 (assuming that value of plaintiff's services exceeded amount of certain notes given by him); *Straight Creek Coal Co. v. Hancy*, 27 Ky. L. Rep. 1117, 87 S. W. 1114 (assuming that mine was in a dangerous condition); *Baltimore & O. R. Co. v. State*, 104 Md. 76, 64 Atl. 304 (assuming

that plaintiff about to cross track did not look and listen, nor use reasonable care); *Lopez v. Jackson*, 80 Miss. 684, 32 So. 117 (assuming that defendant's pecuniary condition might be considered in action of assault); *Abbott v. Marion Min. Co.* 112 Mo. App. 550, 87 S. W. 110 (assuming that failure to timber mine was negligence); *Stanley v. Chicago, M. & St. P. R. Co.* 112 Mo. App. 601, 87 S. W. 112 (assuming that other employees were negligent); *Waters v. Kansas City*, 94 Mo. App. 413, 68 S. W. 366 (assuming that defects in sidewalk were obvious); *Baker v. Independence*, 106 Mo. App. 507, 81 S. W. 501 (assuming that sidewalk was defective); *Freeman v. Metropolitan Street R. Co.* 95 Mo. App. 314, 68 S. W. 1060 (assuming that plaintiff's wife was injured in railroad accident); *Brewster v. Elizabeth City*, 142 N. C. 9, 54 S. E. 784 (assuming that plaintiff was injured and that defendant's negligence caused the injury); *Bumgardner v. Southern R. Co.* 132 N. C. 438, 43 S. E. 948 (assuming that train became separated in two parts, and that collision occurred in consequence); *Cleveland, C. C. & St. L. R. Co. v. Sivey*, 27 Ohio C. C. 248 (assuming that engine bell was not rung); *Choctaw, O. & G. R. Co. v. Deperade*, 12 Okla. 367, 71 Pac. 629 (assuming that value of certain animals was as testified to by plaintiff); *Hayes v. Pennsylvania R. Co.* 195 Pa. 184, 45 Atl. 925 (assuming that defendant was negligent); *Texas & P. R. Co. v. Berry*, 32 Tex. Civ. App. 259, 72 S. W. 423 (assuming that plaintiff was placed in perilous position by defendant's negligence); *Dallas Consol. Electric Street R. Co. v. Ely*, — Tex. Civ. App. —, 91 S. W. 887 (assuming that plaintiff's vehicle was driven across track); *Rapid Transit R. Co. v. Lusk*, — Tex. Civ. App. —, 66 S. W. 799 (assuming that car slowed down to enable plaintiff to alight); *Hall v. West & S. Mill Co.* 39 Wash. 447, 81 Pac. 915, 4 A. & E. Ann. Cas. 587 (assuming that employer had furnished safe place of work); *Atherton v. Tacoma R. & Power Co.* 30 Wash. 395, 71 Pac. 39 (assuming that somebody was negligent).

- ⁴ *Mohrenstecher v. Westerveldt*, 30 C. C. A. 584, 57 U. S. App. 618, 87 Fed. 157; *O'Neal v. McKinna*, 116 Ala. 606, 22 So. 905.

And that it is proper to refuse a request to charge which is objectionable on this ground, see *Caledonian Ins. Co. v. Traub*, 80 Md. 214, 30 Atl. 904; *Lawson v. Metropolitan Street R. Co.* 40 App. Div. 307, 57 N. Y. Supp. 997.

For other cases to the effect that a charge or instruction should conform to the facts in evidence, see *supra*, § 20, notes 1 and 2.

- ⁵ *Burrows v. Dalta Improv. Co.* 106 Mich. 582, 29 L.R.A. 468, 64 N. W. 501; *Jones v. Grossman*, 59 Mo. App. 195; *Texas Land & Loan Co. v. Watson*, 3 Tex. Civ. App. 238, 22 S. W. 873.

- ⁶ *Rexter v. Starin*, 73 N. Y. 601. See, further, *infra*, subdivision D, as to further requests.

25. Summing up and stating evidence.

The court has power at common law,¹ and sometimes under express statute² or constitutional³ provision, to sum up or state the evidence in its charge to the jury.

But whether that power shall be exercised or not is a matter largely discretionary with the court.⁴

¹ *Rose v. Otis*, 5 Colo. App. 472, 39 Pac. 77; *Bellew v. Ahrburg*, 23 Kan. 287; *City & Suburban R. Co. v. Findley*, 76 Ga. 311.

² Thus, an Alabama statute empowers the judge to state the evidence when it is disputed. Ala. Code 1897, § 2336.

So, in North Carolina, a statute provides that the judge shall state in a plain and correct manner the evidence given in the case. Code, § 413.

The Illinois practice act, however, provides that the judge, in charging the jury, shall charge them only as to the law of the case. But this is not the rule in a Federal court sitting in Illinois, notwithstanding this prohibition. *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286.

³ As, for example, California Const. art. 6, § 19; Tennessee Const. art. 6, § 9; *Miller v. Stewart*, 24 Cal. 502; *Morris v. Lachman*, 68 Cal. 109, 8 Pac. 799 (holding that the judge may state the testimony given as "tending to prove" a matter). But he cannot assume to answer both a question of law and of fact. *Case v. Williams*, 2 Coldw. 239.

But, in South Carolina, the Constitution now in force (art. IV. § 26) declares that the judge shall not charge juries in respect to matters of fact, but shall declare the law; and this prohibition covers any direct reference to the testimony, any expression as to what is evidence, or any remark that would amount to stating the testimony. *Burnett v. Crawford*, 50 S. C. 161, 27 S. E. 645. And it is of course proper to reject an instruction which as requested violates this provision. *Horne v. McRae*, 53 S. C. 51, 30 S. E. 701. But it is also held that, as it would be impossible to declare the law applicable to a case on trial without connecting the legal principles involved with some state of facts, actual or hypothetical, it was the intention of the framers of the new Constitution that the trial judge, in charging the law of the case, should lay before the jury the law as applicable to a supposed state of facts, although in so doing he should carefully avoid repeating the evidence on the facts at issue, making no statement of the testimony, either in whole or in part; and that a judge may, in declaring the law applicable to the case, base that law upon hypothetical findings of fact by the jury, and instruct the jury that, if they believe so and so from the evidence they have heard, then such and such will be the legal result. In so doing, if he be careful not to repeat any of the testimony, nor to intimate, directly or indirectly, what is in evidence, he will be chargeable neither with stating the testimony nor with charging in respect to matters of fact. *Norris v. Clinkscales*, 47

S. C. 488, 25 S. E. 797. See also *Ballentine v. Hammond*, 68 S. C. 153, 46 S. E. 1000; *Jenkins v. Charleston Street R. Co.* 58 S. C. 373, 36 S. E. 703; *Sims v. Southern R. Co.* 59 S. C. 246, 37 S. E. 836; *Boyd v. Blue Ridge R. Co.* 65 S. C. 326, 43 S. E. 817.

There is also such a constitutional prohibition in Washington. *Patten v. Auburn*, 41 Wash. 644, 84 Pac. 594; Wash. Const. art. 4, § 16. But this prohibition does not apply to a judge of a Federal court sitting in Washington. See *Sommers v. Carbon Hill Coal Co.* 91 Fed. 337.

4 It is not necessarily the duty of the court to sum up the evidence; it is his privilege to do so. *Wright v. Central R. & Bkg. Co.* 16 Ga. 46.

When the facts are simple, or the judge directs the attention of the jury to the principal questions they have to investigate, by stating the respective contentions of the parties, the failure to recapitulate the evidence is not error. If either party wishes fuller instructions, he should ask for them, and if the material evidence is omitted he should call it to the attention of the court. To permit a party to ask for a new trial because of an omission of the judge to recite all the details of prolix testimony, or for an omission to charge in every possible aspect of the case, would tend not so much to make a trial a full and fair determination of the controversy as a contest of ingenuity between counsel. It is too late certainly after verdict to raise the objection that the judge did not charge upon a particular aspect of the case *Morgan v. Lewis*, 95 N. C. 296; *King v. Blackwell*, 96 N. C. 322, 1 S. E. 485; *Willey v. Norfolk Southern R. Co.* 96 N. C. 408, 1 S. E. 446. and cases cited. Or omitted to recapitulate any part of the evidence. *Boon v. Murphy*, 108 N. C. 187, 12 S. E. 1032.

And certainly there can be no ground for complaint where counsel on both sides, in response to a question by the court when about to begin its charge, asking if they desired the evidence to be repeated, expressly agreed that it need not be. *Wiseman v. Penland*, 79 N. C. 197.

If the testimony be of a complicated character and difficult of recollection and comprehension, and there be a controversy between the parties as to what facts are deposed to, it would be the duty of the court either to state the testimony, or to recall the witness upon the controverted points for explanation; but when there is no dispute as to the facts testified to and the testimony is not complicated or difficult of recollection, the court may, in its discretion, decline to exercise the power given it without committing error. *Ivey v. Hodges*, 4 Humph. 154.

So, a modification of a requested instruction which was in effect an erasure of a statement of the evidence, but which did not change the legal principle stated, was approved in *Parchen v. Peck*, 2 Mont. 567, the court holding that the trial judge was not required to state the evidence in the form of an instruction.

And a court is never bound, at the request of either party, to go over the evidence in behalf of the party. Often it would be prejudicial to the

opposite party to do so. It cannot be assigned as error that the court declines doing it. *Lowe v. Minneapolis Street R. Co.* 37 Minn. 283, 34 S. W. 33.

26. Stating evidence in detail.

In charging the jury it is largely within the discretion of the trial judge as to how much detail shall be entered into, how minute the reference shall be, and how extended the discussion,¹ provided of course the evidence is presented with fairness and impartiality to both sides,² and with substantial accuracy.³

¹ *Fowler v. Smith*, 153 Pa. 639, 25 Atl. 744; *Boon v. Murphy*, 108 N. C. 187, 12 S. E. 1032 (holding a summary sufficient in the absence of a request for its recital in full, or of parts thereof).

It cannot be required that the judge shall rehearse every item of the evidence, or quote any branch of it entire each time that he refers to it. It is sufficient if he gives the outlines and general effect correctly, so as to convey to the jurors the proper idea of the points to which he is referring, and to recall to them the evidence, on their own recollection of which they must make up their verdict. *Boon v. Murphy*, 108 N. C. 187, 12 S. E. 1032, and cases cited. And when, after stating the issue in general terms, the judge goes over the whole case, first of the plaintiff and then of the defendant, witness by witness, briefly as to each, but with substantial accuracy and fairness, he is not required to do so again when referring subsequently to detached parts in connection with particular points of the case; all that is necessary is that he shall leave undisturbed the impartial general presentation the jury already has from him. *Borham v. Davis*, 146 Pa. 72, 23 Atl. 160.

But where the opinions of witnesses as to whether a given condition or state of facts exists are very largely, if not almost entirely, to be depended upon, the charge should call to the jury's attention any contradiction in the testimony of the witnesses, any opposition of views among the experts testifying, and to the fact that the testimony is expert testimony, with an explanation of what expert testimony is, what effect may or should be given to it in determining the case, how the jury should reconcile the contradiction if they can, or if they cannot how they should regard it or act in relation to it. *Richards v.* 176 Pa. 181, 35 Atl. 114.

² *Rose v. Otis*, 5 Colo. App. 473, 39 Pac. 77.

But it is error to present the proof prominently on one side and omit countervailing evidence entirely on the other. *Wright v. Central R. & Bkg. Co.* 16 Ga. 46; *Flowers v. Flowers*, 92 Ga. 688, 18 S. E. 1006.

³ If the judge misstates the evidence upon a material fact in issue, result-

ing in prejudice to one of the parties, reversal is imperative. *Stephens v. Patterson*, 29 Neb. 697, 46 N. W. 154.

But when it is evident that the judge has made a mistake in stating the facts to the jury, it is the duty of counsel to call the judge's attention to the fact at the time; and unless that is done no available exception can be afterwards taken by the party who might possibly be prejudiced by it. *Braunsdorf v. Fellner*, 76 Wis. 1, 45 N. W. 97. So, also, where the statement was not a positive one but was made rather inquiringly by the qualification "I think." *Muetze v. Tuteur*, 77 Wis. 236, 9 L.R.A. 86, 46 N. W. 123.

27. Stating testimony in language of witness.

The court in stating the testimony need not repeat it *verbatim*, but it is sufficient if the substance is stated.¹

¹ *Krepps v. Carlisle*, 157 Pa. 358, 27 Atl. 741; *Strawn v. Shank*, 110 Pa. 259, 20 Atl. 717; *Rose v. Otis*, 5 Colo. App. 472, 39 Pac. 77; *Maynard v. Tyler*, 168 Mass. 107, 46 N. E. 413.

Of course, in referring to testimony, the court should give correctly the substance of it, and caution the jury who have heard it as to their right in determining exactly what fell from the lips of the witness; but the court is not bound to repeat it *verbatim*, nor is the charge, in the hurry of a trial, necessarily to be a polished essay on the law and the facts bearing on the issue. If this were so, the delay incident to jury trials would be a practical denial of justice to suitors.

And it is not every misrecollection of the court of a witness's testimony, or every misstatement of his language, that works material error. It must be in a substantial part of the testimony, and such a misstatement as probably misleads the jury. *Bellew v. Ahrburg*, 23 Kan. 287.

And if the alleged mistakes in narrating the facts are of sufficient gravity, the counsel ought to call the attention of the court to them immediately after the charge. If he does not do so he cannot complain. *Krepps v. Carlisle*, 157 Pa. 358, 27 Atl. 741.

28. Ignoring evidence.

But it is error for the court, when stating the evidence, to ignore material portions of it.¹ And of course an instruction which, as requested, is defective in this respect, is properly refused.²

¹ *Harris v. Russell*, 93 Ala. 59, 9 So. 541 (however weak and inconclusive the judge may consider it); *Michigan Pipe Co. v. North British & M. Ins. Co.* 97 Mich. 493, 56 N. W. 849

And the court in calling the jury's attention to an admission should call attention to it all, and not to a part alone. *Laidlaw v. Sage*, 158 N. Y. 73, 44 L.R.A. 216, 52 N. E. 679.

² *Birmingham Dry Goods Co. v. Bledsoe*, 117 Ala. 495, 23 So. 153; *Model Mill Co. v. McEver*, 95 Ga. 701, 22 S. E. 705; *Lindeman v. Fry*, 178 Ill. 174, 52 N. E. 851; *Todd v. Danner*, 17 Ind. App. 368, 46 N. E. 829; *Fleckenstein v. Inman*, 27 Or. 328, 40 Pac. 87.

29. As to lack of evidence.

It is the duty of the court to inform the jury, if requested, when there is no evidence of a material fact,¹ unless the complexity of oral evidence renders it more proper to instruct them hypothetically.²

¹ *Storey v. Brennan*, 15 N. Y. 524, 69 Am. Dec. 629; *Goodman v. Oregon R. & Nav. Co.* 22 Or. 14, 28 Pac. 894. See also the following cases, approving the giving of such an instruction; *East Tennessee, V. & G. R. Co. v. Markens*, 88 Ga. 60, 14 L.R.A. 281, 13 S. E. 855; *Rogers v. Felton*, 98 Ky. 148, 32 S. W. 405; *Bullock v. Delaware, L. & W. R. Co.* 61 N. J. L. 550, 40 Atl. 650; *Wilson v. Coulter*, 29 App. Div. 85, 51 N. Y. Supp. 804; *Barber v. Roseboro*, 97 N. C. 192, 1 S. E. 849; *Brown v. Moore*, 26 S. C. 160, 2 S. E. 9 (notwithstanding charging upon the facts is prohibited by Constitution); *McClure v. Sparta*, 84 Wis. 269, 54 N. W. 337.

And that the court may properly tell the jury that there is no direct evidence of a fact in issue, where the evidence of such fact is wholly circumstantial, see *Maynard v. Tyler*, 168 Mass. 107, 46 N. E. 413.

But the slightest evidence from which the jury may properly infer the fact is enough to preclude such instruction. *Bond v. Warren*, 53 N. C. (8 Jones, L.) 192. See also the following cases, approving the rejection of a request to charge that there was no evidence of a material fact, where in fact there was evidence, though slight, and though conflicting. *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 12 So. 88; *Central R. Co. v. State*, 82 Md. 647, 33 Atl. 265; *Pomeroy v. Boston & M. R. Co.* 172 Mass. 92, 51 N. E. 523; *Warren v. Halley*, 107 Mich. 120, 64 N. W. 1058. And that it is error to so charge despite such evidence, see *Bisewski v. Booth*, 100 Wis. 383, 76 N. W. 349.

² *Knox v. Fair*, 17 Ala. 503.

30. Disregarding evidence.

The court may instruct the jury to disregard evidence wrongly admitted, although it was admitted without objection and has not been struck out.¹

But a party cannot ask such an instruction, as matter of right, *Abbott, Civ. Jur. T.—44.*

who did not object as soon as the ground of objection was known to him.²

¹ *Pennsylvania Co. v. Roy*, 102 U. S. 451, 458, 26 L. ed. 141; *People v. Parish*, 4 Denio, 153; s. p. *Morton v. Beall*, 2 Harr. & G. 136. Request for instruction to disregard is the proper remedy if motion to strike out improper evidence is refused. *Parker v. Paine*, 37 Misc. 768, 76 N. Y. Supp. 942. See *McCoy v. Munro*, 76 App. Div. 435, 78 N. Y. Supp. 849 (where it is said that a motion to strike out is not the proper remedy).

Contra, *Becker v. Becker*, 45 Iowa, 239 (on the ground that omitting to object led the other party to rely on its going to the jury, instead of supplying better evidence). See also *Fish v. Chicago*, R. I. & P. R. Co. 81 Iowa, 280, 46 N. W. 998, where it is held that after a party has omitted to object to the introduction of evidence he cannot then question its competency by a motion for a peremptory instruction for a verdict in his favor on the ground of insufficiency of evidence. And in *Davidson v. Wallingford*, 88 Tex. 619, 32 S. W. 1030, it is held error to instruct the jury to disregard testimony which has been admitted over or without objection. What is admitted either over objection or without objection should be left for the consideration of the jury, without comment affecting its weight and without devolving upon them the duty of determining its admissibility, a function properly to be performed by the court.

Whether instructions will cure the error is another question.

² *Edge v. Keith*, 13 Smedes & M. 295; *Ganson v. Tift*, 71 N. Y. 48, 56; *Rees v. Livingston*, 41 Pa. 113; *Harrison v. Young*, 9 Ga. 359, 366; *Insurance Cos. v. Scales*, 101 Tenn. 628, 49 S. W. 743 (no error to refuse such an instruction). And an instruction to disregard received without objection, whose nature is patent, and which properly belongs in the case, was held to have been properly refused, in *Coombs Com. Co. v. Block*, 130 Mo. 668, 32 S. W. 1139.

Contra, *Hamilton v. New York C. R. Co.* 51 N. Y. 100, 106; *Barnett v. St. Anthony Falls Water Power Co.* 33 Minn. 265, 22 N. W. 535, 538.

This rule, which I state thus in deference to recent authority, leaves it in the discretion of the judge whether to instruct the jury to disregard or not. If this be sound, the discretion should be controlled by the following distinction: If the objection goes to the means of evidence or the manner of proof,—as, for instance, the competency of a witness, or of oral in lieu of written evidence, or the authentication of a document, or to remoteness in point of time or place on a question of value,—the omission to object or move to strike out should generally be deemed a waiver, giving the adversary, who might have supplied the defect on timely objection, a right to have the evidence go to the jury. But if the objection goes to the substantial relevancy of the fact proved, that is to say, its intrinsic capacity to afford any fair

ground of an inference affecting the issue, it ought not to be deemed waived.

31. Expressing opinion on weight.

Unless expressly forbidden by statute or otherwise,¹ it is within the power of the presiding judge to express his opinion upon a question of fact in his charge to the jury.²

But, irrespective of what may be the course of practice in the state courts as to forbidding the presiding judge to express his opinion upon questions of fact in his charge to the jury, a judge of a United States court may do so.³

If the power be exercised, however, it is indispensable that no rule of law be incorrectly stated and all questions of fact ultimately submitted to the determination of the jury.⁴

¹ Several of the states have statutes or constitutional provisions prohibiting this practice; and that it is error for the judge, in violation of these prohibitive provisions to do so, see, for example, the following cases: *Kauffman v. Maier*, 94 Cal. 269, 18 L.R.A. 124, 29 Pac. 481; *Wheeler v. Baars*, 33 Fla. 696, 15 So. 584; *Louisville & N. R. Co. v. Tift*, 100 Ga. 86, 27 S. E. 765; *Louisville, N. O. & T. R. Co. v. Whitehead*, 71 Miss. 451, 15 So. 890; *Knowles v. Nixon*, 17 Mont. 473, 43 Pac. 628; *Sherrill v. Western U. Teleg. Co.* 116 N. C. 655, 21 S. E. 429; *Jackson v. Jackson*, 32 S. C. 591, 11 S. E. 204; *Davidson v. Wallingford*, 88 Tex. 619, 32 S. W. 1030.

And that it is proper to refuse to so charge on the weight of the evidence, see *Flanagan v. Scott*, 102 Ga. 399, 31 S. E. 23; *Ohio & M. R. Co. v. Percy*, 128 Ind. 207, 27 N. E. 479; *Bogie v. Nolan*, 96 Mo. 85, 9 S. W. 14; *Wilson v. Gamble*, 50 Neb. 426, 69 N. W. 945; *Baldwin v. Von der Ahe*, 184 Pa. 116, 39 Atl. 7; *Dickeschied v. Exchange Bank*, 28 W. Va. 341. Or to modify a request by striking out the objectionable portion. *Carron v. Wood*, 10 Mont. 500, 26 Pac. 388.

In Alabama, the judge cannot charge on the effect of the evidence unless requested by counsel to do so. *Parker v. Daughtry*, 111 Ala. 529, 20 So. 362 (error to do so in the absence of such request).

As to whether it is proper practice in New Hampshire, the cases are not agreed. Compare, for instance, *Haven v. Richardson*, 5 N. H. 126; *Patterson v. Colebrook*, 29 N. H. 94; *Cook v. Brown*, 34 N. H. 460; *State v. Pike*, 49 N. H. 416, 6 Am. Rep. 533.

² *Cook v. M. Steinert & Sons Co.* 69 Conn. 91, 36 Atl. 1008; *Washington Gaslight Co. v. Poore*, 3 App. D. C. 127; *Blumeno v. Grand Rapids & J. R. Co.* 101 Mich. 325, 59 N. W. 594; *First Nat. Bank v. Holan*, 63 Minn. 525, 65 N. W. 952 (the practice not commended, but held to be no error, provided the question is fairly left to the jury for their

determination); *Castner v. Sliker*, 33 N. J. L. 512; *Foley v. Loughran*, 60 N. J. L. 464, 38 Atl. 960, 39 Atl. 358; *Hurlburt v. Hurlburt*, 128 N. Y. 420, 28 N. E. 651; *Price v. Hamscher*, 174 Pa. 73, 34 Atl. 546; *Rowell v. Fuller*, 59 Vt. 688, 10 Atl. 853; *Barndt v. Frederick*, 78 Wis. 1, 11 L.R.A. 199, 47 N. W. 6.

Judge may express his opinion on the facts provided applicable rules of law are correctly stated, and the facts are ultimately submitted to the jury with the statement that the jury are not bound by his opinion. *Lesser Cotton Co. v. St. Louis*, I. M. & S. R. Co. 52 C. C. A. 95, 114 Fed. 133; *Kerr v. Modern Woodmen*, 54 C. C. A. 655, 117 Fed. 593; *Vanarsdale v. Hax*, 47 C. C. A. 31, 107 Fed. 878; *Aerheart v. St. Louis*, I. M. & S. R. Co. 40 C. C. A. 171, 99 Fed. 907; *Nyback v. Champagne Lumber Co.* 48 C. C. A. 632, 109 Fed. 732; *Nome Beach Lighterage & Transp. Co. v. Munich Assur. Co.* 123 Fed. 820; *Butler v. Barret*, 130 Fed. 944; *Bonness v. Felsing*, 97 Minn. 227, 114 Am. St. Rep. 707, 106 N. W. 909; *Knee v. McDowell*, 25 Pa. Super. Ct. 641; *Trecee v. American Asso.* 58 C. C. A. 266, 122 Fed. 598; *Larson v. Barlow*, 112 Minn. 246, 127 N. W. 924; *Bernstein v. Walsh*, 32 Pa. Super. Ct. 392.

And that reasonable comments and remarks in evidence and witnesses are proper was held in *Louisville & N. R. Co. v. York*, 128 Ala. 305, 30 So. 676; *Matthews v. Farrell*, 140 Ala. 298, 37 So. 325; *Chicago City R. Co. v. Creech*, 207 Ill. 400, 69 N. E. 919; *Stowell v. Standard Oil Co.* 139 Mich. 18, 102 N. W. 227; *Harrison v. Lakeman*, 189 Mo. 581, 88 S. W. 53; *Seely v. Manhattan L. Ins. Co.* 73 N. H. 339, 61 Atl. 585; *Puett v. Caldwell & N. R. Co.* 141 N. C. 332, 53 S. E. 852; *Cross v. Coffin-Fletcher Packing Co.* 123 Ga. 817, 51 S. E. 704; *Board of Internal Improvement v. Moore*, 25 Ky. L. Rep. 15, 74 S. W. 683; *Liscomb v. Manchester & L. R. Co.* 70 N. H. 312, 48 Atl. 284; *Phoenix Brewing Co. v. Weiss*, 23 Pa. Super. Ct. 519; *McKinstry v. Collins*, 74 Vt. 147, 52 Atl. 438; *Guertin v. Hudson*, 71 N. H. 505, 53 Atl. 736; *Werner v. Chicago & N. W. R. Co.* 105 Wis. 300, 81 N. W. 416; *Reeder v. Traders' Nat. Bank*, 28 Wash. 139, 68 Pac. 461; *Chicago City R. Co. v. Bennett*, 214 Ill. 26, 73 N. E. 343; *Commonwealth Electric Co. v. Rose*, 214 Ill. 545, 73 N. E. 780; *Wimber v. Iowa C. R. Co.* 114 Iowa, 551, 87 N. E. 505; *Illinois C. R. Co. v. Jolly*, 119 Ky. 452, 84 S. W. 330; *Story v. Concord & M. R. Co.* 70 N. H. 364, 48 Atl. 288; *Texas & P. R. Co. v. Rea*, 27 Tex. Civ. App. 549, 65 S. W. 1115; *Missouri, K. & T. R. Co. v. Follin*, 29 Tex. Civ. App. 512, 68 S. W. 810.

But see *Letts v. Letts*, 91 Mich. 596, 52 N. W. 54 (holding that the use of language from which the jury may infer a clear intimation of the views of the judge on the facts is objectionable); *Kelly v. Emery*, 75 Mich. 147, 42 N. W. 795; *Preston Nat. Bank v. Michigan Mut. F. Ins. Co.* 115 Mich. 511, 73 N. W. 815 (holding that to so modify a request to charge as to give the jury an impression of the judge's personal opinion is reversible error).

And in the following cases also it was held improper for the judge to express his opinion on the facts; *Insurance Co. of N. A. v. Leader*, 121 Ga. 260, 48 S. E. 972; *Coombs v. Mason*, 97 Me. 270, 54 Atl. 728; *Cook v. Bartlett*, 179 Mass. 576, 61 N. E. 266; *Fletcher v. South Carolina & G. Extension R. Co.* 57 S. C. 205, 35 S. E. 513; *Sutton v. Clark*, 59 S. C. 440, 82 Am. St. Rep. 848, 38 S. E. 150; *Thomasson v. Southern R. Co.* 72 S. C. 1, 51 S. E. 443; *Franey v. Illinois C. R. Co.* 104 Ill. App. 499; *Inboden v. St. Louis Union Trust Co.* 111 Mo. App. 220, 86 S. W. 263; *Gilliard v. Board of Education*, 141 N. C. 482, 54 S. E. 413; *Atlanta, K. & N. R. Co. v. Gardner*, 122 Ga. 82, 49 S. E. 818; *Feitl v. Chicago City R. Co.* 211 Ill. 279, 71 N. E. 991; *Southern R. Co. v. Scanlon*, 29 Ky. L. Rep. 268, 92 S. W. 927; *Williams v. Atlantic Coast Line R. Co.* 140 N. C. 623, 53 S. E. 448; *Galveston, H. & S. A. R. Co. v. Parish*, — Tex. Civ. App. —, 93 S. W. 682; *Nyback v. Champagne Lumber Co.* 48 C. C. A. 632, 109 Fed. 732; *Shafer v. Eau Claire*, 105 Wis. 239, 81 N. W. 409.

³ The power of the courts of the United States in this respect is not controlled by the state statutes or constitutional provisions forbidding the judge to express his opinion upon the facts. *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286 (a case from a Federal court sitting in Illinois); *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1 (a case from a Federal court sitting in Georgia), and cases there cited; *California Ins. Co. v. Union Compress Co.* 133 U. S. 387, 33 L. ed. 730, 10 Sup. Ct. Rep. 365 (a case from a Federal court sitting in Arkansas); *Sommers v. Carbon Hill Coal Co.* 91 Fed. 337 (a case from a Federal court sitting in Washington). In all of these cases, and many others which might be cited, statutes or constitutional provisions of the state in which the Federal courts were sitting prohibited the judge from expressing any opinion on questions of fact, and some of them even forbade his commenting at all on the evidence. See, for instance, *Sommers v. Carbon Hill Coal Co.* 91 Fed. 337.

⁴ *Rucker v. Wheeler*, 127 U. S. 85, 32 L. ed. 102, 8 Sup. Ct. Rep. 1142, and cases cited. See also cases cited in note 2, immediately preceding.

The line which separates the provinces of the court and of the jury must not be overlooked by the court. Care must be taken that the jury are not misled into the belief that they are alike bound by the views expressed upon the evidence and the instructions given as to the law. They must distinctly understand that what is said as to the facts is only advisory, and in no wise intended to fetter the exercise finally of their own independent judgment. *Nudd v. Burrows*, 91 U. S. 439, 23 L. ed. 289.

In order to preserve a just balance between the distinct powers of the court and the jury, and that the parties may enjoy, in unimpaired vigor, their constitutional right of having the law decided by the court and of having the fact decided by the jury, every charge should dis-

tinguish clearly between the law and the fact, so that the jury cannot misunderstand their rights or their duty, nor mistake the opinion of the judge upon matter of fact for his direction in point of law. The distinction is all important to the jury. The direction of the judge, in the one case, is obligatory upon their consciences, and so they will, and so they ought to, regard it; but his opinion in the other case is mere advice, and the jury are bound to decide for themselves, notwithstanding the opinion of the judge, and to follow that opinion no farther than it corresponds with the conclusions of their judgment. Unless this distinction be kept steadily in view, and be defined with all possible precision, the trial by jury may, in time, be broken down, and rendered nominal and useless. *New York Firemen Ins. Co. v. Walden*, 12 Johns. 518, 7 Am. Dec. 340.

The rule has been well stated thus: Where the judge intends, in commenting on facts, merely to indicate an opinion on a question which he leaves to the jury, the proper form of charge is to tell the jury that the cause of action or defense, as the case may be, rests upon a question which the judge specifies, and that it is for them to judge from the evidence whether the fact be one way or the other, and if they should be of the opinion one way they must find for the defendants, and if they thought otherwise, they must find for the plaintiffs.

If, then, the judge deems proper to give his opinion on the fact, for the assistance or satisfaction of the jury, he may do so with utility and safety.

But if he tells the jury that the matters given in evidence are conclusive on the one side, and the matters given in evidence on the other side are not sufficient, and that if the jury agree with him in opinion they ought to find so and so, without more, it is error. *New York Firemen Ins. Co. v. Walden*, 12 Johns. 513, 7 Am. Dec. 340; *s. p.* *Gordon v. Little*, 8 Serg. & R. 533, 11 Am. Dec. 632; *Allis v. Leonard*, 58 N. Y. 288; *Massoth v. Delaware & H. Canal Co.* 64 N. Y. 524, 533. *Contra*, *Vedder v. Fellows*, 20 N. Y. 126, 130.

It is not error to refuse to express an opinion on the sufficiency of evidence, if the evidence is not sufficient to warrant a peremptory ruling in favor of the party relying on it.¹

¹ *Moore v. Meacham*, 10 N. Y. 207.

32. Sufficiency of evidence.

It is error to tell the jury, without qualification, that the evidence raises a presumption of a particular fact, or is sufficient to justify finding a particular fact, if it raises, not a presump-

tion of law, but only a presumption of fact on which they might find either way.¹

¹Stone v. Geyser Quicksilver Min. Co. 52 Cal. 315; Allison v. State, 42 Ind. 354, 357; s. p. Read v. Hurd, 7 Wend. 408.

And that it is proper to refuse to so charge, see Chicago, B. & Q. R. Co. v. Warner, 123 Ill. 38, 14 N. E. 206.

33. Result of testimony.

It is not error to refuse to instruct the jury that if they believe a specified witness, they should find for the party for whom he testified.¹

¹Chapman v. Erie R. Co. 55 N. Y. 579, reversing 1 Thomp. & C. 526; Dolan v. Delaware & H. Canal Co. 71 N. Y. 285; Bailey v. Bailey, 97 Mass. 373.

But it is not necessarily error to instruct them that the testimony of a witness, if believed, establishes a fact, if the testimony is clear, and they are given to understand they may believe or not. Russell v. Ely, 2 Black, 575, 17 L. ed. 258. See also Alabama G. S. R. Co. v. Moody, 90 Ala. 46, 8 So. 57; McKean v. Salem, 148 Mass. 109, 19 N. E. 21 (where the testimony of the witness was the only testimony on the subject); Partridge v. Sterling, 79 Mich. 302, 44 N. W. 614 (where there was no dispute as to the facts testified to by the witness); s. p., where the conflicting witnesses were the parties, Bellew v. Ahrburg, 23 Kan. 287.

And an instruction that if the jury believe that a specified witness has told the truth to find for plaintiff, but that if they believe he did not tell the truth, and should believe as testified by the other witnesses, to find for defendant, was held, in Harris v. Murphy, 119 N. C. 34, 25 S. E. 708, not to be misleading as raising an inference that more weight in the opinion of the court should be given to the testimony of such witness than to that of the other witnesses whose testimony contradicted his.

34. Circumstantial evidence.

Where the circumstances together are sufficient to sustain the finding of a fact, the adverse party has no right to require that the jury be instructed that separately not one of them is sufficient.¹

¹Scott v. Lloyd, 9 Pet. 418, 460, 9 L. ed. 178, 193; Keenan v. Hayden, 39 Wis. 558, 561; Cowan v. Chicago, M. & St. P. R. Co. 80 Wis. 290, 50 N. W. 180.

35. Alternative propositions.

A party is entitled to have specified charges upon the law applicable to each of the various hypotheses or combinations of facts which the jury from the evidence might legitimately find, and which have not been covered by other instructions.¹

¹ *Sword v. Keith*, 31 Mich. 247, 255; *Foster v. People*, 50 N. Y. 598 (criminal case). And following up such instructions with an instruction that if the jury do not find the facts as claimed in them the law as stated in them has no application was held no error in *Morris v. Guffey*, 188 Pa. 534, 41 Atl. 731.

But no right to such instructions exists where each party's contention on which he is entitled to recover, if at all, involves but one hypothesis, and both contentions are utterly inconsistent with each other and both cannot be true. *Morehouse v. Remson*, 59 Conn. 392, 22 Atl. 427 (an action on an oral contract in which the contract was shown to be, according to either party's evidence, one definite contract, each utterly inconsistent with the other).

36. Misuse of evidence.

A party has a right to have the jury instructed that evidence admitted only for a specific purpose cannot be regarded by them for another purpose for which it was incompetent.¹

¹ *Henson v. King*, 47 N. C. (2 Jones, L.) 385; *Brush Electric Light & P. Co. v. Wells*, 103 Ga. 512, 30 S. E. 533; *Hardy v. Milwaukee Street R. Co.* 89 Wis. 183, 61 N. W. 771; s. p. *Williams v. Mechanics' & Traders' F. Ins. Co.* 54 N. Y. 577; *Weir v. McGee*, 25 Tex. Supp. 20. And see ante, chapter XXII. § 8, i.

But an instruction which impliedly limits the effect of admissions which are in fact competent as original and independent evidence is erroneous. *Logansport & P. G. Turnp. Co. v. Heil*, 118 Ind. 135, 20 N. E. 703.

37. Affirmative and negative testimony.

It is not error to instruct the jury in an appropriate case that it is a rule of presumptions that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed.¹

¹ Such an instruction was approved in *Stitt v. Huidekoper*, 17 Wall. 384, 21 L. ed. 644, and *Griffith v. Baltimore & O. R. Co.* 44 Fed. 583. In

Missouri P. R. Co. v. Moffatt, 56 Kan. 667, 44 Pac. 607, it was held to be the duty of the court upon request to call the attention of the jury to the relative value of positive evidence that signals were given by a railway train approaching a crossing, and merely negative testimony that they were not given.

And the right of the court to instruct the jury to give greater weight to positive than to negative testimony, other things being equal, is sustained in Southern R. Co. v. O'Bryan, 119 Ga. 147, 45 S. E. 1000; St. Louis & S. F. R. Co. v. Brock, 69 Kan. 448, 77 Pac. 86; Pyne v. Delaware, L. & W. R. Co. 212 Pa. 143, 61 Atl. 817; Hildman v. Phillips, 106 Wis. 611, 82 N. W. 566.

But in Atlanta Consol. Street R. Co. v. Bigham, 105 Ga. 498, 30 S. E. 934, a refusal so to charge was held proper for failure of the request to embody the qualification that other things must be equal and the witnesses of equal credibility. Such, too, was the case in Sibley v. Ratliffe, 50 Ark. 477, 8 S. W. 686.

On the other hand, there are cases which, while admitting the rule of evidence to be as stated with reference to positive and negative testimony, hold that it is not a proper matter on which to charge the jury, in that it violates the rule forbidding a charge on the weight of the testimony, and that, although they might not reverse because such an instruction was given, they certainly will not regard the refusal of such an instruction as error. Ohio & M. R. Co. v. Buck, 130 Ind. 300, 30 N. E. 19; Atchison, T. & S. F. R. Co. v. Feehan, 149 Ill. 202, 36 N. E. 1036. For other instances of cases in which refusal to so instruct was sustained, see Louisville, N. A. & C. R. Co. v. Stommel, 126 Ind. 35, 25 N. E. 863; Missouri P. R. Co. v. Johnson, 44 Kan. 660, 24 Pac. 1116; Lonis v. Lake Shore & M. S. R. Co. 111 Mich. 458, 69 N. W. 642; Ehrman v. Nassau Electric R. Co. 23 App. Div. 21, 48 N. Y. Supp. 379; Olsen v. Oregon Short Line & U. N. R. Co. 9 Utah, 129, 33 Pac. 623; Bisewski v. Booth, 100 Wis. 383, 76 N. W. 349.

And see also Haun v. Rio Grande Western R. Co. 22 Utah, 346, 62 Pac. 908; Birmingham R. Light & P. Co. v. Seaborn, 168 Ala. 658, 53 So. 241; Louisville & N. R. Co. v. York, 128 Ala. 305, 30 So. 676, holding that it is for the jury to determine the relative value of positive and negative testimony; and Central R. Co. v. Sowell, 3 Ga. App. 142, 59 S. E. 323; and Cleveland C. C. & St. L. R. Co. v. Schneider, 40 Ind. App. 38, 80 N. E. 985, holding that it is error for the court to instruct the jury, without proper qualifications, that positive testimony is entitled to more credit than negative.

38. Testimony of party.

a. When his only evidence.—Where the only evidence of a party is his testimony in his own behalf it is error to instruct

the jury that if not improbable nor discredited they must find for him.¹

¹ *Lesser v. Wunder*, 9 Daly, 70; s. p. ante, chapter XXI. § 11.

The well-established rule followed by the English Court of Chancery, that no one can, on his own testimony (*Whittaker v. Whittaker*, L. R. 21 Ch. Div. 657, 51 L. J. Ch. N. S. 737, 46 L. T. N. S. 802, 30 Week. Rep. 787), unsupported by corroborative evidence, sustain a claim against the estate of a deceased person,—may be satisfied by corroborative evidence of the acts of the parties and by their documents. *Young v. Wallingford*, 48 L. T. N. S. 756, 52 L. J. Ch. N. S. 590, 31 Week. Rep. 838.

b. When contradicted by himself.—A party's testimony in his own behalf is entitled to no consideration if it is flatly contradicted by his own previous writings.¹

¹ *Boyd v. Colt*, 20 How. Pr. 384. It is held in *Juniata Bldg. & Loan Asso. v. Hetzel*, 103 Pa. 507, that in an equity case the uncorroborated testimony of a party impeaching his own written testimony, or varying its effect, is not sufficient to go to the jury. *Lynch v. Pyne*, 10 Jones & S. 11.

39. Conflict between adverse parties' testimony.

Where the evidence is the conflicting testimony of plaintiff and defendant, each in his own behalf, it is error to instruct the jury that to the extent of the conflict, the party having the burden of proof must fail.¹

¹ *Kuchn v. Wilson*, 13 Wis. 104, 109; *Salter v. Glenn*, 42 Ga. 64, 82.

40. Omission to call a witness.

The mere omission to call a competent and available witness who has some knowledge of the transactions, which, if the claim of the party omitting is correct, would be favorable, and who is not adversely interested or biased, is a circumstance which the jury may consider;¹ but it is error to instruct them, even when such witness is a party on the same side, that they may infer that his testimony, if he were produced, would be favorable to the other party.²

¹ *Reynolds v. Sweetser*, 15 Gray, 78, 79; *Bleecker v. Johnston*, 69 N. Y. 309, reversing 51 How. Pr. 380. It is error to instruct the jury that

a party is bound to call a particular witness who seems to be able to explain evidence against him, if such witness is interested against the party. *Coykendall v. Eaton*, 42 How. Pr. 378.

While no presumption arises from the failure of a party to call a witness, the jury may draw such inference therefrom as they think warranted by the evidence. *Kirkpatrick v. Allemannia F. Ins. Co.* 102 App. Div. 327, 92 N. Y. Supp. 466. See *Cushman v. De Mallie*, 46 App. Div. 379, 61 N. Y. Supp. 878.

² *Bleecker v. Johnston*, 69 N. Y. 309, reversing 51 How. Pr. 380. See also *Brown v. Swanton*, 69 Vt. 53, 37 Atl. 280, holding that it is not error to refuse to charge that failure to produce one of two favorable witnesses in common possession of certain facts testified to by only one of them raises a fair inference that the facts as testified to by the witness who was sworn are false; and *Carpenter v. Bailey*, 94 Cal. 406, 29 Pac. 1101, holding that instructions that it is a presumption of law that evidence wilfully suppressed would be adverse, and that inferior evidence creates a presumption that higher evidence would be adverse, are prejudicial error as applied to evidence objected to when offered and excluded as inadmissible.

There is much conflict of opinion on the question whether the judge may comment on the absence of supposed testimony or documents.

Compare *Daub v. Northern P. R. Co.* 18 Fed. 625; *Nicol v. Crittenden*, 55 Ga. 497; *Atlanta & W. P. R. Co. v. Holcombe*, 88 Ga. 9, 13 S. E. 751; *Lowe v. Massey*, 62 Ill. 47; *Moore v. Wright*, 90 Ill. 470; *Miller v. Dayton*, 57 Iowa. 423, 10 N. W. 814; *Freeman v. Fogg*, 82 Me. 408, 19 Atl. 907; *Mooney v. Davis*, 75 Mich. 188, 42 N. W. 802; *Fonda v. St. Paul City R. Co.* 71 Minn. 438, 74 N. W. 166; *Sherlock v. German-American Ins. Co.* 21 App. Div. 18, 47 N. Y. Supp. 315, and cases cited; *Carpenter v. Pennsylvania R. Co.* 13 App. Div. 328, 43 N. Y. Supp. 203; *Brooks v. Steen*, 6 Hun, 516; *Hall v. Vanderpool*, 156 Pa. 152, 26 Atl. 1069; *Steininger v. Hoch*, 42 Pa. 432; *Frick v. Barbour*, 64 Pa. 120; *American Underwriter's Assn. v. George*, 97 Pa. 238; *Collins v. Leafey*, 124 Pa. 203, 16 Atl. 765 (where it was said that the reasons why certain evidence which might naturally be looked for may not be produced are so many and so various, and sometimes so difficult of explanation, that obviously this is a kind of argument that requires careful handling, especially when used from the bench. But it is a legitimate instrument in the investigation of truth, and a liberal discretion in its use must be allowed to the trial judge, who is in a far better position to determine the occasion for it than the appellate court possibly can be); *Seward v. Garlin*, 33 Vt. 583; *Clough v. Patrick*, 37 Vt. 421.

41. Refusal to produce document.

A party who refuses on request to produce a document shown to be within his control, thereby raises a presumption that if

produced it would have tended to support the evidence which the other party, in the absence of the document, is compelled to rely upon.¹

¹ *Clifton v. United States*, 4 How. 242, 11 L. ed. 957 (holding the rule to apply even where there is no question of best and secondary); *Wylde v. Northern R. Co.* 14 Abb. Pr. N. S. 213, 53 N. Y. 156.

42. Cumulative evidence.

If a party has called one witness his neglect to call another to the same point, though a circumstance to be considered in weighing the evidence that is actually adduced, cannot be given to the jury as a ground for inferring that the testimony of the other might be prejudicial.¹

¹ *Bleecker v. Johnston*, 69 N. Y. 309, reversing 51 How. Pr. 380.

43. Unimpeached and uncontradicted testimony.

The general rule that the positive testimony of an unimpeached, uncontradicted witness cannot be disregarded by the jury, does not apply to the testimony of an interested witness, nor to one whose testimony is intrinsically improbable, or contradicted by circumstances;¹ nor to testimony to a matter of common opinion on facts that are before the jury.²

¹ *Kochler v. Adler*, 78 N. Y. 287. See also *Curran v. A. H. Strange Co.* 98 Wis. 598, 74 N. W. 377, recognizing this rule, but holding refusal to so charge in that particular case was not error. But see *Irwin v. Metropolitan Street R. Co.* 25 Misc. 187, 54 N. Y. Supp. 195, where this question is discussed at some length and a refusal to so charge sustained on the ground that the credibility of the witness is for the jury to consider in connection with the other evidence.

But it is error for the court, in his charge, to cast doubt and suspicion on the testimony of an unimpeached defendant who has testified in his own behalf, on no other ground than the opposing counsel's groundless and unrestrained criticism of the evidence in his argument. *Valley Lumber Co. v. Smith*, 71 Wis. 304, 37 N. W. 412.

² See ante, chapter XXI. § 17.

44. Impeached testimony.

The testimony of a witness who has been impeached should go to the jury, not with an instruction to disregard it wholly, but to be weighed in connection with the other evidence.¹

Whether a witness has been successfully impeached or not is a question for the jury.²

¹ *White v. McLean*, 57 N. Y. 670; *Dunn v. People*, 29 N. Y. 523, 87 Am. Dec. 319; *Rose v. Otis*, 18 Colo. 59, 31 Pac. 493. See also *Crowell v. McGoon*, 106 Iowa, 266, 76 N. W. 672, sustaining refusal of a requested instruction that the jury might disregard the evidence of any witness if they found from the evidence that his general reputation for truth and veracity in the community in which he resided was bad, unless he was corroborated.

But an instruction that the jury have the right to reject all the testimony of a witness who has been impeached by proof that he has made contradictory and inconsistent statements out of court concerning material and relevant matters, was upheld, in *White v. New York C. & St. L. R. Co.* 142 Ind. 648, 42 N. E. 456, as proper, under a statute providing for impeachment by such proof.

² *Allis v. Leonard*, 58 N. Y. 288.

45. *Falsus in uno.*

Where a witness testifying to matters material to the issues, as to which deliberate false swearing would be perjury, is contradicted by other witnesses, it is not erroneous for the judge to charge the jury that if they believe the witness has knowingly sworn falsely in reference to any fact, he is not entitled to be believed in reference to any other fact testified to by him.¹ But a party is not entitled to have the jury so instructed unless his falsehood is shown to be wilful; but the judge should only caution the jury.²

¹ *O'Rourke v. Vennekohl*, 104 Cal. 254, 37 Pac. 930; *Judge v. Jordan*, 81 Iowa, 519, 46 N. W. 1077; *Fraser v. Haggerty*, 86 Mich. 521, 49 N. W. 616; *Hartpence v. Rogers*, 143 Mo. 623, 45 S. W. 650; *Atkin v. Gladwish*, 27 Neb. 841, 44 N. W. 37; *Wilson v. Coulter*, 29 App. Div. 85, 51 N. Y. Supp. 804; *Roth v. Wells*, 29 N. Y. 471, affirming 41 Barb. 194; s. p. *People v. Evans*, 40 N. Y. 1. *Alabama Steel & Wire Co. v. Griffin*, 149 Ala. 423, 42 So. 1034; *Hammelmann v. Bernhardt*, 140 App. Div. 42, 124 N. Y. Supp. 394; *Whitaker v. California Door Co.* 7 Cal. App. 757, 95 Pac. 910; *Kress v. Lawrence*, 158 Ala. 652, 47 So. 574; *Conlon v. Chicago G. W. R. Co.* 139 Ill. App. 555.

Some courts, however, hold that such an instruction must be qualified to the extent of telling the jury that they may disregard the witness's testimony unless corroborated. *Sandwich v. Dolan*, 141 Ill. 430, 31 N. E. 416; *Bratt v. Swift*, 99 Wis. 579, 75 N. W. 411.

In either case, however, it is error, in so charging, to single out and des-

ignite by name particular witnesses. *Wastl v. Montana Union R. Co.* 17 Mont. 213, 42 Pac. 772. Accordingly, it is not improper to so modify a request to charge this rule with reference to particular witnesses named as to make it apply to all the witnesses generally. *Hartpence v. Rogers*, 143 Mo. 623, 45 S. W. 650.

- ² *Pease v. Smith*, 61 N. Y. 477, affirming 5 Lans. 519; *Koehucke v. Ross*, 16 Abb. Pr. N. S. 345, with note. And to the effect that the charge must tell the jury that the falsehood must be wilful, see *Ward v. Ward*, 25 Colo. 33, 52 Pac. 1105; *Stoppert v. Nierle*, 45 Neb. 105, 63 N. W. 382; *McPherrin v. Jones*, 5 N. D. 261, 65 N. W. 685; *Cahn v. Ladd*, 94 Wis. 134, 68 N. W. 652.

Necessity of qualifying by reference to conscious falsity an instruction under a statute enacting the maxim, *Falsus in uno, falsus in omnibus*, without that qualification, see note in 29 L.R.A.(N.S.) 680.

46. Incredible fact.

Testimony to an intrinsically improbable fact may be disbelieved by the jury, although the witness was uncontradicted and unimpeached.¹ But the right of the court to instruct the jury to that effect has been denied.²

- ¹ *Stillwell v. Carpenter*, 2 Abb. N. C. 238 (testimony to good faith); *Stafford v. Leamy*, 2 Jones & S. 269, and cases cited; *Tracy v. Phelps*, 22 Fed. 634 (U. S. Cir. Ct. N. D. N. Y.) 1 Kan. L. J. 38; *Hawkins v. Sauby*, 48 Minn. 69, 50 N. W. 1015. *Punsky v. New York*, 129 App. Div. 558, 114 N. Y. Supp. 66.

- ² Thus, in *Post v. United States*, 70 L.R.A. 989, 67 C. C. A. 569, 135 Fed. 1, (a case of mental healing), it was held that the jury could not be instructed to ignore legal and relevant evidence which was before them, merely because the court regarded it as incredible.

The following authorities are analogous:

In *Walters v. Syracuse Rapid Transit R. Co.* 178 N. Y. 50, 70 N. E. 98, reversing 84 App. Div. 64, 82 N. Y. Supp. 82, it was held that a nonsuit in an action for injury by electric shock cannot be sustained on the sole ground that the facts to which plaintiff and his witnesses testified at the trial were utterly incredible and, in fact, scientifically and physically impossible, since the credibility of witnesses is a question for the jury; especially in a case involving the action of electricity, concerning which there are many things still imperfectly understood.

- In 7 L.R.A.(N.S.) 357, in a note to *Chybowski v. Bucyrus Co.* 127 Wis. 332, 106 N. W. 833, the reader will find a brief discussion of the right of the appellate court to set aside the finding of a jury on the ground that it is contrary to scientific principles.

In the case cited the court, on appeal, set aside the finding of a jury

that a steam hammer had a double automatic stroke, it appearing that the hammer, which weighed 1,250 pounds, was operated by a piston arm working in a cylinder and driven by a pressure of 70 to 90 pounds of steam to the square inch, which was controllable only by a hand lever, because, it was held that there could be no rebound or double stroke to a hammer of that character without the operation of the controlling lever.

The writer of the note cites no authorities, but presents some considerations which should receive attention by appellate courts in cases involving the application of scientific principles.

The consideration of this subject was resumed in 15 L.R.A.(N.S.) 701, in a note to *Fleming v. Northern Tissue Paper Mill*, 135 Wis. 157, 114 N. W. 841.

In this note several cases are cited bearing on the general question. In the case which is the foundation of the note, the plaintiff claimed to have been injured by an alleged abnormal movement of a cutter knife operated by him in a paper mill. The trial judge thought the alleged abnormal movement was physically impossible. There was no evidence of any specific defect in the machine, which was complicated in character and required careful adjustment. The judge and the jury witnessed the operation of the machine, and the jury found that such a movement was possible and actually occurred. The court, on appeal, refused to set aside this finding of the jury, which was sustained by at least six witnesses, as to the operation of the machine.

The note includes the *Chybowski* Case, already cited; *Tillson v. Maine C. R. Co.* 102 Me. 463, 67 Atl. 407, relating to red and green lights on a semaphore, and involving the question whether persons, from the positions specified, could have seen the red or green lights as alleged by them, and it was held that the claim of these witnesses should be disregarded as contrary to physical laws and the facts. (See *Blumenthal v. Boston & M. R. Co.* 97 Me. 255, 54 Atl. 747, for a similar proposition); *Missouri, K. & T. R. Co. v. Collier*, 88 C. C. A. 127, 157 Fed. 347, in which it was held that credit could not be given to the testimony of a witness standing near the track where the collision occurred, that he saw a certain signal given, where cars of a train on a side track intervened between the place where the witness stood and the spot indicated by his testimony as that at which the signal was given; *Zalotuchin v. Metropolitan Street R. Co.* 127 Mo. App. 577, 106 S. W. 548, where it was held that testimony that an electric car was moving so rapidly that, under ordinary conditions of wind and weather, it threw up a cloud of dust in advance of it so as to obscure the headlight, was so opposed to physical law as to be unworthy of belief; *Montanye v. Northern Electrical Mfg. Co.* 127 Wis. 22, 105 N. W. 1043, in which it was held that there was no question for the jury, where it was claimed that a punch press had developed abnormal movements, by one of which plaintiff was injured, but there was no discoverable defect in the

machine; *Dupuis v. Saginaw Valley Traction Co.* 146 Mich. 151, 109 N. W. 413, in which plaintiff alleged that he was thrown from the rear platform of a car toward the inside of the curve as the car passed around it at a high rate of speed, and this was claimed to be impossible because contrary to the law of centrifugal force, and the question was held to be for the jury, the court saying it would not substitute its opinion for that of the jury upon questions of fact: *Fox v. Le Comte*, 2 App. Div. 61, 37 N. Y. Supp. 316, in which it was held that no verdict will be allowed to stand which is based on the negation of a well-known and accepted scientific fact of common knowledge, or on the existence of a physical impossibility, applying the rule specifically to the plunger in a power press which was operated with the foot on a treadle, and if, as claimed the movement of the plunger was impossible without pressure on the treadle, it was incumbent on those making the claim to establish the fact.

47. Expert testimony.

Expert testimony is generally held to be properly considered like all other testimony; it must be tried by the same tests and receive just the same weight as the witness is entitled to in connection with all the circumstances of the case,¹ although there are cases to the effect that it is unreliable and to be received with caution.²

But, in either case, the judge, when submitting it to the consideration of the jury, should in no way disparage or discredit it;³ nor, on the other hand, should he unduly accord to it a weight to which it is not entitled.⁴

¹ *Ball v. Hardesty*, 38 Kan. 540, 16 Pac. 808; *Turnbull v. Richardson*, 69 Mich. 400, 37 N. W. 499; *Louisville, N. O. & T. R. Co. v. Whitehead*, 71 Miss. 451, 15 So. 890; *Rivard v. Rivard*, 109 Mich. 98, 66 N. W. 681.

The evidence of experts is neither intrinsically weak nor intrinsically strong. Its strength or its weakness depends upon the character, the capacity, the skill, the opportunities for observation, the state of mind of the expert himself, and on the nature of the case and all its developed facts. Like any other evidence it may be entitled to great weight with the jury, or it may be entitled to little; but of its weight and worth the jury must judge without any influencing instruction, either weakening or strengthening, from the court. *Coleman v. Adair*, 75 Miss. 660, 23 So. 369.

And it is therefore error to instruct the jury that they are to receive expert testimony and weigh it with great caution. *Atchison, T. & S. F. R. Co. v. Thul*, 32 Kan. 355, 49 Am. Rep. 484, 4 Pac. 352.

And charging the jury that expert testimony was to be "received with caution, as the opinions of such witnesses, however honestly entertained, may be erroneous," was held to be a violation of the prohibition against charging upon the weight of evidence, in *Louisville, N. O. & T. R. Co. v. Whitehead*, 71 Miss. 451, 15 So. 890.

But it is proper to tell the jury that expert testimony is to be weighed by them and to aid them in coming to a conclusion as to the question presented to them; but that it is not binding upon their judgment. *Turnbull v. Richardson*, 69 Mich. 400, 37 N. W. 499.

² *Wilcox v. State*, 94 Tenn. 106, 28 S. W. 312, sustaining a charge that the jury should give the testimony of expert witnesses a careful and painstaking investigation with a view to find out the truth, and to keep from being misled or confused by it, for, as was said by the trial judge, "while expert testimony is sometimes the only means of or the best way to reach the truth, yet it is largely a field of speculation, beset with pitfalls and uncertainties, and requires patient and intelligent investigation to reach the truth." See also note to *Hull v. St. Louis*, 42 L.R.A. 753, where the conflicting cases on this question are collected and classified.

An instruction that an opinion as to handwriting ought to be received with caution and that direct evidence of the handwriting is entitled to greater weight than such opinions, was sustained in *Buxly v. Buxton*, 92 N. C. 479, as not intimating an opinion upon the evidence. See also *Jackson v. Adams*, 100 Iowa, 163, 69 N. W. 427, where a similar instruction was approved.

³ As to underrate too much the value of expert witnesses as a class. *Eggers v. Eggers*, 57 Ind. 461.

Or to so discredit their testimony as that the jury may understand that it is their duty to entirely disregard it. *Weston v. Brown*, 30 Neb. 609, 46 N. W. 826.

And an instruction which in effect excludes it from their consideration, telling them that it is from their own opinion upon the matter and the conclusions they draw from the facts proved that they are to determine their verdict, and not from what other persons say or think, is erroneous. *Ball v. Hardesty*, 38 Kan. 540, 16 Pac. 808.

So, too, it is error to tell the jury that they are to determine the issue from such personal knowledge as they may have in relation to matters of that kind, when the issue is not one of general knowledge and observation, but one of science upon which no witness not specially qualified as an expert may testify. The jury may think that they can disregard the evidence submitted. *Douglass v. Trask*, 77 Me. 35.

Or to tell them that they may disregard it entirely and base their verdict upon their own observations alone, obtained on a view by them. *Kansas City v. Hill*, 80 Mo. 523.

But it is not error to tell them that they may disregard it if they deem it unreasonable. *St. Louis v. Ranken*, 95 Mo. 189, 8 S. W. 249.

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Nor is it error to tell them not to wholly disregard the testimony and make their finding from their own observation and knowledge, but that they must, in arriving at their verdict, consider the testimony offered, in connection with their own judgment and knowledge as to the matter in question. *Kansas City v. Butterfield*, 89 Mo. 646, 1 S. W. 831.

⁴ As, to tell the jury that the testimony of experts is supposed to be the best that can be furnished. *Kansas City, W. & N. W. R. Co. v. Ryan*, 49 Kan. 1, 30 Pac. 108.

Or to tell the jury that where the witnesses are of equal capacity the opinions of those who have better means of knowledge are ordinarily of greater weight than the opinions of those who have less means of knowledge. Such an instruction leaves out of view the essential element of credibility and, even if true in fact, it is not a presumption of law. *Fulwider v. Ingels*, 87 Ind. 415. But it is not error to tell the jury that where the question is to be determined by the testimony of men of great scientific attainments, other things being equal, the greater number would carry greater weight so long as the existence of the equality in all things is left to the jury. *Spensley v. Lancashire Ins. Co.* 62 Wis. 443, 22 N. W. 740.

And it is error to give too much prominence to the mere experience of the expert, leaving out of view his opportunities, his aptitude, his skill, and other possible qualifications. *Cueno v. Bessoni*, 63 Ind. 524; *Blough v. Parry*, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560. And an instruction that greater weight is to be given the testimony of witnesses showing the greater knowledge and experience is properly refused. *Mewes v. Crescent Pipe Line Co.* 170 Pa. 369, 32 Atl. 1082.

So, too, it is error to tell the jury, in substance, that a party litigant must meet the testimony of experts given on behalf of his adversary by other experts, and, having failed to do so, the jury must take it for granted that their conclusions were correct. *People v. Vanderhoof*, 71 Mich. 158, 39 N. W. 28.

48. Construction and effect of writing.

The construction and effect of writings, if the question arises only from the writings themselves, is for the court.¹ If it depends in part on oral evidence, the question is for the jury.² If the extrinsic facts are ambiguous, the jury should be told what would be the proper construction upon the several different states of facts they might find.³

¹ *Stokes v. Johnson*, 57 N. Y. 673; *Goddard v. Foster*, 17 Wall. 123, 21 L. ed. 589; *Payne v. Pomeroy*, 21 D. C. 243; *Home Friendly Soc. v. Berry*, 94 Ga. 606, 21 S. E. 583; *Richardson v. Coffman*, 87 Iowa, 121, 54 N. W. 356; *Slatten v. Konrath*, 1 Kan. App. 636, 42 Pac.

399; *Jacob Tome Inst. v. Davis*, 87 Md. 591, 41 Atl. 166; *Houston & T. C. R. Co. v. Shirley*, 89 Tex. 95, 31 S. W. 291.

And it is improper to submit to the jury the question of performance of a written contract without any construction of the contract by the court. *Keeler v. Herr*, 157 Ill. 57, 41 N. E. 750.

² *Etting v. Bank of United States*, 11 Wheat. 59, 76, 6 L. ed. 419, 423; *Barreda v. Silsbee*, 21 How. 146, 16 L. ed. 86; *First Nat. Bank v. Dana*, 79 N. Y. 108, 116; *Goddard v. Foster*, 17 Wall. 123, 21 L. ed. 589; *West v. Smith*, 101 U. S. 270, 25 L. ed. 812, and cases cited; *Roberts v. Bonaparte*, 73 Md. 191, 10 L.R.A. 689, 20 Atl. 918 (where the instruction left to the jury the question, not of the construction of the contract, but what the contract was); *Coquillard v. Hovey*, 23 Neb. 622, 37 N. W. 479; *First Nat. Bank v. Dana*, 79 N. Y. 108 (error to take the question from the jury).

³ *Curtis v. Martz*, 14 Mich. 506.

49. Requisite cogency of evidence.

a. *Civil issue*.—On a jury trial of a civil issue, the issue must be determined by a preponderance of evidence;¹ and it is error to instruct the jury that the evidence must be clear, satisfactory, and conclusive, although the question be one which, if tried in equity, would require that degree of proof.²

¹ Various substitutes for "preponderance of evidence," such as "weight of evidence," "balance of probabilities" or telling the jury they must be "satisfied," etc., have been held error in some cases, though sanctioned as harmless in others.

For instances of charges held to be erroneous for exacting too high a degree of proof within this rule, see *Alabama Mineral R. Co. v. Marcus*, 115 Ala. 389, 22 So. 135; *Battles v. Tallman*, 96 Ala. 403, 11 So. 247; *Thompson v. Louisville & N. R. Co.* 91 Ala. 496, 11 L.R.A. 146, 8 So. 406; *Murphy v. Waterhouse*, 113 Cal. 467, 45 Pac. 866; *Ashborn v. Waterbury*, 69 Conn. 217, 37 Atl. 498; *Cleveland, C. C. & St. L. R. Co. v. Best*, 169 Ill. 301, 48 N. E. 684, reversing 68 Ill. App. 532; *Gumberg v. Treusch*, 103 Mich. 543, 61 N. W. 872; *Sanborn v. Gerald*, 91 Me. 366, 40 Atl. 67; *Lewis v. Merritt*, 113 N. Y. 386, 21 N. E. 141; *Wylie v. Posey*, 71 Tex. 34, 9 S. W. 87; *Baines v. Ullman*, 71 Tex. 529, 9 S. W. 543; *Puget Sound Iron Co. v. Lawrence*, 3 Wash. Terr. 226, 14 Pac. 869; *Oregon R. & Nav. Co. v. Owsley*, 3 Wash. Terr. 38, 13 Pac. 186; *Bachmeyer v. Mutual Reserve Fund Life Assn.* 87 Wis. 325, 58 N. W. 399; *Button v. Metcalf*, 80 Wis. 193, 49 N. W. 809.

And that it is proper to refuse a requested instruction objectionable in this respect, see *Louisville & N. R. Co. v. Hill*, 115 Ala. 334, 22 So. 163; *Willis v. Atlantic & D. R. Co.* 122 N. C. 905, 29 S. E. 941. Or

to modify it so as to present the true rule. *Treadwell v. Whittier*, 80 Cal. 574, 5 L.R.A. 498, 22 Pac. 206.

But with the foregoing compare the following cases: *Walker v. Collins*, 8 C. C. A. 1, 19 U. S. App. 307, 59 Fed. 70; *Braddy v. Kansas City, Ft. S. & M. R. Co.* 47 Mo. App. 519; *Wallace v. Mattice*, 118 Ind. 59, 20 N. E. 497; *Callan v. Hanson*, 86 Iowa, 420, 53 N. W. 282; *Altschuler v. Coburn*, 38 Neb. 881, 57 N. W. 836; *Knopke v. German-town Formers' Mut. Ins. Co.* 99 Wis. 289, 74 N. W. 795; *McKeon v. Chicago, M. & St. P. R. Co.* 94 Wis. 477, 35 L.R.A. 252, 69 N. W. 175.

² *Holt v. Brown*, 63 Iowa, 319, 19 N. W. 235. *Contra*, *Brawdy v. Brawdy*, 7 Pa. 157; *Juniata Bldg. & Loan Asso. v. Hetzel*, 103 Pa. 507.

Which of these rulings is sound is too broad a question for discussion here. I state the rule as in the text in deference to what I understand to be the general practice in New York; but it is a question of radical importance under the new procedure which merges cases of law and equity, and it seems to have escaped adequate consideration in reported cases.

In *Piersol v. Neill*, 63 Pa. 420, 426, the Pennsylvania rule was thus stated: "If, in the opinion of the former (the judge) the facts are not such as should move a chancellor to decree specific execution of the contract, he should give a binding instruction to that effect to the jury and withdraw the case from them; if the case should be sufficient on the testimony, then the jury should be so instructed, and the testimony referred to them to find whether it be true or not."

b. As to crime.—An allegation of a criminal act, when made in a civil action tried before a jury, is proved by a preponderance of evidence, weighed with the presumption of innocence;¹ and it is error to instruct the jury that it must be proved beyond a reasonable doubt.²

¹ *First Nat. Bank v. Commercial Union Assur. Co.* 33 Or. 43, 52 Pac. 1050, sustaining an instruction that a natural presumption of innocence exists in a charge of such a nature, arising from the improbability that a person will commit a criminal act. See also cases in note following.

² This is the better opinion, and finds support in the following cases, some of which reverse for the error, others sustain the refusal of the trial court to so charge, while still others sustain the charge for stating the rule correctly: *St. Ores v. McGlashen*, 74 Cal. 148, 15 Pa. 452; *Brown v. Tourtelotte*, 24 Colo. 204, 50 Pac. 195; *Edmond N. E. v. State ex rel. Lula E.* 25 Fla. 268, 6 So. 58 (a bastardy case); *Wintrobe v. Renbarger*, 150 Ind. 556, 50 N. E. 570 (holding that prior to the passage of act of March 4, 1897, a plea justifying speaking words imputing the commission of a crime was to be supported by

evidence establishing its truth beyond a reasonable doubt); *Neal v. Smith*, 89 Me. 596, 36 Atl. 1058; *Morley v. Liverpool & L. & G. Ins. Co.* 85 Mich. 210, 48 N. W. 502; *Smith v. Burrus*, 106 Mo. 94, 13 L.R.A. 59, 16 S. W. 881, and cases cited; *Strickler v. Grass*, 32 Neb. 811, 40 N. W. 804 (a bastardy suit); *New York Guaranty & Indemnity Co. v. Gleason*, 78 N. Y. 503, 7 Abb. N. C. 334, 352; *Johnson v. Agricultural Ins. Co.* 25 Hun, 251 (followed in *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 562, 47 Am. Rep. 75); *Lewis v. Shull*, 67 Hun, 543, 27 N. Y. Supp. 484; *Catasauqua Mfg. Co. v. Hopkins*, 141 Pa. 30, 21 Atl. 638; *Nelson v. Pierce*, 18 R. I. 539, 28 Atl. 806; *Sparta v. Lewis*, 91 Tenn. 370, 23 S. W. 182; *Heiligmann v. Rose*, 81 Tex. 222, 13 L.R.A. 272, 16 S. W. 931; *United States Exp. Co. v. Jenkins*, 73 Wis. 471, 41 N. W. 957. See also note to *New York Guaranty & Indemnity Co. v. Gleason*, 7 Abb. N. C. at page 357, where many of the conflicting cases on this question are classified.

To the contrary, see *Germania F. Ins. Co. v. Klewer*, 129 Ill. 599, 22 N. E. 489; *Elder v. Oliver*, 30 Mo. App. 575 (plea of justification in action of slander). And see *Stephen*, Dig. Ev. art. 95, and cases cited in authorities in the note above mentioned.

50. Doubtful rule of law.

Where the case turns upon a doubtful question of law, the judge may let it go to the jury under instructions in accordance with apparent authority, so as to settle the question of fact, and then grant an order for new trial, on appeal from which the question can be reviewed.¹

¹ *Dickinson v. Edwards*, 2 Abb. N. C. 300.

C. INSTRUCTIONS RELATING TO EFFECT OF VERDICT.

51. Interest on actual damages.

In actions of tort, the judge may leave it to the jury whether to allow interest upon the damages or not,¹ but should not instruct them to allow it.²

¹ *Walrath v. Redfield*, 18 N. Y. 457; *Black v. Camden & A. R. & Transp. Co.* 45 Barb. 40; *Mairs v. Manhattan Real Estate Asso.* 89 N. Y. 498; *Wilson v. Troy*, 135 N. Y. 96, 32 N. E. 44, with note upon interest on sum allowed as damages in 18 L.R.A. 449.

² *Black v. Camden & A. R. & Transp. Co.* 45 Barb. 40; *Toledo, P. & W. R. Co. v. Johnston*, 74 Ill. 83; *Eddy v. Lafayette*, 1 C. C. A. 441, 4 U. S. App. 247, 49 Fed. 807; *Moore v. New York Elev. R. Co.* 126 N. Y. 671, 27 N. E. 791; *Reiso v. New York Steam Co.* 35 N. Y. S.

R. 86, 12 N. Y. Supp. 557; Home Ins. Co. v. Pennsylvania R. Co. 11 Hun, 182.

Contra: St. Louis, I. M. & S. R. Co. v. Biggs, 50 Ark. 169, 6 S. W. 724; Varco v. Chicago, M. & St. P. R. Co. 30 Minn. 18, 13 N. W. 921; Galveston. H. & S. A. R. Co. v. Johnson, — Tex. —, 19 S. W. 867; Alabama G. S. R. Co. v. McAlpine, 75 Ala. 113; Gulf, C. & S. F. R. Co. v. Holliday, 65 Tex. 512.

52. Double or treble damages.

Where the law gives double, treble, or other increased damages the verdict should find single damages as such, unless otherwise directed by the statute, and the court will direct judgment thereon at the increased rate.¹

¹ Beckman v. Chalmers, 1 Cow. 584; Newcomb v. Butterfield, 8 Johns. 342; King v. Havens, 25 Wend. 420; N. Y. Code Civ. Proc. § 1184; Warren v. Doolittle, 5 Cow. 678; Lobdell v. New Bedford, 1 Mass. 153; Swift v. Applebone, 23 Mich. 252; Brewster v. Link, 28 Mo. 147.

In an action for trespassing upon the plaintiff's land and cutting his wood, for which the statute allows treble damages, the jury should find generally for the plaintiff and assess the single value of the wood in terms, or the court will infer that they have found the treble value. Livingston v. Platner, 1 Cow. 175.

The assessment of double damages by the jury is held not to be a ground for a new trial in Quimby v. Carter, 20 Me. 218.

53. Informing jury as to effect of verdict,—on costs,—on imprisonment.

The judge may, in his discretion, inform the jury what will be the effect of a verdict, in respect to carrying costs,¹ or to justifying execution against the person;² but it is not error to refuse to do so.³

¹ Waffle v. Dillenback, 38 N. Y. 53, 4 Abb. Pr. N. S. 457, affirming 39 Barb. 123; Nolton v. Moses, 3 Barb. 31; Elliott v. Brown, 2 Wend. 497, 20 Am. Dec. 644.

² Keller v. Strasburger, 90 N. Y. 379, affirming 23 Hun, 625; Catasaqua Mfg. Co. v. Hopkins, 141 Pa. 30, 21 Atl. 638.

A charge that a landlord is criminally responsible for the act of his tenant in obstructing a highway, if he knew of the act and did not dissent, is erroneous in putting before the jury, on the trial of an indictment against the landlord, the probable result of a verdict of guilty. Com. v. Switzer, 134 Pa. 383, 19 Atl. 681.

³ Keller v. Strasburger, 90 N. Y. 379, affirming 23 Hun, 625.

D. FURTHER REQUESTS AND EXCEPTIONS.

54. Further instructions.

It is error for the judge to refuse to listen to requests for further instructions on specific points, merely because he has already instructed the jury;¹ but when the charge already given covers the entire case and submits it properly to the jury, the court may refuse to give further instructions.²

¹ *Metropolitan Street R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49; *Thompson v. Thompson*, 77 Ga. 692, 3 S. E. 261; *Adams v. People*, 179 Ill. 633, 54 N. E. 296; *Crosby v. Ritchey*, 56 Neb. 336, 76 N. W. 895; *Pfeffele v. Second Ave. R. Co.* 34 Hun, 497; *Louisville & N. R. Co. v. Kelly*, 11 C. C. A. 260, 24 U. S. App. 103, 63 Fed. 407; *Texas & P. R. Co. v. Rhodes*, 18 C. C. A. 9, 30 U. S. App. 561, 71 Fed. 145; *Mobile & O. R. Co. v. Wilson*, 22 C. C. A. 101, 46 U. S. App. 214, 76 Fed. 127.

See also Amended or substituted requests, *supra*, § 8.

² *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *Burdiet v. Missouri P. R. Co.* 123 Mo. 221, 26 L.R.A. 384, 27 S. W. 453; *Edwards v. Murray*, 5 Wyo. 153, 38 Pac. 681; *Texas & P. R. Co. v. Elliott*, 18 C. C. A. 139, 30 U. S. App. 606, 71 Fed. 278; *Ward v. Chicago, St. P. M. & O. R. Co.* 85 Wis. 601, 55 N. W. 771; *Bull v. Wagner*, 33 Neb. 246, 49 N. W. 1130; *Wrigley v. Cornelius*, 162 Ill. 92, 44 N. E. 406; *Smith v. Hall*, 69 Conn. 651, 38 Atl. 386; *Atlanta R. Co. v. Jett*, 103 Ga. 569, 29 S. E. 767; *Cosgrove v. Cummings*, 190 Pa. 525, 42 Atl. 881; *Davidson v. Pittsburg, C. C. & St. L. R. Co.* 41 W. Va. 407, 23 S. E. 593; *Watkins v. United States*, 5 Okla. 729, 50 Pac. 88; *Carstens v. Stetson & P. Mill Co.* 14 Wash. 643, 45 Pac. 313; *Chicago, R. I. & P. R. Co. v. Parks*, 59 Kan. 709, 54 Pac. 1052; *Ryan v. Washington & G. R. Co.* 8 App. D. C. 542; *McDonald v. Norfolk & W. R. Co.* 95 Va. 98, 27 S. E. 821; *State v. Fontenot*, 48 La. Ann. 283, 19 So. 113; *Brown v. Southern P. R. Co.* 7 Utah. 288, 26 Pac. 579; *Sage v. Evansville & T. H. R. Co.* 134 Ind. 100, 33 N. E. 771; *Texas & P. R. Co. v. Brick*, 83 Tex. 598, 20 S. W. 511; *Holbrook v. Utica & S. R. Co.* 12 N. Y. 236, 64 Am. Dec. 502; *Los Angeles County v. Reyes*. — Cal. —, 32 Pac. 233; *Hamilton Buggy Co. v. Iowa Buggy Co.* 88 Iowa, 364, 55 N. W. 496; *Norwood v. Somerville*, 159 Mass. 105, 33 N. E. 1108; *Bernard v. Merrill*, 91 Me. 358, 40 Atl. 136; *Alabama G. S. R. Co. v. Burgess*, 116 Ala. 509, 22 So. 913; *Long v. Southern R. Co.* 50 S. C. 49, 27 So. 531; *Finance Co. v. Old Pittsburgh Coal Co.* 65 Minn. 442, 68 N. W. 70; *Rose v. Otis*, 18 Colo. 59, 31 Pac. 493; *Territory v. Pendry*, 9 Mont. 67, 22 Pac. 760; *Bobo v. State*. — Miss. —, 16 So. 755; *Thompson v. Holyoke Street R. Co.* 170 Mass. 365, 49 N. E. 748; *Pinson v. State*, 28 Fla. 735, 9 So. 706; *Smith v. Irwin*, 51 N. J. L. 507, 18 Atl. 852; *Balti-*

more & R. Turnpike R. Co. v. State use of Grimes, 71 Md. 573, 18 Atl. 884.

55. Exception to charge.

a. In general.—An exception to the entire charge or to a series of propositions in it, in gross, does not require attention, if any portion of what is excepted to is sound.¹

¹ Beaver v. Taylor, 93 U. S. 46, 23 L. ed. 797; Jones v. Osgood, 6 N. Y. 233. For full treatment of this subject, see ante, chapter XII. Exceptions.

b. To variance from request.—An exception does not require attention if it does not indicate the precise point of the supposed error, but leaves it to the judge to compare the requests and the charge to ascertain what modifications are desired.¹

¹ Beaver v. Taylor, 93 U. S. 46, 23 L. ed. 797; Ayrault v. Pacific Bank, 47 N. Y. 570, 576, 7 Am. Rep. 489.
See also ante, chapter XII. Exceptions.

c. When to be taken.—An exception to the charge must be taken before the jury have rendered their verdict. It must, at the time when taken, be reduced to writing by the exceptant or entered in the minutes.¹

¹ N. Y. Code Civ. Proc. § 995; Phelps v. Mayer, 15 How. 160, 14 L. ed 643; Broadway Trust Co. v. Fry, 40 Misc. 680, 83 N. Y. Supp. 103; Polykranas v. Krausz, 73 App. Div. 583, 77 N. Y. Supp. 46.

It is a convenient practice to suggest to counsel that the taking of exceptions which do not involve requests for further instructions be postponed until the jury have gone out.

See also ante, chapter XII. Exceptions.

XXIV.—CUSTODY AND DELIBERATIONS OF JURY; MISCONDUCT.

1. Separation of jury.
2. Deliberations of jury.
 - a. In general.
 - b. Documents for the jury.
 - (1) Documents in evidence.
 - (2) Documents used, but not in evidence.
 - (3) Several documents.
 - c. Right of jurors to act on their own knowledge of the facts.
3. Misconduct of jurors or others.

1. Separation of jury.

In civil cases, when the court adjourns during the progress of a trial and before the cause is finally submitted to the jury, it is now the usual course to allow the jurors to separate and return to their homes;¹ and a verdict will not be set aside merely because the jury, after being charged, were permitted to separate before giving their verdict, though it is undoubtedly better that juries should be kept together after the charge.² So the court, in its discretion, may permit the jurors to separate, where they find a verdict during adjournment, and return a sealed verdict on the reassembling of court.³

And it is generally held that the separation of the jury, even without the consent of the court, is a mere irregularity, which will not necessarily require a reversal or setting aside of the verdict, unless it is shown that prejudice has resulted,⁴ though it may subject the jurors to punishment for contempt.⁵

¹ *Wilson v. Abrams*, 1 Hill, 207.

So, a motion made after the jury have been selected, and before the pleadings have been read or any evidence offered, asking to have the jury kept together, and not permitted to separate until they return a verdict, is addressed to the sound discretion of the court. *International & G. N. R. Co. v. McVey*, 46 Tex. Civ. App. 181, 102 S. W. 172.

And it is not erroneous for the court to permit a special jury engaged in a protracted trial of a civil case to separate whenever the court takes a recess, no motion being made against it or cause shown for not doing

so, this being a matter within the discretion of the court. *Stancell v. Kenan*, 33 Ga. 56.

And under a statute authorizing the court to allow jurors to separate after being admonished by the court as to their duty, it is not error for the court to dismiss the jury at night and allow them to go where they please, against the objection of defendant's counsel, the jury being appropriately instructed not to talk about the case. *Noel v. Denman*, 76 Tex. 306, 13 S. W. 318.

² *Vicksburg, S. & P. R. Co. v. Elmore*, 46 La. Ann. 1237, 15 So. 701.

A verdict will not be set aside because, after the cause was submitted to the jury but before they retired to consider of their verdict, a portion of the jurors, by agreement of the parties, were allowed to attend a caucus, and some of them went upon the street, and one went to his office and remained for some time, not being in charge of a sworn officer, where it is not shown that any prejudice resulted from the irregularity complained of. *Iowa Sav. Bank v. Frink*, 1 Neb. (Unof.) 14, 92 N. W. 916.

Separation of the jury is not sufficient cause to set aside the verdict, where the jury, after being charged by the court, requested leave to separate for their supper, which was given, under instructions that they were not to have communication with anyone on the subject of the case, and the counsel for defendant was present and made no objection. *Adkins v. Williams*, 23 Ga. 222.

A separation, after agreement, but before return of the verdict, cannot vitiate the verdict, unless there is ground for suspicion that the jury had been tampered with and the verdict affected. *Welch v. Welch*, 9 Rich. L. 133. In this case it is said that it is a matter for the discretion of the court whether the jury shall separate or not, as well during the progress of the case as after a verdict has been agreed upon.

But to take the jurors on Sunday to a park which is a place of great public resort, especially on Sunday, where they are almost sure to hear something said about the case, is error which will require the verdict to be set aside, unless it affirmatively appears that while in the park they did not hear anything said about the case. *Obear v. Gray*, 68 Ga. 182.

³ *Scott v. Chope*, 33 Neb. 41, 49 N. W. 940; *Crocker v. Hoffman*, 48 Ind. 207; *Rogers v. Sample*, 28 Neb. 141, 44 N. W. 86.

And the fact that consent was given without notice to counsel is of no effect. *Mains v. Cosner*, 62 Ill. 465; *Walker v. Dailey*, 87 Iowa, 375, 54 N. W. 344.

Contra, *Prescott v. Augusta*, 118 Ga. 549, 45 S. E. 431; *Barfield v. Mullino*, 107 Ga. 730, 33 S. E. 647.

⁴ *Smith v. Thompson*, 1 Cow. 221, and note; *Horton v. Horton*, 2 Cow. 589; *Cook v. Walters*, 4 Iowa, 72; *Heiser v. VanDyke*, 27 Iowa, 359; *Evans v. Foss*, 49 N. H. 490; *Abel v. Hitt*, 30 Nev. 93, 93 Pac. 227;

Butts v. Drake, 3 N. C. (2 Hayw.) 102; Luttrell v. Martin, 112 N. C. 593, 17 S. E. 573; Sutliff v. Gilbert, 8 Ohio, 405; Sartor v. McJunkin, 8 Rich. 451; Downer v. Baxter, 30 Vt. 467.

In the last case the court said that while such a separation of the jury, if attended with reasonable suspicion of abuse, will be ground for new trial, yet this inquiry necessarily involves matters of fact, and the question whether the ends of justice require a new trial to be granted in a particular case must rest in the sound discretion of the court which tried the case.

⁵ Horton v. Horton, 2 Cow. 589; Downer v. Baxter, 30 Vt. 467.

2. Deliberations of jury.

a. In general.—It is the duty of the jury to reconcile, if they reasonably can, seeming conflicts in the evidence, without convicting witnesses of deliberate false swearing.¹ And jurors should deliberate patiently and long, if necessary, on issues submitted to them, and should cultivate a spirit of harmony and tolerance, and arrive at a verdict if they can conscientiously do so.² But the law does not prescribe the length of time that a jury shall remain out in consideration of their verdict, and, if they return the verdict without retirement from the box, that alone would not impeach or weaken it. If sustained by the law and the evidence, it would be accorded the same respect as though hours had been consumed in its consideration, though unseemly haste, in connection with other circumstances, might evince passion and prejudice.³

¹ Atlantic Coast Line R. Co. v. Miller, 53 Fla. 246, 44 So. 247.

² Phoenix Ins. Co. v. Moog, 81 Ala. 335, 1 So. 108; Doty v. Smith, 80 Conn. 245, 67 Atl. 885.

³ Gulf, B. & K. C. R. Co. v. Harrison, — Tex. Civ. App. —, 104 S. W. 399.

The jury have a right to request the court that their recollection of the evidence may be refreshed by having the testimony, if taken down, read to them.¹ And the court may, of its own motion, have the stenographic report of the witness's testimony read to the jury.² But the jury have no absolute right, in the absence of statute, to have the stenographer's notes of the testimony taken in the case read to them. Whether their request in this regard should be complied with rests in the

discretion of the court.³ It is desirable, but not essential, that counsel should be present when the stenographic minutes are read to the jury; at least, absence of counsel is not necessarily ground for a new trial.⁴

¹ *Roberts v. Atlanta Consol. Street R. Co.* 104 Ga. 805, 30 S. E. 966.

² *Morman v. State*, 110 Ga. 311, 35 S. E. 152.

³ *State v. Manning*, 75 Vt. 185, 54 Atl. 181; *People v. Shuler*, 136 Mich. 161, 98 N. W. 986; *Strickland v. State*, 115 Ga. 222, 41 S. E. 713.

But see *Padgitt v. Moll*, 159 Mo. 143, 52 L.R.A. 854, 81 Am. St. Rep. 347, 60 S. W. 121, and *Hersey v. Tully*, 8 Colo. App. 110, 44 Pac. 854, holding that it is error for the court to direct the reading of the stenographer's minutes to the jury, against the objection of counsel.

It follows, from the discretionary nature of the privilege, that it is not necessarily error for the court to refuse to allow the stenographer's notes to be read. *Westgate v. Aschenbrenner*, 39 Ill. App. 263; *Byrnes v. New York, L. E. & W. R. Co.* 28 N. Y. Week. Dig. 49, 14 N. Y. S. R. 554.

But it is stated in *Drew v. Andrews*, 8 Hun, 23, that it is error for the court to refuse to bring in the jury, at their request, seconded by the request of counsel for one of the parties, and inform them as to what a witness has sworn to.

⁴ *Alexander v. Gardiner*, 14 R. I. 15; *Slack v. Stephens*, 19 Colo. App. 538, 76 Pac. 741.

But in *Cannon v. Griffith*, 3 Kan. App. 506, 43 Pac. 829, it is held that the court may permit the stenographer's notes to be read to the jury, where they disagree as to what certain witnesses testified to, when the testimony is read in the presence of the party complaining.

And in *Otto v. Young*, 43 Misc. 628, 88 N. Y. Supp. 188, it is held that the stenographer should not be permitted to enter the jury room for the purpose of reading his minutes to the jury, in the absence of, or without the consent of, counsel.

So, in *Fleming v. Shenandoah*, 67 Iowa, 505, 56 Am. Rep. 354, 25 N. W. 752, it is held reversible error for the court, without consulting either of the attorneys, to permit the official reporter to go into the jury room, at the request of the jury, to read from his notes portions of the testimony.

But a party who consents that the reporter be permitted to go before the jury and read to them from his notes cannot afterwards complain that this was done. *Hahn v. Miller*, 60 Iowa, 96, 14 N. W. 119.

For an extended review of the cases on the question of the right of the jury to have reporter's shorthand notes read to them, see note in 21 L.R.A. (N.S.) 931.

b. Documents for the jury. (1) *Documents in evidence.*—In the absence of a statute to the contrary,¹ the judge may in his discretion allow documents (except in most of the states' depositions),² which have been admitted in evidence to be taken by the jury when retiring to deliberate upon their verdict,³ unless objected to because written upon or underscored to call attention to special portions of them.⁴

¹ In *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286, it was held not error for the United States court to refuse to follow a state statute allowing the jury to take out documentary evidence other than depositions.

Statutes which in general provide that all papers received in evidence, except depositions, may be taken by the jury when retiring to deliberate upon their verdict, exist in Alabama (Code 1896, § 3329), California (Code Civ. Proc. § 612), Colorado (Code Civ. Proc. § 169), Delaware (Rev. Code 1893, chap. 106, § 26), Idaho (Rev. Stat. 1887, chap. 4388), Illinois (Starr & C. Rev. Stat. 1896, chap. 110, § 56), Iowa (Rev. Code 1897, § 3717), Minnesota (Gen. Stat. 1894, § 5375), Mississippi (Anno. Code 1892, § 730), Montana (Code Civ. Proc. 1895, § 1083), Nevada (Gen. Stat. 1885, § 3191), New Jersey (Rev. Stat. 1896, p. 2563, § 182), North Dakota (Rev. Codes, § 5436), Oregon (1 Hill's Anno. Laws 1892, p. 301, § 204), South Dakota (Dak. Comp. Laws 1887, § 5052), Utah (Rev. Stat. 1898, § 488), Virginia (Code 1898, § 3388), Washington (Code Civ. Proc. 1987, § 5004), and West Virginia (Code 1891, chap. 131, § 12).

Depositions may be taken out in Alabama and West Virginia, however, and in Iowa a deposition may be taken out if all the evidence is in writing and no part of the deposition has been excluded; but in Virginia, Mississippi, and New Jersey the statute is silent as to depositions.

Accounts and account books are excepted in Colorado.

Copies of such papers or of parts of such public documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession may be taken out in California, Colorado, North Dakota, South Dakota, Idaho, Minnesota, Montana, Oregon, and Washington.

Notes of the testimony taken by the jurors or any of them may be taken out by the jury in California, Colorado, North Dakota, South Dakota, Idaho, Montana, Minnesota, Oregon, and Utah, but none taken by any other person.

Written instructions to the jury may be taken out in Alabama (Code 1896, § 3228), Illinois, Missouri (Rev. Stat. 1889, § 2188), Ohio Bates's Anno. Stat. 1898, §§ 5190-5197), North Carolina (Acts 1885, chap. 137), North Dakota (Rev. Codes 1895, § 5433), South Dakota (Dak. Comp. Laws, 1887, § 5049), Texas and Utah, and this provision is generally held to be mandatory. *Miller v. Hampton*, 37 Ala. 342; *State v. Thompson*, 83 Mo. 257; *Caldwell v. Brown*, 9 Ohio C. C. 691,

6 Ohio C. D. 694. The Alabama statute on this point requires and allows no charges to go to the jury except those marked "given." *Washington v. State*, 106 Ala. 58, 17 So. 546.

In Maine (Rev. Stat. 1883, chap. 82, § 90), it is provided that if either party purposely introduces an improper paper (one which has some connection with the cause, but is not in evidence) among those given to the jury when they retire, the court may set aside the verdict on motion of the adverse party.

In general it seems that these statutes are directory merely, and that it would not be error for the court in its discretion to refuse to allow the jury to take out any papers. See *People v. Cochran*, 61 Cal. 548, where that view is taken of the California statute.

²Depositions are commonly excepted from the general rule (see note 1, *supra*). *Whitehead v. Keyes*, 3 Allen, 495. The reason is that the testimony which they contain if read and reread by the jury would otherwise have an unfair advantage over the oral testimony by speaking to the jury more than once. Where all the evidence is in writing this is no objection. *Thomp. & M. Juries*, § 385 (1, 2), and cases cited. *Shomo v. Zeigler*, 10 Phila. 611; *Hairgrove v. Millington*, 8 Kan. 480.

Papers attached to and made a part of a deposition cannot be detached and sent to the jury over objection. *Chamberlain v. Pybas*, 81 Tex. 511, 17 S. W. 50; *Snow v. Starr*, 75 Tex. 411, 12 S. W. 673; *Oskaloosa College v. Western Union Fuel Co.* 90 Iowa, 380, 54 N. W. 152, 57 N. W. 903. But it is error to refuse to permit the jury to take into the jury room an exhibit admitted as independent evidence, notwithstanding its connection with a deposition. *Sargent v. Lawrence*, 16 Tex. Civ. App. 540, 40 S. W. 1075. And it is not error to permit the jury to take out, for the purpose of definitely fixing their verdict, exhibits which have become detached from a deposition, where the facts contained in them are conclusively established by the evidence. *Texas & P. R. Co. v. Robertson*, — Tex. Civ. App. —, 35 S. W. 505.

In malicious prosecution, the affidavit of the defendant made before the magistrate in instituting the prosecution is not a deposition within the exception. *Seibert v. Price*, 5 Watts & S. 438, 40 Am. Dec. 525. Nor do promissory notes in evidence not so attached to a deposition as not to be removable therefrom constitute a part of the deposition, although it proves certain matters concerning them. *Cockrill v. Hall*, 76 Cal. 192, 18 Pac. 318.

In New York, and it seems in Ohio and Kentucky, it is within the discretion of the court to permit the jury to take out a deposition even where the testimony is partly oral. *Howland v. Willetts*, 9 N. Y. 170; *Stites v. McKibben*, 2 Ohio St. 588; *Newport News & M. Valley Co. v. Mendell*, 17 Ky. L. Rep. 1400, 34 S. W. 1081.

³*Thomp. & M. Juries*, § 383 (1), and cases cited; *Howland v. Willetts*, 9 N. Y. 170; *Raynolds v. Vinier*, 125 App. Div. 18, 109 N. Y. Supp. 293; *Paige v. Chedsey*, 4 Misc. 183, 23 N. Y. Supp. 879; *K. B. Koosa &*

Co. v. Warten, 158 Ala. 496, 48 So. 544; Clark v. Phoenix Ins. Co. 36 Cal. 168; Davis v. State, 91 Ga. 167, 17 S. E. 292; Standard Starch Co. v. McMullen, 100 Ill. App. 83; Collins v. Frost, 54 Ind. 242; Peterson v. Haugen, 34 Iowa, 395; Wood v. Wood, 47 Kan. 617, 28 Pac. 709; Baltimore & O. R. Co. v. McCamey, 12 Ohio C. C. 543, 5 Ohio C. D. 631; Sibley v. Nason, 196 Mass. 125, 12 L.R.A. (N.S.) 1173, 124 Am. St. Rep. 520, 81 N. E. 887, 12 A. & E. Ann. Cas. 938; Alexander v. Jameson, 5 Binn. 238; Gable v. Rauch, 50 S. C. 95, 27 S. E. 555; Burghardt v. VanDeusen, 4 Allen, 374; Hanger v. Imboden, 12 Mo. 85; Tabor v. Judd, 62 N. H. 288; Hickman v. Layne, 47 Neb. 177, 66 N. W. 298; San Antonio & A. P. R. Co. v. Barnett, 12 Tex. Civ. App. 321, 34 S. W. 139; Tubbs v. Dwelling-House Ins. Co. 84 Mich. 646, 48 N. W. 296 (laying down the rule that where exhibits have been fully proved and admitted in evidence and their authenticity is unquestioned and there is no testimony to impeach their contents it is within the discretion of the trial court to allow them to be taken to the jury room over objection). Contra, Nichols v. State, 65 Ind. 512; Lotz v. Briggs, 50 Ind. 346; Toohy v. Sarvis, 78 Ind. 474; Williams v. Thomas, 78 N. C. 47. And see Moore v. McDonald, 68 Md. 321, 12 Atl. 117, in which it is held that a party cannot claim as a matter of legal right that the jury be allowed to take out a paper in evidence, though the court may permit it upon consent of both parties.

And in Kalamazoo Novelty Mfg. Co. v. McAlister, 36 Mich. 327, it is held that documents should be allowed to be taken into the jury room only where the propriety of it is very obvious, and in general not against the objection of either party.

The rule extends to tangible objects. Thus, a model used as evidence may be taken out by the jury. Louisville & N. R. Co. v. Berry, 96 Ky. 604, 29 S. W. 449. And they may take with them a piece of a broken column used without objection at the trial upon the issue of strength (Linch v. Paris Lumber & G. Elevator Co. 80 Tex. 23, 15 S. W. 208), or a model used by witnesses to explain their testimony and admitted only for that purpose (Illinois Silver Min. & Mill. Co. v. Raff, 7 N. M. 336, 34 Pac. 544), or a model so used and not formally introduced in evidence. Blazinski v. Perkins, 77 Wis. 9, 45 N. W. 947.

Papers proper for the jury to have may be sent out after they have retired for deliberation. Kline v. First Nat. Bank, — Pa. —, 15 Atl. 433; Smith v. Holcomb, 99 Mass. 552.

Where the genuineness of a document in evidence is disputed it has been held error to allow it to be taken out by the jury to compare the handwriting of the body of it with that of the signature. Re Foster, 34 Mich. 21; Chance v. Indianapolis & W. Gravel Road Co. 32 Ind. 472. Compare, however, State v. Scott, 45 Mo. 302, contra. Papers admitted in evidence for other purposes may be taken to the jury room, it seems, to test handwriting by comparison. Hardy v. Norton, 66 Barb. 527. But see Howell v. Hartford F. Ins. Co. 6 Biss, 163, Fed. Cas. No. 6,779, where reasons are given why the comparison should be made

only in open court and holding that it is no ground for a new trial to refuse to permit the jury to take out papers for that purpose. In *Means v. Means*, 7 Rich. L. 533, it is held to be a matter within the discretion of the court. A document used for comparison by consent was held not a paper "read in evidence" within the meaning of a statute of Illinois allowing such papers to go to the jury room, in *Cox v. Straisser*, 62 Ill. 383. See 62 L.R.A. 867, for a note on the right of the jury to compare disputed handwritings.

As judicial records put in evidence must be complete, and as documents offered in evidence must generally go in as a whole, they may be taken to the jury room although they contain irrelevant matter, or even contain depositions pertinent to the proceeding wherein taken, but immaterial to the issue, on which the jury are to find. *Shomo v. Zeigler*, 10 Phila. 611. So in *O'Neill v. Calhoun*, 67 Ill. 219, where the record of a former suit was read in evidence by consent, it was held no error to allow it to be taken up by the jury, since it was not a deposition read without consent, nor was it excluded by the Illinois statute. But in *Lotz v. Briggs*, 50 Ind. 346, 348, it was held error to allow a record of a former suit, admitted in evidence, to be taken out by the jury. Thus applying the rule in that state which excludes all documents from the jury room (see above).

Allowing jury to take papers is within the discretion of the court (*K. B. Koosa & Co. v. Warten*, 158 Ala. 496, 48 So. 544; *Blackburn v. Boston & N. Street R. Co.* 201 Mass. 186, 87 N. E. 579), including documents, maps, plats, etc., properly authenticated (*Suiter v. Chicago, R. I. & P. R. Co.* 84 Neb. 256, 121 N. W. 113).

⁴ *Thomp. & M. Juries*, § 383 (5); *Watson v. Walker*, 23 N. H. 472, 497.

(2) *Documents used, but not in evidence.*—The judge may also allow documents forming part of the record or properly used before the jury on the trial—such as the writ or process and the pleadings,¹ and bills of particulars,² and the judge's written instructions³—to be taken out, provided the jury understand that they are not evidence.⁴

Other papers must not be taken out.⁵

¹ *Thomp. & M. Juries*, § 387, and cases cited.

It is not error to allow the jury to take the pleadings with them to the jury room (*Shulse v. McWilliams*, 104 Ind. 512, 3 N. E. 243; *Dorr v. Simerson*, 73 Iowa, 89, 34 N. W. 752; *East Dubuque v. Burhyte*, 173 Ill. 558, 50 N. E. 1077), where the construction of the pleadings and the determination as to what are the issues are not left to the jury. *Myer v. Moon*, 45 Kan. 580, 26 Pac. 40. But a pleading which has been withdrawn should not be sent out although such a course will not require

a reversal where the withdrawn pleading is in substance the same as the one on which the cause was tried. *Hall v. Rupley*, 10 Pa. 231.

And in *Powley v. Swensen*, 146 Cal. 471, 80 Pac. 722, it is held that the practice of allowing the jury to take the pleadings to the jury room is of doubtful propriety, but that where no prejudice results it does not constitute reversible error. And to the same effect is *Bluedorn v. Missouri P. R. Co.* 121 Mo. 258, 24 S. W. 57, 25 S. W. 943.

So, under a statute permitting certain papers, not including pleadings, to be taken to the jury room, the court held, in *Mattson v. Minnesota & N. W. R. Co.* 98 Minn. 296, 108 N. W. 517, that the practice of allowing the jury to take the pleadings with them is of very doubtful propriety, and that, unless some special reason for doing so exists, the terms of the statute should be strictly followed; adding, however, that the matter may safely be left to the discretion of the trial court, subject to review when that discretion is abused and prejudice results.

The South Dakota statute (see § 1, note 1, *supra*) does not contemplate that the jury shall be permitted to take the pleadings with them upon retiring. *Harding v. Norwich Union F. Ins. Soc.* 10 S. D. 64, 71 N. W. 755. And under the Colorado statute the pleadings cannot be taken out by the jury in order that they may determine what matters are admitted and what not (*Spaulding v. Saltiel*, 18 Colo. 86, 31 Pac. 486), and the practice is generally not sanctioned in that state. *Good v. Martin*, 1 Colo. 169, 91 Am. Dec. 706.

That a verdict on a former trial was indorsed upon or attached to the pleadings does not seem to be material (*St. Louis, I. M. & S. R. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571), where it was not read by the jury until after their verdict was agreed upon. *Georgia P. R. Co. v. Dooley*, 86 Ga. 294, 12 L.R.A. 342, 12 S. E. 923. Nor does the fact that a writ was inadvertently permitted to go to the jury without erasing or covering up the indorsement of a memorandum of the amount of the judgment on a former trial require reversal. *Clapp v. Clapp*, 137 Mass. 183. And that the verdict on a former trial accidentally falls into the hands of the jury with the other papers is not ground for exception. *Ohio & M. R. Co. v. Hill*, 7 Ind. App. 255, 34 N. E. 646; *Harriman v. Wilkins*, 20 Me. 93.

² *Rich v. Flanders*, 39 N. H. 304.

³ *Thomp. & M. Juries*, § 388 (citing *Hurley v. State*, 29 Ark. 17, 29; *State v. Tompkins*, 71 Mo. 613; *Wood v. Aldrich*, 25 Wis. 695); *Head v. Langworthy*, 15 Iowa, 235; *Seoville v. Salt Lake City*, 11 Utah, 60, 39 Pac. 481. And see § 1, note 1, *supra*. Contra, *Hewitt v. Flint & P. M. R. Co.* 67 Mich. 61, 34 N. W. 659. Nor is it material that the instruction is a requested one which the judge marked "refused." *Langworthy v. Connelly*, 14 Neb. 340, 15 N. W. 737. But it is error to permit the jury to take out a charge indorsed "refused" where a part of

it contains matter which the jury might properly consider. *Trinity County Lumber Co. v. Denham*, 85 Tex. 56, 19 S. W. 1012.

The practice was disapproved in *Smith v. Lownsdale*, 6 Or. 79, but was not held reversible error, as the law of the case was clearly and correctly stated. So, in Georgia, it has been regarded as an unsafe practice because of the danger of a part, and not the whole, being read by the jury, and it was held error for the judge to permit the jury to take his written charge to the jury room against the objection of counsel. *Gholston v. Gholston*, 31 Ga. 625. But see *Chattahoochee Brick Co. v. Sullivan*, 86 Ga. 50, 12 S. E. 216, in which sending the written charge of the court out with the jury after it had been read to them was held to be at most only an irregularity which was waived by a failure to object at the time.

In Alabama, the statute providing that written instructions shall "become part of the record and may be taken" out by the jury (see § 1, note 1, *supra*) is held to be mandatory and that it is error to refuse to allow the jury to take them to the jury room when requested by counsel. *Miller v. Hampton*, 37 Ala. 342. Under a statute providing that all charges shall be given in writing, if requested, and that all written instructions and charges shall be taken out by the jury, written instructions given at the request of the parties may be so taken out, although the general charge is given orally. *Foy v. Toledo Consol. Street R. Co.* 10 Ohio C. C. 151, 6 Ohio C. D. 396.

Written instructions given to the jury at the trial cannot be sent to the jury after they have retired, without consent of the parties. *Smith v. McMillen*, 19 Ind. 391.

⁴ *Thomp. & M. Juries*, § 386 (2); *O'Hara v. Richardson*, 46 Pa. 385, 389.

⁵ *Thomp. & M. Juries*, § 386 (1), and cases cited; *Nolan v. Vosburg*, 3 Ill. App. 596; *Chase v. Perley*, 148 Mass. 289, 19 N. E. 398. To the same effect are *Carlin v. Chicago*, R. I. & P. R. Co. 31 Iowa, 370 (an erroneous instruction taken out); *Durfee v. Eveland*, 8 Barb. 46 (counsel's minutes of testimony); *O'Brien v. Merchants' F. Ins. Co.* 6 Jones & S. 482 (a prejudicial paper inadvertently left in an account book taken out. Judgment reversed); *Mitchell v. Carter*, 14 Hun, 448 (judge's minutes of testimony); *Stoudenmire v. Harper*, 81 Ala. 242, 1 So. 857 (memorandum improperly used to refresh recollection); *McLeod v. Humeston & S. R. Co.* 71 Iowa, 138, 32 N. W. 246 (evidence taken at coroner's inquest inadvertently given to the jury with the other papers).

An entire document should not be permitted to go to the jury with no safeguard against the examination or consideration of those portions not in evidence. *Sargent v. Lawrence*, 16 Tex. Civ. App. 540, 40 S. W. 1075. An instruction not to examine any portion of the document except what was put in evidence is not sufficient. *Bates v. Preble*, 151 U. S. 149, 38 L. ed. 106, 14 Sup. Ct. Rep. 277; *Kalamazoo Novelty*

Mfg. Co. v. McAlister, 36 Mich. 327. *Contra. Boyer v. Shenandoah*, 16 Pa. Co. Ct. 75.

In an action to recover the balance struck on an account rendered it is error to allow the jury to take out the account itself which was incompetent evidence and contested. *Watson v. Davis*, 52 N. C. (7 Jones, L.) 178. And admitting in the pleadings the execution of a note in suit does not authorize the court to allow the jury to take it to their room unless it has been introduced in evidence. But since the jury may take out the pleadings, the examination of the original instrument instead of the copy contained in the pleadings is not prejudicial to either party. *State Bank v. Brewer*, 100 Iowa, 576, 69 N. W. 1011. And that the jury took out without the administrator's consent the written claim against the estate sued on, if an irregularity, will not require a reversal of the judgment. *Avery v. Moore*, 133 Ill. 74, 24 N. E. 606.

As to computations to aid the jury in estimating the amount due the plaintiff the cases are conflicting. In *Millar v. Cuddy*, 43 Mich. 273, 5 N. W. 316, it is said to be the practice in Michigan to allow the jury to take such a computation made by the plaintiff's attorney to the jury room, provided they understand that it is not evidence. But this case was qualified in *Harroun v. Chicago & W. M. R. Co.* 68 Mich. 208, 35 N. W. 914, in which the rule is laid down that memoranda or statements made by counsel cannot be taken out by the jury over objection except in cases involving the investigation of long accounts. In *Rorer v. Rorer*, 48 N. J. L. 51, 3 Atl. 67, the court, following *Millar v. Cuddy*, 43 Mich. 273, 5 N. W. 316, approved the action of the trial judge in permitting the jury to take out a long itemized account used by counsel in the course of the trial but not offered in evidence, proof as to the items of the account having been given and the court having instructed the jury not to use it as evidence except for the purpose of aiding the memory. It seems to be proper in Pennsylvania to permit statements of claim to go to the jury. *Allen v. Philadelphia*, 1 Pa. Dist. R. 216; *Ege v. Kille*, 84 Pa. 333; *Ott v. Oyer*, 106 Pa. 7. But it is error to permit a statement to be taken out which contains one claim which cannot be recovered in the action and another, the amount of which is entirely a matter of dispute. *Himes v. Kiehl*, 154 Pa. 190, 25 Atl. 632. The practice was disapproved in *Hatfield v. Cheaney*, 76 Ill. 488, where a witness made a computation of the amount due upon a note, and made a memorandum of the result upon the note itself, which was permitted to go to the jury. The practice is also disapproved in *Alexander v. Dunn*, 5 Ind. 122. And in *Burton v. Wilkes*, 66 N. C. 604, it was held error for the judge to hand to the jury an abbreviated estimate of plaintiff's claim for damages, against the wish of the opposite party. See also *Drew v. Andrews*, 8 Hun, 23, where it was held error for the court to direct the jury to take out the pleadings and from them fix the amount due the plaintiff after having already found for the plaintiff without fixing any amount.

Law books should not be taken out by the jury. *Harrison v. Hance*, 37 Mo. 185; *Merrill v. Nary*, 10 Allen, 416 (a well-considered case); *State v. Smith*, 6 R. I. 33; *Newkirk v. State*, 27 Ind. 1; *State v. Kimball*, 50 Me. 409, 418 (where it was held no error to refuse to allow the jury to take out the Revised Statutes). Contra, *Loew v. State*, 60 Wis. 559, 19 N. W. 437. Even where both parties consent. *Burrows v. Unwin*, 3 Car. & P. 310. Nor scientific books, nor maps. *Thomp. & M. Juries*, § 392, citing *State v. Gillick*, 10 Iowa, 98, and *State v. Hartmann*, 46 Wis. 248, 50 N. W. 193. See also *State v. Lantz*, 23 Kan. 728. But it is not error for the jury to use a dictionary to ascertain the meaning of a word employed by them in a special verdict. *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496. And in *United States v. Horn*, 5 Blatchf. 105, Fed. Cas. No. 15,389, the use of the city directories by the jury in their room was held insufficient ground for a new trial.

As the judge's minutes of the testimony are usually imperfect and are likely to have marginal notes, underscorings, and the minutes written upon them, it is obvious that they should never go to the jury, and if the jury obtain them even accidentally it is ground for a new trial. *Neil v. Abel*, 24 Wend. 185; *Mitchell v. Carter*, 14 Hun, 448.

It is also erroneous for the minutes of counsel to go to the jury, and a new trial will be granted unless it affirmatively appears that the losing party could not have been prejudiced thereby. *Durfee v. Ewelland*, 8 Barb. 46.

As to the juror's minutes of the testimony it is provided by statute in some states (see § 1, note 1, *supra*), that they may be taken to the jury room, but in the absence of a statute it has been held in Indiana that, as jurors would be too apt to rely on what might be imperfectly written and thus make the case turn on a part of the facts, it is error to allow such minutes to be taken out. *Cheek v. State*, 35 Ind. 492. Contra, *Cowles v. Hayes*, 71 N. C. 231 (holding that the jury may copy a memorandum of counsel which was itself a copy of an account proved and admitted in evidence, since this is nothing more than a note of the evidence taken down by the jury). So, in *Omaha F. Ins. Co. v. Crighton*, 50 Neb. 314, 69 N. W. 766, it was held no abuse of discretion to permit juries in an action on a policy of fire insurance to make memoranda of the articles testified to have been destroyed by the fire.

(3) *Several documents*.—If there are several documents and counsel do not agree on which shall be sent out, it is proper practice, on sending any one or more out, to send all that have been put in evidence relating to the same subject.

c. Right of jurors to act on their own knowledge of the facts.—The ancient doctrine was that jurors were to render the ver-

dict as well upon facts within their personal knowledge, as upon those derived from the testimony of the witnesses duly sworn and testifying in the case.¹ The present rule, however, is that jurors cannot act upon their personal knowledge of facts in the case, but must base their verdict upon the testimony of the witnesses.² But the jurors must, in some degree, act on their own knowledge of the parties and their witnesses;³ and it is proper for them to apply to the facts proved their general knowledge as intelligent business men,⁴ and take into consideration matters of common knowledge and observation;⁵ and in estimating the weight of the evidence and the credibility of witnesses, the jurors may apply their own general knowledge and experience.⁶

¹ *Sam v. State*, 1 Swan, 61; *Schmidt v. New York Union Mut. F. Ins. Co.* 1 Gray, 529.

² *Clarke v. Robinson*, 5 B. Mon. 55; *Wade v. Ordway*, 1 Baxt. 229; *Mitchum v. State*, 11 Ga. 615; *Heffron v. Gallupe*, 55 Me. 563; *Smith ex dem. Dormer v. Parkhurst, Andrews*, 315; *Stewart v. Burlington & M. River R. Co.* 11 Iowa, 62; *Simpson v. Kent*, 9 Phila. 30; *Gibson v. Carreker*, 91 Ga. 617, 17 S. E. 965; *Schmidt v. New York Union Mut. F. Ins. Co.* 1 Gray, 529; *Wood River Bank v. Dodge*, 36 Neb. 708, 55 N. W. 234; *Kruidenier Bros. v. Shields*, 70 Iowa, 428, 30 N. W. 681; *Winslow v. Morrill*, 68 Me. 362; *Close v. Samm*, 27 Iowa, 503; *Ottawa Gaslight & Coke Co. v. Graham*, 28 Ill. 73, 81 Am. Dec. 263; *Green v. Hill*, 4 Tex. 465; *Bennet v. Hartford, Style*, 233; *M'Kain v. Love*, 2 Hill, L. 506, 27 Am. Dec. 401; *Falls City v. Sperry*, 68 Neb. 420, 94 N. W. 529, 4 A. & E. Ann. Cas. 272; *Hancock v. Chicago, B. & Q. R. Co.* 145 Ill. App. 491; *Bowman v. American Car & Foundry Co.* 226 Mo. 53, 125 S. W. 1120.

³ *M'Kain v. Love*, 2 Hill, L. 506, 27 Am. Dec. 401.

⁴ *Kitzinger v. Sanborn*, 70 Ill. 146.

⁵ *Chicago, M. & St. P. R. Co. v. Moore*, 23 L.R.A. (N.S.) 962, 92 C. C. A. 357, 166 Fed. 663; *Hamilton v. Seaboard Air Line R. Co.* 150 N. C. 193, 63 S. E. 730; *State v. Maine C. R. Co.* 86 Me. 309, 29 Atl. 1086; *Johnson v. Hillstrom*, 37 Minn. 122, 33 N. W. 547; *Swain v. Fourteenth Street R. Co.* 93 Cal. 179, 28 Pac. 829; *Carscallen v. Coeur D'Alene & St. J. Transp. Co.* 15 Idaho, 444, 98 Pac. 622, 16 A. & E. Ann. Cas. 544.

⁶ *Schmidt v. New York Union Mut. F. Ins. Co.* 1 Gray, 529; *State v. Jacob*, 30 S. C. 131, 14 Am. St. Rep. 897, 8 S. E. 698; *Douglass v. Trask*, 77 Me. 35; *Jenney Electric Co. v. Branham*, 145 Ind. 314, 33 L.R.A. 395, 41 N. E. 448. For a full review of the cases on this subject, see note in 31 L.R.A. 489.

3. Misconduct of jurors or others.

Not every irregularity which would subject a juror to censure should overturn the verdict. In order to authorize the setting aside of a verdict on account of misconduct of the jury, it must appear that such misconduct may have had an influence upon the final result, and caused injury to the complaining party.¹ And misconduct of the jury may be waived by remaining silent after receiving knowledge thereof.² It is not misconduct for the jury to send out for refreshments while deliberating on their verdict;³ nor to take notes of the testimony, if this is not attended with delay;⁴ nor is it sufficient to vitiate a verdict that a juror, during the progress of the trial, played cards with an attorney interested in the case.⁵ A casual conversation by a juror with a party or an agent of one of the parties, which has no reference to the case, does not vitiate the verdict;⁶ though conversation with a party or with other persons about the case is ground for setting aside the verdict.⁷ Disclosure of the nature of a sealed verdict, while reprehensible, is not sufficient to vitiate the verdict;⁸ but it is gross misconduct, requiring a reversal, for a jury authorized to return a sealed verdict to seal up a piece of paper which states that they cannot agree, and then to disperse.⁹ An unauthorized view constitutes misconduct;¹⁰ though not every unauthorized view will be sufficient to require setting aside the verdict; injury must have resulted to the party complaining.¹¹

The mere drinking of intoxicating liquors by a juror or jurors during the progress of the trial, not shown to have produced intoxicating effects, is not sufficient to vitiate the verdict;¹² but drinking to excess,¹³ or at the expense of the successful party,¹⁴ is generally held fatal.

The weight of authority holds that any kind of "treating" of the jurors, whether the treat consists of drinks, cigars, or food or lodging, by a party,¹⁵ or by an attorney,¹⁶ or an interested person,¹⁷ is sufficient to vitiate the verdict. But the mere fact that a witness in a case treated the jurors during the progress of the trial is not sufficient to vitiate the verdict.¹⁸

Misconduct of a party who, while the jury was viewing certain premises in charge of the bailiff, intruded upon their presence, and insisted upon talking to the jurymen about the subject of the action, is ground for reversal.¹⁹ And the act of a party in pay-

ing jurors dissatisfied with the regular fees something in addition thereto, which the jurors received with knowledge that they were not legally entitled to it, and that it was a gratuity paid to them by the party, is fatal to the verdict.²⁰ Misconduct of a party to induce a jury to decide in his favor is always dealt with more strictly by the court than similar misconduct of a third party or of a juror without the knowledge of either party.²¹

Misconduct of the officer in charge of the jury may also vitiate the verdict.²²

¹ Richardson v. Jones, 1 Nev. 405; Haight v. Elmira, 42 App. Div. 391, 59 N. Y. Supp. 193; De Hart v. Etnire, 121 Ind. 242, 23 N. E. 77; Vaughn v. Crites, 44 Neb. 812, 62 N. W. 1098.

² Stampofski v. Steffens, 79 Ill. 303; Wood v. Moulton, 146 Cal. 317, 80 Pac. 92.

³ Long v. Davis, 136 Iowa, 734, 114 N. W. 197.

⁴ Lilly v. Griffin, 71 Ga. 535; Tift v. Towns, 63 Ga. 237.

⁵ Feary v. Metropolitan Street R. Co. 162 Mo. 75, 62 S. W. 452.

But see Austin & McCargar v. Langlois, 81 Vt. 223, 69 Atl. 739, holding that the fact that defendant's counsel played cards with several of the jurors during the progress of the trial requires the verdict to be set aside, although it is not shown that the verdict was affected by such misconduct.

⁶ Bonnet v. Glattfeldt, 120 Ill. 166, 11 N. E. 250, affirming 24 Ill. App. 533; Vowell v. Issaquah Coal Co. 31 Wash. 103, 71 Pac. 725.

⁷ Bow v. Parsons, 1 Root, 429; Iron-ton Lumber Co. v. Wagner, — Ky. —, 119 S. W. 197.

⁸ Ingersoll v. Truebody, 40 Cal. 603.

⁹ White v. Martin, 3 Ill. 69.

¹⁰ Winslow v. Morrill, 68 Me. 362; Bowler v. Washington, 62 Me. 302; Pierce v. Brennan, 83 Minn. 422, 86 N. W. 417; Buffalo Structural Steel Co. v. Dickinson, 98 App. Div. 355, 90 N. Y. Supp. 268; Stampofski v. Steffens, 79 Ill. 303; Peppercorn v. Black River Falls, 89 Wis. 38, 46 Am. St. Rep. 818, 61 N. W. 79.

¹¹ Haight v. Elmira, 42 App. Div. 391, 59 N. Y. Supp. 193; Wood v. Moulton, 146 Cal. 317, 80 Pac. 92; Lyons v. Dee, 88 Minn. 490, 93 N. W. 899; Rush v. St. Paul City R. Co. 70 Minn. 5, 72 N. W. 733.

¹² Richardson v. Jones, 1 Nev. 405; Hemmi v. Chicago G. W. R. Co. 102 Iowa, 25, 70 N. W. 746; Ankeny v. Rawhouser, 2 Neb. (Unof.) 32, 95 N. W. 1053; Wilson v. Abrahams, 1 Hill, 207, disapproving Brant v. Fowler, 7 Cow. 562.

¹³ Repath v. Walker, 13 Colo. 109, 21 Pac. 917.

¹⁴ Wilson v. Abrahams, 1 Hill, 207; Scott v. Tubbs, 43 Colo. 221, 19 L.R.A.

(N.S.) 733, 95 Pac. 540. But see to the contrary, *Gould v. Gould*, 3 N. S. 87; *Webster County v. Hutchinson*, 60 Iowa, 721, 9 N. W. 901, 12 N. W. 534; *McCarty v. McCarty*, 4 Rich. L. 594. And the furnishing to jurors of cider belonging to a party, but without his knowledge, is not ground for a new trial where no injury resulted therefrom. *Tripp v. Bristol County*, 2 Allen, 556.

- ¹⁵ *Phillipsburgh Bank v. Fulmer*, 31 N. J. L. 52, 86 Am. Dec. 193; *Bender v. Buehrer*, 8 Ohio C. C. 244, 4 Ohio C. D. 507; *Goodright v. M'Causland*, 1 Yeates, 372, 1 Am. Dec. 306 (*dictum*); *Redmond v. Royal Ins. Co.* 7 Phila. 167; *Keegan v. McCandless*, 7 Phila. 248; *Mynatt v. Hubbs*, 6 Heisk. 320; *Sexton v. Lelievre*, 4 Coldw. 11; *Palm v. Chernowsky*, 28 Tex. Civ. App. 405, 67 S. W. 165; *Harvester Co. v. Hodge*, 6 Pa. Dist. R. 378; *Pickens v. Coal River Boom & Timber Co.* 58 W. Va. 11, 50 S. E. 872, 6 A. & E. Ann. Cas. 285 (*dictum*); *Marshall v. Watson*, 16 Tex. Civ. App. 127, 40 S. W. 352; *Harrison v. Rowan*, 4 Wash. C. C. 32, Fed. Cas. No. 6,142 (*dictum*); *Fairmount Park Case*, 6 Phila. 285; *Wright v. Eastlick*, 125 Cal. 517, 58 Pac. 87; *Pelham v. Page*, 6 Ark. 535 (*dictum*); *Walker v. Walker*, 11 Ga. 203; *Burke v. McDonald*, 3 Idaho, 296, 29 Pac. 98; *Huston v. Vail*, 51 Ind. 299; *Perry v. Bailey*, 12 Kan. 539 (*dictum*); *Studley v. Hall*, 22 Me. 198; *Harrington v. Calhoun Probate Judge*, 153 Mich. 660, 117 N. W. 62; *Vose v. Muller*, 23 Neb. 171, 36 N. W. 583; *Sacramento & M. Min. Co. v. Showers*, 6 Nev. 291; *Drake v. Newton*, 23 N. J. L. 111; *R. v. Burdett*, 12 Mod. 111; *Vollrath v. Crowe*, 9 Wash. 374, 37 Pac. 474 (*dictum*).

And where counsel for one party refused to share the expense of providing meals for the jury, and, no provision for them having been obtained, the other party furnished and paid for the same, such circumstances furnished ground for setting aside the verdict, although it does not appear that it was determined thereby. *Johnson v. Hobart*, 45 Fed. 542.

But see *Drainage Dist. No. 8 v. Knox*, 237 Ill. 148, 86 N. E. 636, holding that treating of jurymen by a party, with cigars and peanuts, is not ground for setting aside the verdict; *Wichita & W. R. Co. v. Fechheimer*, 49 Kan. 643, 31 Pac. 127, holding that, while the furnishing of cigars by a party to the jurors, during the progress of the trial, was improper and reprehensible, it was not ground for new trial, where it did not appear that such misconduct had any influence upon the verdict of the jury. And to the same effect is *Vaughn v. Dotson*, 2 Swan, 348.

- ¹⁶ *Nadeau v. Theriault*, 37 N. B. 498; *Stewart v. Woolman*, 26 Ont. Rep. 714; *People v. Montague*, 71 Mich. 447, 39 N. W. 585; *Stafford v. Oskaloosa*, 57 Iowa, 748, 11 N. W. 668; *Rainy v. State*, 100 Ga. 82, 27 S. E. 709; *Walker v. Hunter*, 17 Ga. 364; *Steenburgh v. McRorie*, 60 Misc. 510, 113 N. Y. Supp. 1118; *Grottkau v. State*, 70 Wis. 462, 36 N. W. 31; *Demund v. Gowen*, 5 N. J. L. 687. But see *Pittsburg, C. & St. L. R. Co. v. Porter*, 32 Ohio St. 328; *McLaughlin v. Hinds*, 151

- Ill. 403, 38 N. E. 136; *Koester v. Ottumwa*, 34 Iowa, 41, in which the court refused to set aside the verdict, where no injurious results to the complaining party were shown.
- 17 *McGill Bros. v. Seaboard Air Line R. Co.* 75 S. C. 177, 55 S. E. 216; *Gulf, C. & S. F. R. Co. v. Matthews*, 28 Tex. Civ. App. 92, 66 S. W. 588, 67 S. W. 788; *Central R. Co. v. Hammond*, 109 Ga. 383, 34 S. E. 594; *Armour v. Boswell*, 6 U. C. Q. B. 352. But see *Todd v. Gray*, 16 S. C. 635; *Larson v. Levy*, — Tex. Civ. App. —, 57 S. W. 52.
- 18 *Thompson v. Com.* 8 Gratt. 657; *State v. Minor*, 106 Iowa, 642, 77 N. W. 330; *Harris v. Harris, Jr.* 3 C. L. 294.
- 19 *Pond v. Barton*, 8 Kan. App. 601, 56 Pac. 139.
- 20 *Re Vanderbilt*, 127 App. Div. 408, 111 N. Y. Supp. 558.
- 21 *Crocker v. Crocker*, 198 Mass. 401, 84 N. E. 476.
- 22 Thus, misconduct of the officer in telling the jury, which was unable to agree, that, in his opinion, the judge would keep them out a week or compel them to agree, constitutes reversible error. *Obear v. Gray*, 68 Ga. 182. So, misconduct of an officer in telling jurors that, unless they could agree speedily, the judge would carry them with him to another county, and that he was making preparations for that purpose, is a gross violation of his duty, and constitutes reversible error. *Gholston v. Gholston*, 31 Ga. 625. And misconduct of the bailiff in remaining with the jurymen while they were deliberating upon their verdict, and talking with different jurymen, answering their questions about the case, and in threatening a juror who declined to vote until after further consideration, was held to be so gross as to vitiate the verdict. *Heston v. Neathammer*, 180 Ill. 150, 54 N. E. 310.
- For an extensive review of the cases on the question of treating jurors as ground for new trial or reversal, see note in 19 L.R.A.(N.S.) 733.

XXV.—FURTHER INSTRUCTIONS; INDUCING AGREEMENT.

1. Power and duty of giving further instructions.
2. Manner of giving.
3. Inducing agreement.

1. Power and duty of giving further instructions.

After the jury have retired to deliberate upon their verdict, the judge of his own motion has power to recall them, and in the presence of the parties or their counsel give them further instructions,¹ or withdraw erroneous instructions; but this is in the discretion of the court, and not the legal right of the party.²

When the jury make a reasonable request for further instructions and either party joins in such request, it may be error to refuse.³ But after the jury have retired, the judge is not bound to comply with a party's request to give additional instructions upon a point not covered by a request of the jury;⁴ nor to comply with a party's request to give the jury further instructions by way of explanation or modification of those already given;⁵ for it is a matter within the discretion of the court.

A fresh discussion by counsel of the law or the evidence, in the presence of the jury, cannot be had unless allowed by the judge in his discretion.⁶

When further instructions are given, they are subject to exceptions for error, the same as those given before the jury retired.⁷

¹ 2 Graham & W. New Trial, 356 (a); Thomp. & M. Juries, § 355, and cases cited. Com. v. Snelling, 15 Pick. 321, 333; Breedlove v. Bundy, 96 Ind. 319; Hartman v. Flaherty, 80 Ind. 472; Re Darrow, — Ind. —, 92 N. E. 369; Jones v. Swearingen, 42 S. C. 58, 19 S. E. 947; Buck v. Buck, 4 Baxt. 392; McClary v. Stull, 44 Neb. 175, 62 N. W. 501; First Nat. Bank v. Hedgecock, 87 Neb. 220, 127 N. W. 171; Wood v. Isom, 68 Ga. 417; Charlton v. Kelly, 84 C. C. A. 295, 156 Fed. 433, 13 A. & E. Ann. Cas. 518.

The trial judge may, upon a report by the jury that they are unable to agree, inquire of them the cause of their disagreement, and restate his views of the law or give additional proper charges in the presence of the parties and counsel. *Salomon v. Reis*, 5 Ohio C. C. 375, 3 Ohio C. D. 184. Compare *Swaggerty v. Caton*, 1 Heisk. 199, where, in a criminal case, the jury reported to the judge in open court that they could not agree, but did not ask for further instructions, and it was held error for the judge to repeat to them certain disjointed portions of the charge already given, since it would lead the jury to suppose that such portions of the charge were the controlling features of the case.

The court may, over objection, give an additional instruction to the jury after their retirement in respect to a material point in the case concerning which no instruction has been given, where equal opportunity is first given to each side to submit instructions on that point. *Joliet v. Looney*, 159 Ill. 471, 42 N. E. 854. And see *Hogg v. State*, 7 Ind. 551 (where it was held no error to give further instructions, even against the wishes of counsel for both sides).

* *Turner v. Foxall*, 2 Cranch, C. C. 324, Fed. Cas. No. 14,255; *Forrest v. Hanson*, 1 Cranch, C. C. 63, Fed. Cas. No. 4,943; *United States v. White*, 5 Cranch, C. C. 116, Fed. Cas. No. 16,677; *Norton v. McNutt*, 55 Ark. 59, 17 S. W. 362; *Lafoon v. Shearin*, 95 N. C. 391. See *Tinkham v. Thomas*, 2 Jones & S. 236, where it was held no error for the judge to refuse to receive or entertain proposed requests to charge the jury after they had just been charged and some of them had left the jury box on their way to the jury room, although all of them were still in the courtroom. It is certainly proper for the court to refuse counsel's request that the jury be recalled for further instructions, where no sufficient reason for his request is shown. *Bowling v. Memphis & C. R. Co.* 15 Lea, 122.

* See *Drew v. Andrews*, 8 Hun, 23, where the jury having retired, and having sent in to request the court to give them information as to what a witness had testified to upon a certain point, and the counsel for the losing party having, in the presence of the opposite counsel, asked the court to bring in the jury and state the evidence to them as requested,—the refusal of this reasonable request was one of the grounds upon which a new trial was granted.

In *Cook v. Green*, 6 N. J. L. 109, the court says: "If a jury, after withdrawing to consider the cause, get embarrassed on a question of law, they may, and in prudence ought to, ask for the opinion of the justice thereon, and it is his duty to declare the law to them." So in *Bank of Kentucky v. M'Williams*, 2 J. J. Marsh. 256, it is said to be the duty of the court to instruct the jury on matters of law, after the jury have retired, should they think proper to request it.

But upon the jury's return and request for instructions on a special point it is proper to direct them to follow the instructions already given

and to refuse a party's motion to read the particular instructions covering that point where the court expressed his willingness to read all the instructions if the jury so desired. *Cockrill v. Hall*, 76 Cal. 192, 18 Pac. 318.

- ⁴ *Kellogg v. French*, 15 Gray, 354; *Harvey v. Graham*, 46 N. H. 175; *Parker v. Georgia P. R. Co.* 83 Ga. 539, 10 S. E. 233.

But where the jury have returned into court for further instructions it is error for the court to refuse to charge the jury at the request of one of the parties upon a point on which the court has not charged and on which it is proper that the jury should receive instructions. *Yeldell v. Shinholster*, 15 Ga. 189.

- ⁵ *Nelson v. Dodge*, 116 Mass. 367.

- ⁶ *Nelson v. Dodge*, 116 Mass. 367; *Wilkinson v. St. Louis Sectional Dock Co.* 102 Mo. 130, 14 S. W. 177. See *Ruffing v. Tilton*, 12 Ind. 259, where it is held no error to permit counsel to discuss to the court what the form of the verdict shall be, in the presence of the jury, they having come for instructions thereupon.

In *Cotten v. Rutledge*, 33 Ala. 110, it is held that, where both parties have waived their right to argue by declining to do so, allowing one party to reread a record to the jury on their coming for instructions does not revive the right of the other to argue the case.

- ⁷ *Nelson v. Dodge*, 116 Mass. 367. Further instructions should not be given in such a way as erroneously to cause the jury to ignore other instruction previously given. *Wiggins v. Snow*, 89 Mich. 476, 50 N. W. 991; *Willmott v. Corrigan Consol. Street R. Co.* — Mo. —, 16 S. W. 500. In *Foster v. Turner*, 31 Kan. 58, 1 Pac. 145, it is said that the court, when giving further explanation or information at the jury's request, is never justified in giving another full, complete, and different charge upon nearly all or even some of the material questions involved in the case.

2. Manner of giving.

Further instructions as to the case, after the jury have retired, should be given only in open court, and when counsel on both sides are present or have had notice and an opportunity of being present. This is matter of legal right. If either party requests that a further instruction be given, or if the jury send in an inquiry, it is proper practice to submit the answer, in writing, to counsel, and if they consent, to send it to the jury; if counsel do not consent, then to call in the jury and answer their inquiry in open court.¹

¹ The authorities are not altogether uniform as to the necessity of the presence of counsel when additional instructions are given. The rule

laid down in the text finds support in *Feibelman v. Manchester F. Assur. Co.* 108 Ala. 180, 19 So. 540, in which it was held reversible error for the court to orally charge the jury upon their return into court in the absence of counsel with no attempt to notify them. To the same effect is *Seagrave v. Hall*, 10 Ohio C. C. 395, 6 Ohio C. D. 497. But if counsel, "sought for honestly at the place of trial, where they ought to be, . . . cannot be found, or, being found, they or either of them refuse to attend, such absence or refusal does not release the justice from his duty to declare the law to the jury." *Cook v. Green*, 6 N. J. L. 109. See also *Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430, where it is held no error for the court to give further instructions to the jury during its regular session in open court in the absence of a party or his counsel after the parties and their counsel have been loudly called at the door. So it is not error for the court to give additional instructions publicly during a regular session of the court and after a prolonged but unavailing search for the absent counsel by the officers of the court under its direction. *Cornish v. Graff*, 36 Hun, 160; *McPherson v. St. Louis, I. M. & S. R. Co.* 97 Mo. 253, 10 S. W. 846.

In *Taylor v. Manley*, 6 Smedes & M. 305, judgment was reversed for error in giving instructions to the jury in absence of the parties and without their consent during a recess of the court, even though the jury had returned and asked for an explanation of a matter of law, for it contravened a Mississippi statute requiring instructions to be given at the request of a party. And in *Bryant v. Simmons*, 74 Ga. 405, a remark by the court at the time of taking a recess that a verdict would be received if rendered before a specified time was held to be such notice that nothing would be done in the case during recess except to receive the verdict as to make it error for the court on its own motion to re-charge the jury during recess in the absence of counsel and parties on one side. In *Campbell v. Beckett*, 8 Ohio St. 210, the court quotes, with apparent approval, the passage given above from *Cook v. Green*, 6 N. J. L. 109, but adds that in the case under consideration the instructions were given without notice to the absent counsel, and "during the hours of recess of the court when it was neither the duty nor custom of parties or their counsel to be in the courtroom." It may be added that the Ohio case was decided under a provision of the Code in that state requiring further instructions to the jury to be given in open court "in the presence of, or after notice to, the parties or their counsel;" and the court was of the opinion that the provision was intended to express, and did in fact correctly express, the common-law rule upon the subject.

By the weight of authority, sending for counsel when the jury return into court for further instructions, unless required by statute, is a matter of favor or courtesy and not of right. *Meier v. Morgan*, 82 Wis. 289, 52 N. W. 174; *Alexander v. Gardiner*, 14 R. I. 15; *Kullberg v. O'Donnell*, 158 Mass. 405, 33 N. E. 528; *Wiggins v. Downer*, 67 How. Pr. 65;

Hudson v. Minneapolis, L. & M. R. Co. 44 Minn. 52, 46 N. W. 314; *Cooper v. Morris*, 48 N. J. L. 607, 7 Atl. 427. In the case last cited the court says: "In contemplation of law the parties and their counsel remain in court until a verdict has been rendered or the jury discharged from rendering one." So, in *Chapman v. Chicago & N. W. R. Co.* 26 Wis. 295, 7 Am. Rep. 81, where further instructions were given to the jury at their request in open court, but in the absence of one of the parties and his counsel, to whom no notice was given, it was held not to be a private communication, and that the failure of the court to give the customary notice was no error, and that the giving of notice to counsel in such a case is a matter of grace or favor on the part of the court, and not of legal obligation; but that it is the legal obligation and "duty of counsel and suitors to be present in court when their causes are moved or any proceedings taken in them; and if they are not, it is at their own risk, and not at the risk of the other party, if the court sees fit not to notify them." It is to be observed that the court speak of the fact that the absent party and his counsel were well aware of the hour in the evening to which the court had adjourned for the express purpose of reviewing the verdict, if any, and discharging the jury; and also that the court expressly approve of the custom of giving notice to absent counsel, and makes the significant remark that "the court may proceed without it (notice) subject to the power of opening the proceedings, where sufficient cause of absence is shown, and it appears that injustice has been done." The court distinguished the cases of *Redman v. Gulnac*, 5 Cal. 148, and *Campbell v. Beckett*, 8 Ohio St. 210 (above), from the one at bar, on the ground that the former was a decision under a statute of California positively prohibiting further instructions in the absence of counsel, and that the latter was a case where, unlike the one at bar, the further instructions were given during a recess of the court, and in the absence of both parties and their counsel. But under a statute providing that while the court may adjourn from time to time during the absence of the jury, it is "to be deemed open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged," it is not error to give further instructions during adjournment, in the absence of counsel who made no arrangement to be called. *Reilly v. Bader*, 46 Minn. 212, 48 N. W. 909.

The jury must be brought into open court to receive any further instructions in the case. *Chicago & A. R. Co. v. Robbins*, 159 Ill. 598, 43 N. E. 332, reversing 54 Ill. App. 611; *O'Connor v. Guthrie*, 11 Iowa, 80; *Greely v. Weaver*, — Me. —, 2 New Eng. Rep. 459; *Hopkins v. Bishop*, 91 Mich. 328, 51 N. W. 902; *Chouteau v. Jupiter Iron Works*, 94 Mo. 388, 7 S. W. 467; *Glenn v. Hunt*, 120 Mo. 330, 35 S. W. 181; *Watertown Bank & Loan Co. v. Mix*, 51 N. Y. 558; *Com. v. Ware*, 137 Pa. 465, 20 Atl. 806; *Lester v. Hays*, 14 Tex. Civ. App. 643, 38 S. W. 52.

As an exception to the rule that further instructions must be given in open court in the presence of counsel, it seems that the judge may go

alone to the jurors' room to give them further instructions at their request (*Taylor v. Betsford*, 13 Johns. 487; *Moody v. Pomeroy*, 4 Denio, 115); or may send them written instructions at their request (*Plunkett v. Appleton*, 9 Jones & S. 159), provided that in each case the parties give their express consent, which it seems must be affirmatively proved and cannot be inferred from counsel's failure to object when knowing that the judge is going to do either one of those things (same cases; *Danes v. Pearson*, 6 Ind. App. 465, 33 N. E. 976). In *Whitney v. Crim*, 1 Hill, 61, the complaining party had told the judge that the jury wished to see him, and it was held to be equivalent to an express consent that the justice should go into the jury room. So, too, it seems no ground for a new trial that the jury are given further instructions in their own room provided the parties or their counsel are present, or have notice and an opportunity of being present. *Rogers v. Moulthrop*, 13 Wend. 274; *Cook v. Green*, 6 N. J. L. 109.

The cases in New Hampshire also form an exception to the rule, and it is settled in that state that upon the request of the jury after they have retired, and after the court has adjourned, the judge may send them further instructions in writing as to a matter of law, even though counsel are not present (*School Dist. No. 1 v. Bragdon*, 23 N. H. 507, 517, which states that the broad rule of *Sargent v. Roberts*, 1 Pick. 542, 11 Am. Dec. 185, is not recognized in New Hampshire), but cannot send them further instructions as to a matter of fact (*Sharpley v. White*, 6 N. H. 172, 176), since any error in stating the evidence to the jury cannot be corrected, as a matter of law may, upon exceptions to the written instructions, which should be returned by the jury with the other papers in the case when they come into court.

So, too, in South Carolina, what communication may be made by the court to the jury after they have retired is left entirely to the discretion of the judge (*Goldsmith v. Solomons*, 2 Strobh. L. 296, 300, which disapproves of *Sargent v. Roberts*, 1 Pick. 342, 11 Am. Dec. 185).

In Virginia, also, it would seem to be left to the discretion of the judge as to what communications he shall make to the jury during their deliberations. See *Philips v. Com.* 19 Gratt. 485 (where it was held not a ground for new trial that the judge visited the jury in their room and inquired after their health and took personal custody of a juror separated from his fellows for a short time; and the court was also of the opinion that it is "in the competency of a judge out of court, as necessity or occasion may require, to direct, superintend, and charge jurymen and other officers of the court in matters pertaining to their official conduct and behavior out of court"). See also *Buntin v. Danville*, 93 Va. 200, 24 S. E. 830, in which the irregularity of returning a correct answer to a question from the jury, without informing counsel until after verdict, was held not sufficient to vitiate a verdict otherwise correct.

In the United States circuit court, sitting in Rhode Island, the practice is that if the jury send a written request for instruction from the

court when not in session, the court, after summoning the counsel and making known to them the inquiry of the jury, will then answer it in writing if the court think it safe and proper to do so. *Norris v. Cook*, 1 Curt. C. C. 464, Fed. Cas. No. 10,305.

See 17 L.R.A.(N.S.) 609 (*State v. Murphy*, 17 N. D. 48, 115 N. W. 84, 16 A. & E. Ann. Cas. 1133), for a note on the effect of communications by the judge with the jury not in open court. The note includes cases in which there was some actual communication, oral or written, between the judge and jury, not in open court, and cases in which the judge entered the jury room, whether he actually communicated with the jury or not; but it does not include cases involving communications in open court in the absence of, or without notice to, parties or counsel. It is laid down as a general rule, based on *Sargent v. Roberts*, 1 Pick. 337, 11 Am. Dec. 185, that "any communication between the judge and jury after they have retired to deliberate upon the verdict, except in open court, is improper." Numerous authorities are cited sustaining the rule under a great variety of circumstances, including cases where the judge went to the jury room, sometimes entering it, sometimes standing in the door, and talked with the jury in response to questions by them or pertaining to matters involved in their deliberations, but without the presence of counsel or the parties. The note also contains a large collection of decisions, too numerous to be cited here, in which various communications between the judge and jury were held to be harmless, including casual or apparently inadvertent visits to the jury room by the judge, questions by the jury which the judge declined to answer out of court because he had no right to do so, and several other incidental situations which were not deemed sufficiently prejudicial to justify a reversal. The note also considers cases involving questions as to when parties or counsel may be deemed to have consented to the communication between the judge and the jury.

3. Inducing agreement.

The judge must not coerce the jury into agreement upon a verdict by intimidation or threats to subject them to any unreasonable inconvenience,¹ yet he may and ought to urge upon the jury all proper motives to induce them to agree upon a verdict, such as the propriety of a spirit of legal concession in their deliberations, and the importance to the parties and the public of a verdict and the saving of time and expense of a new trial.²

¹*Spearman v. Wilson*, 44 Ga. 473; *Pierce v. Pierce*, 38 Mich. 412; *Green v. Telfair*, 11 How. Pr. 260; *Slater v. Mead*, 53 How. Pr. 57; *Miller v. Miller*, 187 Pa. 572, 41 Atl. 277; *Terre Haute & I. R. Co. v. Jackson*, 81 Ind. 19; *Obear v. Gray*, 68 Ga. 182; *Phoenix Ins. Co. v. Moog*, 81

Ala. 335, 1 So. 108; *Taylor v. Jones*, 2 Head, 565. Compare *Erwin v. Hamilton*, 50 How. Pr. 32.

Where a jury return and report that they stand eleven to one for plaintiff, the remark of the trial judge in sending them back, that if "any juror has stubbornly refused to do his duty or wilfully tried to bring about a disagreement so as to interfere with the administration of justice, I will send him to jail for contempt of court," warrants a reversal of a judgment upon a verdict for plaintiff. *Lively v. Sexton*, 35 Ill. App. 417.

There should be no intimation of extended confinement if they do not agree. *Phœnix Ins. Co. v. Moog*, 81 Ala. 335, 1 So. 108. Thus, a threat to keep the jury together a period of four days, unless they sooner agree upon a verdict, constitutes coercion inconsistent with their proper independence. *Terre Haute & I. R. Co. v. Jackson*, 81 Ind. 19. And it is error to compel the jury to bring in a verdict or remain in confinement for four days without the aid, protection, or even presence of the court. *Ingersoll v. Lansing*, 51 Hun, 101; *McCormick v. Cox*, 8 Colo. App. 17, 44 Pac. 768 (two days). So, it is error to state that the jury will be kept together during the entire term if it lasts three weeks, unless they sooner agree upon a verdict, where a verdict was returned the next day. *Chesapeake, O. & S. W. R. Co. v. Barlow*, 86 Tenn. 537, 8 S. W. 147. And in *North Dallas Circuit R. Co. v. McCue* — Tex. Civ. App. —, 35 S. W. 1080, it was held that the court has no authority to tell the jury that he will keep them together until the term has expired, if necessary.

But see *Buntin v. Danville*, 93 Va. 200, 24 S. E. 830, in which it was held to be no abuse of discretion for the court to state that he would keep the jurors together until the end of the term, unless they returned a verdict, and that the case was so plain that it ought to be decided in five minutes, though it was said to be the better practice not to state how long the jurors will be kept together unless they sooner agree. So it is not error for the court to state that there are two more weeks of the term and that he will give the jury plenty of time to consider, accompanied by a direction to the sheriff to provide comfortable accommodations for them. *Osborne v. Wilkes*, 108 N. C. 651, 13 S. E. 285. Nor can the jury be deemed to have been coerced into rendering a verdict by the statement of the judge immediately before they retired that if they did not agree upon a verdict until after adjournment they should seal their verdict and separate and not return until the following Tuesday, the next day being Saturday on which the court did not sit for jury trials, and the following Monday being a holiday. *Darlington v. Allegheny City*, 189 Pa. 202, 42 Atl. 112. The court says that the judge had a right to assume that the jury knew that if they did not agree they could communicate with him or other judges of equal power. But in *McCoombs v. Foster*, 64 Mo. App. 613, it was held that a statement by the court to the jury on Saturday evening, that he must leave on a specified train, and that if they cannot agree

before train time he will leave some one to receive their verdict, and that they can stay until morning if they do not sooner agree, was reversible error, where the jury returned a verdict in a few minutes after being informed by the sheriff at the court's direction that it was time for him to go and that he wished them to report the prospect of a verdict.

It is no longer permissible to starve a jury into returning a verdict. Thus it is error to inform a jury which has been out all night without supper or breakfast that meals will be allowed them only at their own expense, where an agreement was reported within ten minutes thereafter. *Physioc v. Shea*, 75 Ga. 466. And instructing a jury shortly before midnight on Saturday that they will have to cease deliberation during Sunday and will be kept together and given their meals and a place to sleep at their own expense is sufficient to require the setting aside of a verdict which was rendered by the jury a few minutes later. *Henderson v. Reynolds*, 84 Ga. 159, 7 L.R.A. 327, 10 S. E. 734. And a verdict agreed upon within several hours after an order of the court that the jury be locked up until they should agree, without allowing them to have dinner, was set aside in *Hancock v. Elam*, 3 Baxt. 33.

Upon the question of the coercion of a disagreeing jury generally, see note to *Darling v. New York*, P. & B. R. Co. 16 L.R.A. 643.

²*Green v. Telfair*, 11 How. Pr. 260; *Allen v. Woodson*, 50 Ga. 53; *Pierce v. Relhuss*, 35 Mich. 53; *Kelly v. Emery*, 75 Mich. 147, 42 N. W. 795. But instructing them that they must compromise on the amount, held error. *Edens v. Hannibal & St. J. R. Co.* 72 Mo. 212. See also *North Dallas Circuit R. Co. v. McCue*, — Tex. Civ. App. —, 35 S. W. 1080, in which it was held that the court has no authority to tell the jury of the trouble and expense of trials.

The court may properly advise the jury that it is their duty to try to agree. *Phoenix Ins. Co. v. Moog*, 81 Ala. 335, 1 So. 108; *Wheeler v. Thomas*, 67 Conn. 577, 35 Atl. 499. And in sending back a jury for further deliberation may state that the court does not think it will trouble them to agree by following the rule that in civil cases the jury may upon conflicting evidence find a verdict in accordance with the preponderance of the testimony. *Austin v. Appling*, 88 Ga. 54, 13 S. E. 955. And it is proper to state that while no juror is required to surrender his conscientious convictions for the sake of reaching a verdict, the fact that his judgment is opposed to that of the majority of his fellows should induce him to doubt the correctness of his own views and to weigh carefully the opinions of his associates and the arguments and reasons on which they are founded. *Ahearn v. Mann*, 60 N. H. 472; *Gibson v. Minneapolis*, St. P. & S. S. M. R. Co. 55 Minn. 177, 56 N. W. 686. This on the principle that all men usually know more than one man and that he ought to give due deference to the will of the majority. *Cowan v. Umbagog Pulp Co.* 91 Me. 26, 39 Atl. 340. So, it is proper to instruct the jury that no juror should refuse

to agree from mere pride of opinion, though he should not surrender any conscientious views. *Warlick v. Plonk*, 103 N. C. 81, 9 S. E. 190. But a statement of the trial judge upon calling the jury into court, and being informed that eleven of the jurors could agree on a verdict, that he trusted that every juror was acting rationally and that no one was acting from a dogmatic spirit merely for the purpose of asserting his opinion, constitutes reversible error. *McPeak v. Missouri P. R. Co.* 128 Mo. 617, 30 S. W. 170.

Any language of the court is improper which may reasonably be construed to mean that a juror may yield individual convictions of right and agree with his fellows for the sake of reaching a verdict, whether or not his judgment is convinced and his conscience satisfied. *Randolph v. Lampkin*, 90 Ky. 551, 10 L.R.A. 87, 14 S. W. 538; *Goodsell v. Seeley*, 46 Mich. 623, 10 N. W. 44; *Sargent v. Lawrence*, 16 Tex. Civ. App. 540, 40 S. W. 1075; *Mahoney v. San Francisco & S. M. R. Co.* 110 Cal. 471, 42 Pac. 968. Thus, it is error for the court to state to the jury, after their failure to agree, that if they cannot obtain exactly what they want "get the next best thing to it." *Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. 425. And it is error to instruct the jury that the law expects and will tolerate reasonable compromise and concessions in order to arrive at a verdict. *Richardson v. Coleman*, 131 Ind. 210, 29 N. E. 909. And an assignment of error that the remarks of the court coerced the jury into rendering a verdict not in accordance with their belief will be sustained, where they were told that the rendition of the verdict was a matter of judgment, and not of conscience. *Miller v. Miller*, 187 Pa. 572, 41 Atl. 277. And to state that "no juror ought to remain entirely firm in his own conviction one way or the other until he has made up his own mind beyond all question that he is necessarily right and the others are necessarily wrong" is to announce an incorrect statement of law which will require reversal. *Cranston v. New York C. & H. R. R. Co.* 103 N. Y. 614, 9 N. E. 500.

In order that a verdict may result from a further deliberation of the jury after proper admonitions as to their duty to try to agree, it is well settled that it is entirely within the sound discretion of the judge as to how long to keep them together, and it is no error or irregularity for him to refuse to discharge them until he is satisfied that there is no reasonable prospect of an agreement. *White v. Calder*, 35 N. Y. 183, 33 How. Pr. 392; *Erwin v. Hamilton*, 50 How. Pr. 32; *Coit v. Waples*, 1 Minn. 134, Gil. 110; *German Sav. Bank v. Citizen's Nat. Bank*, 101 Iowa, 530, 70 N. W. 769; *Chesapeake & O. R. Co. v. Cowherd*, 96 Ky. 113, 27 S. W. 990. See *People v. Green*, 13 Wend. 55, where the jury were discharged after they had deliberated only thirty minutes, and, although a criminal case, the rule seems to apply with even greater force in civil cases.

When satisfied there is no reasonable prospect of an agreement it is his duty to discharge them. *People v. Green*, 13 Wend. 55; *Green v. Telfair*, 11 How. Pr. 260. But the judge cannot make an agreement of

the jury a condition of their discharge. *Slater v. Mead*, 53 How. Pr. 57.

And it seems he should not intimate to them how long he intends to keep them together. *Green v. Telfair*, 11 How. Pr. 260; *Reg. v. Charlesworth*, 1 Best & S. 523, where Crompton, J., says: "It is a dangerous thing to say that the jury should be discharged in a certain time, or in a few hours. I think that they ought to be kept, not, as the chief justice says, to coerce them, but for such a time as they should not be able to say, 'We need not agree in a verdict; we will wait for such a time and then we shall be discharged.'" Compare *Erwin v. Hamilton*, 50 How. Pr. 35. In some states the matter is regulated by statute; as in New York, where, following the common-law rule, the Code of Civil Procedure, § 1181, provides that the jury may be discharged, in case of disagreement, after being kept together for such a time as is deemed reasonable by the court. N. Y. Code Civ. Proc. §§ 1181, 3347.

XXVI.—GENERAL VERDICT AND ITS INCIDENTS.

1. Form of general verdict.
2. Verdict may be oral or written.
3. Signing the verdict.
4. Surplusage.
5. Conforming verdict to evidence.
6. Obedience to instructions.
7. Responsiveness to issues.
8. Certainty as to prevailing party.
9. Certainty as to finding or recovery.
10. Stating amount of recovery.
 - a. In general.
 - b. Computing interest.
11. Allowing more than demanded.
12. Allowing excessive damages.
13. Allowing inadequate damages.
14. Improper allowance of interest.
15. Reception of verdict.
 - a. When, where, and by whom received.
 - b. Presence of parties.
 - c. Polling the jury.
 - (1) In general.
 - (2) When request to poll should be made.
 - (3) Mode of polling.
 - (4) Right and consequence of dissent.
16. Chance verdict.
17. Compromise or quotient verdict.
18. Number and unanimity of jurors.
19. Amendment of verdict.
 - a. Power of jury to correct verdict.
 - b. Power of court to require jury to correct.
 - c. Power of court to correct.
 - d. Argument on question of correcting.
 - e. Exception to correction.
 - f. Amendment after discharge of jury.
20. Sealed verdict.

1. Form of general verdict.

In the absence of an express statute,¹ or rule of court,² pre-

scribing the form of a general verdict to be returned by the jury, the form of the verdict is governed by no hard and fast rule; and so long as it clearly manifests the intention and finding of the jury upon the issue submitted to them, it will not be overthrown because of defects of form merely.³

¹ Statutes sometimes prescribe the form of the verdict. Thus, an article of the Louisiana Code of Practice (art. 522) declares that "the form of a general verdict consists in the foreman indorsing on the back of the petition these words, 'verdict for the plaintiff for so much, with interest,' if it has been prayed for; or 'verdict for the defendant,' according as the verdict is for plaintiff or defendant." This article is, however, held to be directory merely and a substantial compliance therewith is sufficient. *Wichtrecht v. Fasnacht*, 17 La. Ann. 166 (sustaining a verdict thus,—“we agree to give to”).

The Louisiana statute was held, however, to have no application to a verdict rendered in a Federal court sitting in that state, in *Parks v. Turner*, 12 How. 39, 13 L. ed. 883; the sufficiency of the verdict in its form, as well as the question of its force and effect, depending upon the rules of the common law and the statutes of the United States. This case, it will be seen, was decided prior to the act of Congress of June, 1872, conforming the practice, pleadings, and form and mode of proceeding in the Federal courts as nearly as may be to that of the state courts in which they are sitting; and the question as to whether the form of a verdict to be returned by a jury in a Federal court is to be governed by a local statute or rule of court, if there be such, does not seem directly to have been passed upon.

² Thus rule 33 of the Massachusetts superior court of 1874 prescribed that "the general form of verdict shall be as follows: If for plaintiff, 'The jury find for the plaintiff, and assess damages in the sum of —;' if for the defendant, 'The jury find for defendant,'— unless the court shall in particular cases otherwise order." And a paper signed by the foreman of the jury, although it did not mention the name of the case in which it was rendered, finding "for plaintiff in the sum" specified, and which showed that it had been rendered in open court as the verdict in that case, and had been filed in the case as such verdict, was held to be an effective verdict for plaintiff within the rule of court mentioned, inasmuch as the record of the court supplied any omission as to the title of the cause, in *Miller v. Morgan*, 143 Mass. 25, 8 N. E. 644.

And the 42d common law rule of that court, in effect July 1, 1900, is in the same language as rule 33, quoted above.

³ *Lincoln v. Cambria Iron Co.* 103 U. S. 412, 26 L. ed. 518.

The rule is that a verdict is not bad for informality if the court can

understand it. It is to have a reasonable intendment, and is to receive a reasonable construction, and must not be avoided except from necessity. *Steele v. Empson*, 142 Ind. 397, 41 N. E. 822. And immaterial defects or unimportant inaccuracies will not prevail to overthrow the verdict. *Case v. Hall*, 2 Ind. Terr. 8, 46 S. W. 180, citing *Elliott*, App. Proc. p. 292, § 342; *Hartford F. Ins. Co. v. Vanduzor*, 49 Ill. 489; *Floege v. Wiedner*, 77 Tex. 311, 14 S. W. 132; *Harran v. Klaus*, 79 Wis. 383, 48 N. W. 479.

Nor will mere clerical inaccuracies be permitted to destroy a verdict otherwise unobjectionable; such as, "We, the jurors" instead of "We, the jury," or misspelling the word "foreman." *Ryors v. Prior*, 31 Mo. App. 555. Or a slight error in spelling the plaintiff's name in the body of the verdict, his name being correctly spelled in the other places where found. *Missouri, K. & T. R. Co. v. Turley*, 1 Ind. Terr. 275, 37 S. W. 52. To similar effect see *Edmondson v. Beals*, 27 Kan. 656.

The mere fact that the verdict is entitled in the name of the plaintiff and one of the defendants is immaterial. Indeed, it need not be entitled at all. *McGarritty v. Byington*, 12 Cal. 426.

And a verdict the caption to which named the defendant, a railroad corporation, by its initials merely, but otherwise sufficiently identified the cause, and in which the findings of the issue submitted could be ascertained and clearly understood, was upheld in *Kelsey v. Chicago & N. W. R. Co.* 1 S. D. 80, 45 N. W. 204. And in *Missouri P. R. Co. v. Kingsbury*, — Tex. Civ. App. —, 25 S. W. 322, a verdict against a corporation described by abbreviations of the several words constituting its name was held to authorize the entry of a judgment against the corporation by its proper name, the verdict indicating with sufficient clearness the party against which it was rendered.

So, also, that the jury say they "believe" instead of "find" is a mere formal defect, not invalidating the verdict, see *Patton v. Gregory*, 21 Tex. 513. "What they find or what they believe is from the evidence, and in either form of expression amounts to the same thing."

Nor is the validity of the verdict affected by the use of the dollar sign (\$) instead of the word dollars, in assessing damages. *Mayson v. Sheppard*, 12 Rich. (L.) 254.

Nor will the omission of the word "dollars" following the amount of the recovery awarded affect the validity of the verdict. *Hopkins v. Orr*, 124 U. S. 510, 31 L. ed. 523, 8 Sup. Ct. Rep. 590. So held also of the omission of the dollar sign preceding the amount of the recovery set out in figures. *Provo Mfg. Co. v. Severance*, 51 Mo. App. 260. See also *Hall v. King*, 29 Ind. 205 (sustaining a verdict assessing the amount of the recovery at a sum specified in words, but omitting the word "dollars," but in which the amount was also set out in figures to which was prefixed the dollar sign (\$)). In Illinois a

verdict in which the word "dollars" is omitted is defective in substance (Kankakee Stone & Lime Co. v. Cogan, 74 Ill. App. 78), unless it appears that the clerk in reading the verdict supplies the omitted word, and the jury through the foreman, in response to the question propounded by the clerk, declare that the verdict as read by the clerk is their verdict. Griffin v. Larned, 111 Ill. 432; Mexican Amole Soap Co. v. Clarke, 72 Ill. App. 655.

Nor does the omission of both the word "dollars" and the dollar sign, where the suit is for money and the charge does not authorize the recovery of anything else. Gulf, C. & S. F. R. Co. v. Fink, 4 Tex. Civ. App. 269, 23 S. W. 330.

As to the power of the judge to authorize the jury to bring in a sealed verdict, see *infra*, § 21.

And as to receiving a sealed verdict, see *post*, chapter XXVII., Receiving Verdict, § 21.

As to the necessity for the presence of the parties when a verdict is received; the time when and the place where it may be received; the correction of the verdict; failure of the jury to answer special interrogatories or to agree generally; the effect of special findings, and other questions raised when the verdict is received, or by applications after verdict, see *post*, chapters XXVI. and XXIX.

2. Verdict may be oral or written.

Nor does the validity of a verdict depend upon its being reduced to writing, but it may be given in by the foreman of the jury either orally or in writing,¹ at least unless it is expressly required by statute that the verdict shall be in writing.²

¹The verdict may be reduced to writing and signed by the jury or it may be delivered *ore tenus* by the foreman. The validity of the verdict does not depend upon its being reduced to writing and signed by the members of the jury, but whatever may be pronounced by the jury in open court, whether in writing or verbally through the foreman, is to be regarded as the verdict of the jury. Griffin v. Larned, 111 Ill. 432. By express statute in Illinois the verdict may be oral. 3 Starr & C. Anno. Stat. p. 3054, ¶ 57.

The jurors acting as a body speak through their foreman. They declare by his voice their verdict and their assent to the same as recorded; and his assent is conclusive upon all unless a disagreement be expressed at the time. Blum v. Pate, 20 Cal. 70.

And it has been held in a Louisiana case that the validity of a verdict is not affected by the fact that it is written in a foreign language, the only one in which the jurors can write, where it is translated into English under direction of the court, read to the jury as translated,

assented to by them as read, signed by their foreman, and recorded by the clerk in their presence. *Walsh v. Barrow*, 3 La. Ann. 265.

- ² Statutes in several states require the verdict to be in writing and signed by the foreman of the jury; and many courts have held the provision relating to the signature of the foreman to be directory merely (see cases cited to note in next succeeding section), without passing directly on the question whether or not the requirement that the verdict must be in writing is mandatory. See, for instance, *McFarland v. Muscatine*, 98 Iowa, 199, 67 N. W. 233; *Berry v. Pusey*, 80 Ky. 166. In *Sage v. Brown*, 34 Ind. 464, however, it was said that there could be neither a general nor a special verdict unless in writing and signed by the foreman as provided by statute, although the question there was as to the signature of the foreman to special findings. And *Miller v. Mabon*, 6 Iowa, 456, seems to hold that under the Iowa statute the verdict must be in writing.

It would seem, however, from *Sage v. Brown*, 34 Ind. 464, that these requirements may be waived by consent of the parties through their counsel. See also *Menne v. Neumeister*, 25 Mo. App. 300.

3. Signing the verdict.

Nor need the verdict be signed,¹ unless required by statute.²

- ¹ At common law a verdict need not be signed. *Gurley v. O'Dwyer*, 61 Mo. App. 348; *Duncan v. Oliphant*, 59 Mo. App. 1. And see *Com. v. Ripperdon*, Litt. Sel. Cas. 195, where the court said: "We are not appraised of any law requiring the verdict of a petit jury, either in a criminal or civil case, to be signed; and it would, no doubt, be good without it; yet we know that it is the usual practice for one of the jury to sign it, and very often as foreman. But most certainly the omission of this circumstance would not render it void." There is now, however, a statute in Kentucky requiring the verdict to be signed by the foreman of the jury. See next succeeding note.

But a paper purporting to contain a verdict of a jury delivered by the foreman to the clerk, but not signed by him or by the jury, and not assented to by the jury as their finding, cannot be entered of record as their verdict, after their discharge from further consideration of the case. *Rose v. Harvey*, 18 R. I. 527, 30 Atl. 459. As to whether the discharge of the jury terminates their power over the verdict, see post, § 19, f.

- ² As stated in a previous note (see note 2, preceding section), statutes in several of the states required the verdict to be signed by the foreman; but this provision is usually held to be directory. *Morrison v. Overton*, 20 Iowa, 465; *McFarland v. Muscatine*, 98 Iowa, 196, 67 N. W. 233; *Berry v. Pusey*, 80 Ky. 166; *Gurley v. O'Dwyer*, 61 Mo. App. 348. "The foreman's signature is a mere element in the formal

authentication of the verdict. The statutes requiring it must . . . be regarded as directory only, and not mandatory or as prescribing an essential to the validity of the proceeding." *Menne v. Neumeister*, 25 Mo. App. 300. And in *Harris v. Barden*, 24 Ga. 72, an action on a judgment, objection was made to the introduction of the judgment in evidence on the ground that it did not contain the names of the jurors by whom the verdict was rendered, but the court, reversing the trial court, held the objection to be without merit, saying: "This objection is based on the mode of proceeding in England. There, where the trials are at bar or at nisi prius, each cause has its distinct jury, and the names of the jurors appear in the judgment roll. Here, our juries are impaneled differently, and all causes at issue, at one term of the court, are submitted to juries, summoned and impaneled according to our statutes for the trial of every cause depending between parties litigating at that term. Their names appear on the minutes at the beginning of the term. In no case tried by a petit jury do the names of the jurors who tried it appear in the verdict . . . but, if in any case, that be not done, and the verdict appears in the record without his [the foreman's] signature, and a judgment is signed thereupon, it must be presumed that the verdict was satisfactory to the court, and deemed by it to be sufficient, in form and substance, to warrant the judgment."

And interrogatories and answers are not to be disregarded on the ground that they are not signed by the foreman of the jury, merely because the word "foreman" is not added to the name, where his name is properly signed as foreman to the general verdict. *Norwich Union F. Ins. Soc. v. Girton*, 124 Ind. 217, 24 N. E. 984.

But the failure of the foreman of a jury to sign the verdict if material is waived by permitting the verdict to be received and judgment rendered thereon without objection. *Northern P. R. Co. v. Urlin*, 158 U. S. 271, 39 L. ed. 977, 15 Sup. Ct. Rep. 840; *Duncan v. Oliphant*, 59 Mo. App. 1 (holding proper method of reaching objection to be by motion in arrest). The verdict should be signed by the foreman, but the signature may be waived by the defeated party. *McCaskey Register Co. v. Keena*, 81 Conn. 656, 71 Atl. 898.

So held, also, of a failure of the foreman to sign answers to special interrogatories. *Thompson v. Thompson*, 49 Neb. 157, 68 N. W. 372; *Menne v. Neumeister*, 25 Mo. App. 300.

In Texas, a statute authorizes trials with a jury of less than twelve, but not less than nine, without regard to the consent of the parties, and in such case the verdict must be signed by each of the jurors returning it. But where, by consent and agreement of the parties, as provided by the statute, the trial is had with less than twelve jurors, one of them having been excused during trial, their verdict is sufficient if signed by only one of them as foreman. *Tram Lumber Co. v. Hancock*, 70 Tex. 312, 7 S. W. 724. The rule prescribed for

verdicts requiring the signatures of all the jurors has no application in such case. *Bluefields Banana Co. v. Wollfe*, — *Tex. Civ. App.* —, 22 S. W. 269.

4. Surplusage.

Matter contained in a verdict which is immaterial or not responsive to the issues may be treated as surplusage,¹ and rejected, so as to validate the verdict, if the remaining portion thereof is responsive to the issues and not otherwise objectionable.²

¹ "If the jury give a verdict of the whole issue, and of more, etc., that which is more is surplusage, and shall not stay judgment; for *utile per inutile non vitiatur*, but necessary incidents required by law the jury may find." 2 Co. Litt. 227a.

The maxim is, *Utile per inutile non vitiatur*; and the maxim is constantly applied to uphold verdicts in which the useless matter may be rejected as surplusage. *Martin v. Ohio River R. Co.* 37 W. Va. 349, 16 S. E. 589.

So, in *Windham v. Williams*, 27 Miss. 313, it is said that "if more be found than is necessary, it may be disregarded as surplusage, but it does not vitiate that which is necessary and well found."

² *Lassiter v. Thompson*, 85 Ala. 223, 6 So. 33; *Muir v. Meredith*, 82 Cal. 19, 22 Pac. 1080; *Hudson v. Hawkins*, 79 Ga. 274, 4 S. E. 682; *North & South Street R. Co. v. Crayton*, 86 Ga. 499, 12 S. E. 877; *Newman v. Chicago*, 153 Ill. 469, 38 N. E. 1053; *Van Meter v. Barnett*, 119 Ind. 35, 20 N. E. 426; *Evansville & T. H. R. Co. v. Tohill*, 143 Ind. 49, 41 N. E. 709 (special verdict); *Wilson v. Durant*, 1 Ind. Terr. 532, 42 S. W. 282; *Miller v. Shackelford*, 4 Dana, 264 (special verdict); *Tuley v. Mauzey*, 4 B. Mon. 5; *Pejepscot Proprs. v. Nichols*, 10 Me. 256; *Ashton v. Touhey*, 131 Mass. 26; *Gover v. Turner*, 28 Md. 600; *Rawson v. McElvaine*, 49 Mich. 194, 13 N. W. 513; *Coit v. Waples*, 1 Minn. 134, Gil. 110; *Windham v. Williams*, 27 Miss. 313; *Hancock v. Buckley*, 13 Mo. App. 459; *Tucker v. Cochran*, 47 N. H. 54; *Hawkins v. House*, 65 N. C. 614; *Richmond v. Tallmadge*, 16 Johns. 307 (special verdict); *Brigg v. Hilton*, 99 N. Y. 517, 52 Am. Rep. 63, 3 N. E. 51; *Foote v. Woodworth*, 66 Vt. 216, 28 Atl. 1034 (*dictum*); *Martin v. Ohio River R. Co.* 37 W. Va. 349, 16 S. E. 589; *Parkinson v. McQuaid*, 54 Wis. 475, 11 N. W. 682.

So held as to conclusions of law contained in a special verdict. *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Erwin v. Clark*, 13 Mich. 10; *Smith v. Ireland*, 4 Utah, 189, 7 Pac. 749.

And of findings in a special verdict which are outside the issues. *Lake Shore & M. S. R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246. See also Responsiveness to issues, *infra*, § 7, note 2.

And a verdict which is a distinct and explicit finding with respect to the cause of action alleged by each party is not invalidated by the fact that it improperly attempts to apportion the costs, and should not be refused, as the improper finding may be rejected as surplusage. *State ex rel. Fuller v. Beall*, 48 Neb. 817, 67 N. W. 868 (where mandamus to compel the judge to receive and enter of record such a verdict was granted).

But a portion of a verdict clearly responsive to an issue cannot be treated as surplusage merely because it is clearly erroneous and based upon improper considerations. *McNairy v. Gathings*, 57 Miss. 215 (holding thus as to an improper assessment of damages).

5. Conforming verdict to evidence.

A verdict or finding of the jury must be based upon and conform to the evidence; and a verdict wholly unsupported by any evidence whatever should not be allowed to stand.¹

But that a verdict is against evidence, or that the evidence is insufficient to support it, is no objection unless there is such a preponderance of proof on the other side as to show that manifest injustice has been done by the verdict, and to warrant the conclusion the jury have mistaken or failed properly to weigh the evidence, or that some mistake has been made in the application of legal principles, or to justify the suspicion of corruption, prejudice, or partiality on the part of the jury.²

¹ *Campbell v. Jones*, 38 Cal. 507; *Bucki v. Seitz*, 39 Fla. 55, 21 So. 576; *Sinclair v. Hewett*, 102 Ga. 90, 29 S. E. 139; *Ford v. Central Iowa R. Co.* 69 Iowa, 627, 21 N. W. 587, 29 N. W. 755; *Wilson v. Hawkeye Ins. Co.* 70 Iowa, 91, 30 N. W. 22; *Casey v. Louisville & N. R. Co.* 84 Ky. 79 (special verdict); *Iron Mountain Bank v. Armstrong*, 92 Mo. 265, 4 S. W. 720; *Gulf, C. & S. F. R. Co. v. Wallen*, 65 Tex. 568. See also *Continental L. Ins. Co. v. Yung*, 113 Ind. 159, 15 N. E. 220, where it is said that whenever it can be said that there is clear and convincing proof of an essential fact, contrary to the finding of the jury and that the verdict is without any evidence fairly tending to sustain it, the verdict ought not to stand; but held that that could not be said of the verdict in that case.

So held as to a general verdict for the gross amount sued for, where the plaintiff joins two causes of action, and shows liability of defendant on the first cause, but not on the second. *Kent v. Abeel*, 12 Colo. 547, 21 Pac. 718.

Or where the only ground upon which the verdict rendered for plaintiff could be based was thoroughly disproved. *Goss & P. Mfg. Co. v. Suelau*, 35 Ill. App. 103.

- Or** where the verdict is based upon evidence consisting of an instrument invalid by reason of noncompliance with a statutory requirement, and therefore incompetent as evidence, although it was received in evidence with the consent of the adverse party, but under a misapprehension by both court and counsel as to its legal effect. *Vanderlinde v. Canfield*, 40 Minn. 541, 42 N. W. 538.
- Or** where an important special finding of the jury, sufficient of itself to sustain a verdict and judgment, is wholly unsupported by the evidence, and such finding is the probable support for other important and material findings, and the verdict is against the great preponderance of the evidence. *Kansas City & P. R. Co. v. Ryan*, 52 Kan. 637, 35 Pac. 292.
- And** a jury should not be allowed to give a plaintiff a verdict against his own admissions and his own case as he makes it out, without any other reliance or evidence. *Karrer v. Detroit, G. H. & M. R. Co.* 76 Mich. 400, 43 N. W. 370.
- Nor** to make a finding inconsistent with an undisputed fact in the case. *Murphey v. Weil*, 89 Wis. 146, 61 N. W. 315.
- Omission** to ask direction of a verdict in his favor by a plaintiff constitutes an admission that there is evidence sufficient to carry the case to a jury, and precludes asking that a new trial be granted on the ground that there is no evidence to support the verdict; but not where the ground asserted is that the verdict is against the weight of the evidence, or is founded on insufficient evidence. *Slater v. Drescher*, 72 Hun, 425, 25 N. Y. Supp. 153; *Haist v. Bell*, 24 App. Div. 252, 48 N. Y. Supp. 405.
- A** verdict based on incompetent evidence alone cannot be sustained, even if the evidence was admitted without objection. *Goehrig v. Stryker*, 174 Fed. 897; *Lennox v. Interurban Street R. Co.* 104 App. Div. 110, 93 N. Y. Supp. 230.
- A** statute providing that not more than two new trials shall be granted to the same party deprives the trial judge of power to set aside a third verdict upon the sole ground that the evidence is insufficient to support it where two former verdicts have been set aside at the instance of the same party for that cause alone, although the judge may think the evidence weak and insufficient; but not where there is no evidence whatever to support it. In such case he may set aside a third or any subsequent verdict upon motion of the same party. *East Tennessee, V. & G. R. Co. v. Mahoney*, 89 Tenn. 311, 15 S. W. 652.
- Cooke v. Navarro**, 29 Fed. 346; *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848; *Foster v. Smith*, 52 Conn. 449; *Bissell v. Dickerson*, 64 Conn. 61, 29 Atl. 226; *Johnson v. Norton*, 64 Conn. 134, 29 Atl. 242; *Empire Coal & Min. Co. v. McIntosh*, 82 Ky. 554; *McNerney v. East Livermore*, 83 Me. 449, 22 Atl. 372; *Baker v. Briggs*,

8 Pick. 122, 19 Am. Dec. 311; *Hopkins v. Ogden City*, 5 Utah, 390, 16 Pac. 596. And for some instances of verdicts which were held objectionable within this rule, see: *Marks v. Boone*, 24 Fla. 177, 4 So. 532; *Mary Lee Coal & R. Co. v. Chambliss*, 97 Ala. 171, 11 So. 897; *Rapp v. Washington & G. R. Co.* 26 Wash. L. Rep. 210; *Chicago, K. & N. R. Co. v. Muncie*, 56 Kan. 210, 42 Pac. 710; *Cherokee & P. Coal & Min. Co. v. Stoop*, 56 Kan. 426, 43 Pac. 766; *Smith v. California Ins. Co.* 85 Me. 348, 27 Atl. 191; *Reid v. Young*, 7 App. Div. 400, 39 N. Y. Supp. 899; *Averill v. Robinson*, 70 Vt. 161, 40 Atl. 49; *McCoy v. Milwaukee Street R. Co.* 82 Wis. 215, 52 N. W. 93.

It is the duty of a court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion, of prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law. *Pleasants v. Fant*, 22 Wall. 116, 22 L. ed. 780.

That the evidence was so conflicting as to warrant the court to submit it to the jury does not necessarily forbid the trial judge from setting the verdict aside as against the weight of evidence. *Suhrada v. Third Ave. R. Co.* 14 App. Div. 361, 43 N. Y. Supp. 904.

The Missouri statute, providing that only one new trial shall be allowed to either party, except for the reasons specified therein, gives the trial court the right to grant one new trial on the ground that the verdict is against the weight of the evidence, although other new trials may have been granted for other reasons. *Dean v. Fire Asso. of Philadelphia*, 65 Mo. App. 209.

That the trial court cannot, in an action triable by a jury as a matter of right, disregard the verdict and findings of the jury and make findings of its own on which to base a judgment, see *Hill v. Ellis*, 5 Kan. App. 532, 48 Pac. 204.

As against the objection of the insufficiency of the evidence to support the verdict, it is sufficient that there is some evidence on every material branch of the issues tending to support the verdict. *Pittsburgh, C. C. & St. L. R. Co. v. Harper*, 11 Ind. App. 481, 37 N. E. 41.

It is no objection that the verdict of the jury against a defendant's counterclaim be wholly contrary to the evidence, unless it is prejudicial to him; and it is not prejudicial if he has no right to plead the counterclaim set up by him as such. *Ward v. Blackwood*, 48 Ark. 396, 3 S. W. 624.

If there is any evidence to support a material finding, it cannot be stricken

from the special verdict or the answer set aside and a directly opposite one substituted for it. If a finding in a special verdict is against a decided preponderance of the evidence, the remedy is by motion for a new trial. *Ohlweiler v. Lohmann*, 82 Wis. 198, 52 N. W. 172.

The jury are not bound to blindly adopt the testimony of an interested witness merely because he is not directly contradicted by the testimony of other witnesses, and his character has not been impeached.¹

¹ He may be contradicted by circumstances, as in *Dowling v. New York*, 4 N. Y. Week. Dig. 452.

But they must find in accordance with the testimony of a witness not a party who is unimpeached and uncontradicted and is corroborated by others, although slight discrepancies appear therein, and it is not clearly shown that he is not interested in the result. *Desh v. Barnes*, 13 N. Y. Week. Dig. 251.

6. Obedience to instructions.

The instructions of the trial court are the law of the case for the jury to obey and follow, and a verdict disobedient thereto is a verdict "contrary to law,"¹ and should be set aside,² even though the instruction disobeyed be itself erroneous in point of law.³

But refusal of the jury to accept and be controlled by an erroneous instruction of the court is not always regarded as necessarily being reversible error.⁴

¹ The phrase "contrary to law," as ordinarily used in statutes providing for the granting of a new trial on the ground that the verdict is contrary to law, means "contrary to the instructions." *Valerius v. Richard*, 57 Minn. 443, 59 N. W. 534.

And a verdict for the plaintiff which, in disregard of a proper charge that upon one of the paragraphs of plaintiff's complaint their finding must be for the defendant, is based in part on that paragraph, is "contrary to law" and insufficient to support a judgment for the plaintiff. *Cincinnati, I. St. L. & C. R. Co. v. Darling*, 130 Ind. 376, 30 N. E. 416.

As to whether the court have power to correct a verdict objectionable in this respect, see post, § 19, c.

² It needs no authority to say that the jury are bound to take the law from the court. This principle applies practically to every class of cases. And, when the law is announced by the court, it is the law of the case, until overruled by a higher authority. It follows, then, that a

verdict in direct conflict with the law of the court is a verdict against the law, and will in all cases be vacated in the first instance, either *sua sponte* by the judge, or on motion of the aggrieved party. Any other doctrine would lead to the utmost confusion. If the jury could question the charge of the judge the result would be that, in every case, the whole case, both law and facts, would go to the jury, under the hope that, whatever might be the charge of the judge at the time, he could be satisfied afterwards that he was in error. This could not be tolerated. It would degrade the judiciary and unhinge the whole system. So far as the jury are concerned, there is no such thing as the charge of the judge being contrary to law, because, whatever may be his charge, it is the law to them. *Dent v. Bryce*, 16 S. C. 1-14. To the same effect, see: *Declez v. Save*, 71 Cal. 552, 12 Pac. 722; *South Florida R. Co. v. Rhodes*, 25 Fla. 40, 3 L.R.A. 733, 5 So. 633; *Bushnell v. Chicago & N. W. R. Co.* 69 Iowa, 620, 29 N. W. 753; *Kimball Bros. Co. v. Citizens' Gas & Electric Co.* 141 Iowa, 632, 118 N. W. 891; *Eggert v. Templeton*, 113 Iowa, 266, 85 N. W. 19; *Smouse v. Iowa State Traveling Men's Asso.* 118 Iowa, 436, 92 N. W. 53; *Union P. R. Co. v. Hutchinson*, 40 Kan. 51, 19 Pac. 312; *Stevens v. Maxwell*, 65 Kan. 835, 70 Pac. 873; *Kansas City, Ft. S. & M. R. Co. v. Furst*, 3 Kan. App. 265, 45 Pac. 128; *Rafferty v. Missouri P. R. Co.* 15 Mo. App. 559; *Champ Spring Co. v. Roth Tool Co.* 103 Mo. App. 103, 77 S. W. 344; *Jacobs v. Oren*, 30 Or. 593, 48 Pac. 431; *Hulett v. Patterson*, 6 Sadler (Pa.) 22, 8 Atl. 917; *Tonles v. Atlantic Coast Line R. Co.* 83 S. C. 501, 65 S. E. 638; *Morrison v. Dickey*, 119 Ga. 698, 46 S. E. 863; *Council v. Teal*, 122 Ga. 61, 49 S. E. 806; *Chicago & E. I. R. Co. v. Stonecipher*, 90 Ill. App. 511; *Strong v. Eggert*, 71 Neb. 813, 99 N. W. 647; *Hyde v. Swanton*, 72 Vt. 242, 47 Atl. 790.

But to obtain a new trial upon that ground it must be made to appear that there was an instruction which was disregarded. It is not enough that a principle of law not embodied in an instruction was disregarded by the jury. *Valerius v. Richard*, 57 Minn. 443, 59 N. W. 534, and cases cited.

And the trial court is not justified in vacating the verdict on its own motion upon the ground merely that it is contrary to law, under a statute limiting its right to set aside the verdict to cases where there has been such plain disregard by the jury of the instructions of the court as to satisfy the court that the verdict was rendered under misapprehension of such instructions or under the influence of passion or prejudice; but the verdict must be so perceptibly in disregard of the instructions as to satisfy the court *upon its announcement and without the aid of argument and necessity of mature reflection*, that it is grossly erroneous or the result of passion or prejudice. *Flugel v. Henschel*, 6 N. D. 205, 69 N. W. 195; *Clement v. Barnes*, 6 S. D. 483, 61 N. W. 1126.

Nor does the statute justify such action on the part of the court, where

the case was not withdrawn from the jury on any proposition and a verdict was not directed by the court upon any matter. *Townley v. Adams*, 118 Cal. 382, 50 Pac. 550.

- ³ *Reynolds v. Keokuk*, 72 Iowa, 371, 34 N. W. 167; *Union P. R. Co. v. Hutchinson*, 40 Kan. 51, 19 Pac. 312; *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714 (a well-considered case); *Boyesen v. Heidelberg*, 56 Neb. 570, 76 N. W. 1089; *Schuyler v. Southern P. Co.* — *Utah*, —, 109 Pac. 458; *Pepperall v. City Park Transit Co.* 15 Wash. 176, 45 Pac. 743, 46 Pac. 407, and cases cited. Especially where the verdict is not only contrary to the instructions, but is also contrary to and inconsistent with special findings made by the jury. *Felton v. Chicago, R. I. & P. R. Co.* 69 Iowa, 577, 29 N. W. 618; *Pepperall v. City Park Transit Co.* 15 Wash. 176, 45 Pac. 743, 46 Pac. 407. And this principle was recognized in *Brown v. Wilson*, 45 S. C. 519, 23 S. E. 630, although the verdict was held to be in fact responsive to the charge.

It matters not if the instruction disobeyed be itself erroneous in point of law; it is, nevertheless, binding upon the jury, who can no more be permitted to look beyond the instructions of the court to ascertain the law than they would be allowed to go outside of the evidence to find the facts of the case. The consequence of such a practice would be to fearfully impair the integrity of trials by jury. The question of law in theory supposed to have been settled by the court before the retirement of the jury, and upon the determination of which exceptions have been reserved, would not have been really determined at all (otherwise at least, than as mere abstract propositions of law), for the jury would have the right, in their retirement, to review the opinion of the court, and disregard his instructions, when they did not accord with their own notions of the law of the case, the law, while thus appearing to have been settled by the court in a particular way, would, in reality, have been determined by the jury in exactly the opposite way, and while the court would read the verdict as the finding of fact, arrived at by applying the law as the court had announced it, the verdict would, in reality, be but a reversal by the jury of the rulings of the court, for the errors in point of law, which the jury were of opinion that the court had committed. Such a practice should not be countenanced by an inquiry as to whether the court below or the jury were mistaken in point of law in the particular case. *Emerson v. Santa Clara County*, 40 Cal. 543.

- ⁴ A judgment will not be reversed if the verdict be the only one which could properly have been rendered. *Dern v. Kellogg*, 54 Neb. 560, 74 N. W. 844; *Watts v. Norfolk & W. R. Co.* 39 W. Va. 196, 23 L.R.A. 674, 19 S. E. 521, and cases cited; *West Chicago Street R. Co. v. Manning*, 170 Ill. 417, 48 N. E. 958; *Davis v. Threlkeld*, 58 Kan. 763, 51 Pac. 226; *Pittsburgh, C. C. & St. L. R. Co. v. Ives*, 12 Ind. App. 602, 40 N. E. 923.

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A verdict, although not responsive to the instructions of the court, but so responsive to the issues presented by the pleadings as to enable the court to adjudicate the rights of the parties, was held sufficient in *Harkey v. Cain*, 69 Tex. 146, 6 S. W. 637.

See 21 L.R.A.(N.S.) 852, for a note on the right to a reversal or a new trial where the jury disregard erroneous instructions. The note is founded on *Lynch v. Snead Architectural Iron Works*, 132 Ky. 241, 116 S. W. 693, in which it is held that "the law as laid down by the court in its instructions, although erroneous, is the law referred to by a statute permitting a new trial in case the verdict is contrary to law." Other authorities are cited, some of which appear in the foregoing notes, from which the doctrine is deduced that the disregard of erroneous instructions by the jury constitutes a ground for setting aside the verdict. The note also reviews authorities holding a different view; namely, "that a new trial will not be granted on the ground that the verdict is contrary to the charge of the court, where the verdict is according to law, and the charge against it."

7. Responsiveness to issues.

The verdict must be responsive to and answer all the issues made by the pleadings, and if it varies from the issues in a substantial manner, or if it be confined to a part only of the issues, no judgment can be rendered on the verdict.¹

But the verdict should not go outside the issues.²

And where the finding of one or more of the issues is decisive of the cause, and negatives, or renders immaterial, the other issues, the jury need not find as to the latter.³

¹ The rule of law is precise upon this point. A verdict is bad if it varies from the issue in a substantial manner, or if it find only a part of that which is in issue. The reason of the rule is obvious. It results from the nature and the end of the pleadings. Whether the jury find a general or special verdict, it is their duty to decide the very point in issue. *Perea v. Colorado Nat. Bank*, 6 N. M. 1, 27 Pac. 322, citing *Patterson v. United States*, 2 Wheat. 222, 4 L. ed. 224. See also the following cases, where this principle is recognized and affirmed, although not always applied for the reason that the verdict is not open to the objection: *Johnson v. Higgins*, 53 Conn. 237, 1 Atl. 616; *Central R. Co. v. Freeman*, 75 Ga. 331; *Burke v. McDonald*, 2 Idaho, 646, 33 Pac. 49; *Wilson v. Talley*, 144 Ind. 74, 42 N. E. 362, 1009; *Pumphrey v. Walker*, 75 Iowa, 408, 39 N. W. 671; *Lancaster v. Lancaster*, 19 Ky. L. Rep. 577, 41 S. W. 34; *Gerrish v. Train*, 3 Pick. 124; *Moriarty v. McDevitt*, 46 Minn. 136, 48 N. E. 684; *Bird v. Thompson*, 96 Mo. 424, 9 S. W. 788; *Cannon v. Smith*, 47 Neb. 917, 66 N. W. 999; *Middleton v. Quigley*, 12 N. J. L. 352; *Thompson v. Button*, 14 Johns. 84;

Smith v. Smith, 17 Or. 444, 21 Pac. 439; Burdick v. Burdick, 15 R. I. 165, 1 Atl. 289; Collins v. Kay, 69 Tex. 365, 6 S. W. 313; Messick v. Thomas, 84 Va. 891, 6 S. E. 482.

But the verdict need not conclude formally or punctually in the words of the issue; if the point in issue can be concluded out of the finding the court shall work the verdict into form and make it serve according to the justice of the case. Porter v. Rummery, 10 Mass. 64.

Verdicts are to be favorably construed, and technical objections to the want of form in wording them disregarded. If it can be inferred from the verdict that the jury have found the point in issue, it is the duty of the court to work and mould it into form according to the real justice of the case. Picket v. Richet, 2 Bibb, 178.

A verdict for plaintiff suing upon a note payable in gold coin should so find, and failure to do so is error. Irvin v. Garner, 50 Tex. 48.

But a verdict is not bad for not passing upon a question made by the evidence alone, and not raised by the pleadings or brought to the attention of the jury by an instruction. Semple v. Crouch, 8 Mo. App. 593, Appx.; Price v. Bell, 88 Ga. 740, 15 S. E. 810.

And the failure of the jury to find upon issues raised upon a counterclaim in defendant's answer is not error available to plaintiff. North Star Boot & Shoe Co. v. Stebbins, 2 S. D. 74, 48 N. W. 833.

² Swan v. Smith, 13 Nev. 257; Bunnell v. Bunnell, 93 Ind. 595; Deering v. Halbert, 2 Litt. (Ky.) 291.

The verdict cannot contradict or be at variance with express admissions contained in the pleadings. Brayton v. Delaware County, 16 Iowa, 44; Watts v. Greenlee, 13 N. C. (2 Dev. L.) 87.

But a verdict which is responsive to all the issues made by the pleadings will not be rejected because of immaterial findings. Baum Iron Co. Union Sav. Bank, 50 Neb. 387, 69 N. W. 939. See, also, Bushnell v. Crooke Min. & Smelting Co. 12 Colo. 247, 21 Pac. 931, where the rule was sought to be invoked, but was denied because the verdict was not open to the objection.

³ Beers v. Flock, 2 Ind. App. 567, 28 N. E. 1011; French v. Hanchett, 12 Pick. 15; White v. Bailey, 10 Mich. 155; Law v. Merrills, 6 Wend. 268; Atlantic, T. & O. R. Co. v. Purifoy, 95 N. C. 302; Martin v. Clinton Bank, 14 Ohio, 187; Gulf, C. & S. F. R. Co. v. James, 73 Tex. 12, 10 S. W. 744; Everit v. Walworth County Bank, 13 Wis. 419.

Thus, a verdict in an action of replevin finding ownership in plaintiff is sufficient, without a finding as to right of possession, as the finding of ownership carries with it the right of possession, in the absence of evidence to the contrary. Cassel v. Western Stage Co. 12 Iowa, 47. So held, too, of a verdict finding plaintiff entitled to possession of the property, but silent as to the issue of ownership. Fitzer v. McCannan, 14 Wis. 63. Contra, Phipps v. Taylor, 15 Or. 484, 16 Pac. 171.

So error, if any, in failing to find upon issues of fact not submitted to the jury is not prejudicial to plaintiff, where one complete defense was found in favor of defendant, so that plaintiff could not have recovered in any event. *People ex rel. Samuel v. Cooper*, 139 Ill. 461, 29 N. E. 872.

And a general verdict in favor of a wife suing for divorce and alimony on the ground of cruelty will not be set aside because the jury did not find whether or not there was condonation by cohabiting together, where in view of defendant's acts and conduct up to the commencement of the action there can be no possible ground to claim condonement. *Morrison v. Morrison*, 14 Mont. 8, 35 Pac. 1.

8. Certainty as to prevailing party.

A verdict from which it is impossible to ascertain whether the jury intended to award a recovery for plaintiff or defendant is defective in substance and no valid judgment can be rendered thereon.¹

¹ *Baughan v. Baughan*, 114 Ind. 73, 15 N. E. 466, 17 N. E. 181.

Thus, a verdict against the wife alone in an action against a husband and wife on a joint contract relating to her separate estate, in which they plead jointly, is void. *Magruder v. Belt*, 7 App. D. C. 303. And in *Porter v. Mount*, 45 Barb. 422, a verdict against the wife alone in an action against husband and wife as joint debtors, each answering separately, was held a mistrial, although a discontinuance as to the husband was permitted on plaintiff's motion in order to retain the verdict.

So, where two or more defendants are sued jointly for a joint tort, each of whom answers separately, denying the tort as to him, the verdict must expressly declare in favor of or against each, and a general verdict for plaintiff against one defendant only will be set aside at plaintiff's instance as being no verdict at all as to the defendant not named; and the fact that plaintiff failed to ask for its correction at the time it was announced does not raise the presumption that the issue as to the defendant not so named in the verdict was abandoned at the trial. *Rankin v. Central P. R. Co.* 73 Cal. 93, 15 Pac. 57.

Train v. Taylor, 51 Hun, 215, 4 N. Y. Supp. 492, holds that a verdict against one and in favor of another defendant cannot be rendered in an action for conspiracy.

But *Houston v. Ladies' Union Branch Asso.* 87 Ga. 203, 13 S. E. 634, holds that a general verdict for plaintiff in an action against two defendants sued jointly is a finding against both, and is sufficiently certain.

But where two or more defendants are sued severally and individually, the verdict may find against any one or more of them, omitting all

reference to the others, and a valid judgment entered upon it for plaintiff. *Kaufman v. People's Cold Storage & Warehouse Co.* 10 Misc. 53, 30 N. Y. Supp. 831; *Gulf, C. & S. F. R. Co. v. James*, 73 Tex. 12, 10 S. W. 744; *French v. Cresswell*, 13 Or. 418, 11 Pac. 62 (holding that a verdict for plaintiff in which a line had been drawn across the name of one of the defendants was good against the other defendant). In *Austin v. Appling*, 88 Ga. 54, 13 S. E. 955, an action of tort against three persons sued as partners in which two of them filed pleas of non-partnership, and the whole case was tried together, a verdict against the three was sustained as a finding that they were all liable as partners, and equivalent to a verdict against the partnership; but inasmuch as the proof showed that but one of the partners was liable, the appellate court, applying the rule that for torts partners may be jointly and severally liable, affirmed the judgment as to the guilty partner, and reversed as to the others with direction to dismiss.

So, also, the verdict may omit all reference to a defendant as to whom there is no issue to be tried. *Etter v. Hughes*, — Cal. —, 41 Pac. 790 (where the defendant not named had admitted his liability); *Price v. Bell*, 88 Ga. 740, 15 S. E. 810; *Shattuck v. North British & Mercantile Ins. Co.* 7 C. C. A. 386, 19 U. S. App. 215, 58 Fed. 609; *Baker v. Thompson*, 89 Ga. 488, 15 S. E. 644 (where plaintiff had disclaimed his right to recover against the defendant not named); *Columbia Phosphate Co. v. Farmers' Alliance Store*, 47 S. C. 358, 25 S. E. 116 (where plaintiff had dismissed as to the defendant not named).

Nor is the verdict made uncertain by the fact that in finding for one party or the other the jury have used the plural instead of the singular, where there is in fact but one party. *Williams v. Ewart*, 29 W. Va. 659, 2 S. E. 881; *Houston & T. C. R. Co. v. Berling*, 14 Tex. Civ. App. 544, 37 S. W. 1083; *McGill v. Rothger*, 45 Ill. App. 511. Or that in finding for plaintiff they have used the singular instead of the plural, although there are several plaintiffs, and that fact is elsewhere apparent. *Missouri, K. & T. R. Co. v. Jamison*, 12 Tex. Civ. App. 689, 34 S. W. 674; *Daft v. Drew*, 40 Ill. App. 266; *Hartford County Comrs. v. Wise*, 71 Md. 43, 18 Atl. 31 (where the names of the plaintiffs appeared in full in the caption of the verdict); *Henry v. Halsey*, 5 Smedes & M. 573.

So held, also, of a verdict against "defendant" in an action against partners, the jury proceeding on the theory that the defendant was a corporation. *Davis v. Shuah*, 136 Ind. 237, 36 N. E. 122. So, even though they plead separately. *Waddingham v. Dickson*, 17 Colo. 226, 29 Pac. 177. See also *Union P. R. Co. v. Smith*, 59 Kan. 80, 52 Pac. 102, where a verdict in favor of plaintiff in an action against a corporation and the receivers in entire and exclusive control of the corporate property, without naming either defendant, was construed as a

verdict against the receivers alone, a judgment thereon to be entered against such receivers only.

A verdict entitled in the name of the plaintiff against one of defendants by name, and designating numerous other defendants as "et al.," was held good against all those shown by the record to be the codefendants of the one specifically named in the verdict, in *Knox v. Gregorious*, 43 Kan. 26, 22 Pac. 981.

And in *Blue v. McCabe*, 5 Wash. 125, 31 Pac. 531, an action against two defendants, one of whom did not appear or answer, a verdict for the plaintiff was upheld as good against the defendant who appeared and defended, notwithstanding that the caption named the other defendant as sole defendant.

9. Certainty as to finding or recovery.

The verdict must with reasonable certainty show what finding or recovery the jury intend to award;¹ and if a verdict, uncertain in this respect when returned, cannot be made certain by the aid of and reference to the record, it is fatally defective.²

¹ Thus, a verdict in an action for the recovery of personal property, which does not describe it except as to quantity, with no description as to location to afford the means of identification, is insufficient. *Lockhart v. Little*, 30 S. C. 326, 9 S. E. 511.

But a verdict assessing the value of the "property taken," without describing it, is sufficient if reference to the complaint makes certain what property is meant. *Hobbs v. Clark*, 53 Ark. 411, 9 L.R.A. 526, 14 S. W. 652.

So held also of a verdict in an action to obtain specific performance of contract for the conveyance of land. *Bunnell v. Bunnell*, 93 Ind. 595.

A verdict finding "no cause of action" will support a judgment for defendant. *Felter v. Mulliner*, 2 Johns. 181; *Glaze v. Keith*, 55 Neb. 593, 76 N. W. 15 (holding that a verdict in a justice's court that the jury find that "plaintiff had no cause of action until the assignor and executor of the lease had settlement on old account" is a verdict for defendant). Not so, however, in an action of replevin, according to *Ford v. Ford*, 3 Wis. 399. And *Cattell v. Despatch Pub. Co.* 88 Mo. 356, holds that a verdict of "no cause for action" is informal; and where the jury decline to change it, at the court's suggestion, to one "for the defendant," it is insufficient to support judgment for defendant.

In Colorado, a statute allows an action of replevin to proceed as one for damages, where the property has not been taken in on the writ; and a verdict in such a case, finding the issues for the plaintiff and assessing damages, is sufficient. *Witcher v. Watkins*, 11 Colo. 548, 19 Pac. 540.

² *Moriarty v. McDevitt*, 46 Minn. 136, 48 N. W. 684. See also the following cases, where this rule is recognized and affirmed, although not always applied because the verdict is held not to be uncertain within the rule: *Seifert v. Holt*, 82 Ga. 757, 9 S. E. 843; *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Garrett v. State ex rel. Huntsinger*, 149 Ind. 264, 49 N. E. 33; *McCormick Harvesting Mach. Co. v. Gray*; 114 Ind. 340, 16 N. E. 787; *Richardson v. McCormick*, 47 Iowa, 80; *Smith v. Cornett*, 18 Ky. L. Rep. 818, 38 S. W. 689; *McCaskill v. Currie*, 113 N. C. 313, 18 S. E. 252; *Roy v. Missouri, K. & T. R. Co.* — Tex. Civ. App. —, 32 S. W. 72.

It is not usually difficult to make a verdict express the conclusions or findings of the jury; and while it may be liberally aided by the contents of the record, and enforced when, if so aided, there can be no uncertainty as to intention of the jury, mere conjecture cannot be resorted to. *Gulf, C. & S. F. R. Co. v. Hathaway*, 75 Tex. 557, 12 S. W. 999.

Thus, in ejectment, a verdict finding for plaintiff, whether as to the whole of the land claimed, or a part only, must be certain in itself, or must refer to some certain standard by which to ascertain the land so awarded; otherwise it will be too uncertain to support a judgment. *Messick v. Thomas*, 84 Va. 891, 6 S. E. 482 (upholding a verdict which awarded to plaintiff "the whole of the premises described in the declaration," which, in accordance with a statute requiring the declaration to describe the premises "with convenient certainty so that from that description possession may be delivered," did so describe them); *Benn v. Hatcher*, 81 Va. 25, 59 Am. Rep. 645 (holding as immaterial a variance between the declaration and the verdict, as to the location of the land with reference to a certain highway, where in all other respects they agreed as to the description); *Slocum v. Compton*, 93 Va. 374, 25 S. E. 3; *Colorado Cent. Consol. Min. Co. v. Turek*, 2 C. C. A. 67, 4 U. S. App. 290, 50 Fed. 888; *Grace v. Martin*, 83 Ga. 245, 9 S. E. 841. And for other illustrations of verdicts held to be defective for uncertainty in not sufficiently identifying the land awarded, see: *McCullough v. East Tennessee, V. & G. R. Co.* 106 Ga. 275, 32 S. E. 97; *Cincinnati, H. & I. R. Co. v. Clifford*, 113 Ind. 460, 15 N. E. 524; *Harris v. Johnson*, 19 Ky. L. Rep. 1865, 44 S. W. 948; *Robertson v. Drane*, 100 Mo. 273, 13 S. W. 405; *DeClemente v. Winstanley*, 8 Misc. 45, 28 N. Y. Supp. 513; *Clark v. Clark*, 7 Vt. 190.

In Michigan a statute requires the verdict in an action of ejectment, if for plaintiff, to specify the right or estate established by him; and a verdict which does not so specify the right or estate will not support a judgment for plaintiff. *Shaw v. Hill*, 79 Mich. 86, 44 N. W. 422.

And in Florida a similar statute requires the verdict to state the quantity of the estate of the plaintiff, and to describe the lands by its metes and bounds, by the number of the lot, or by other certain description; and a verdict for plaintiff which does not find the quantity of the estate of the plaintiff sued for is insufficient. *Lungren*

v. Brownlie, 22 Fla. 491. But a verdict rendered in compliance with the requirements of the statute need not expressly declare the defendant guilty. *Russell v. Marks*, 32 Fla. 456, 14 So. 40.

But on the trial of an adverse claim to a mining claim instituted under U. S. Rev. Stat. § 2326, U. S. Comp. Stat. 1901, p. 1430, regulating the proceedings to be had on such claims, the only question presented for determination is the priority of right to purchase the fee, the fee itself to the land still remaining in the general government; and a verdict simply "for plaintiff" is sufficient. *Bennett v. Harkrader*, 158 U. S. 441, 39 L. ed. 1046, 15 Sup. Ct. Rep. 863.

In boundary line suits, if the land in dispute is not described by metes and bounds in plaintiff's petition, a general verdict for plaintiff should describe it by metes and bounds. *Edwards v. Smith*, 71 Tex. 156, 9 S. W. 77; *Bennett v. Seabright*, — Tex. Civ. App. —, 32 S. W. 1048. See also *Reed v. Cavett*, 1 Tex. Civ. App. 154, 20 S. W. 837.

A verdict generally "for the plaintiffs" in an action of trespass is a finding upon all the issues raised by the pleadings material to a recovery by the plaintiffs, and concludes the parties upon the question of title where it was distinctly put in issue. *McLaughlin v. Kelly*, 22 Cal. 211.

A verdict in an action for the location of a proposed highway, finding in favor of the establishment of the highway "as prayed for by the plaintiffs in their petition," is not defective for not describing the proposed highway where the beginning, terminus, course, distance, and width of the highway are fully and accurately set forth in the petition. *Thayer v. Burger*, 100 Ind. 262.

A verdict finding a certain amount of usury is equivalent to finding in favor of the plaintiff as to the remainder of the debt, which amount can be made certain from the pleadings. *Small v. Hicks*, 81 Ga. 691, 8 S. E. 628.

In Alabama, a statute authorizes a defendant, in an action to enforce a mechanic's lien, to put in issue the fact of indebtedness, the existence of the lien, or to interpose any other appropriate defense, and if the verdict for the plaintiff ascertains the existence of the lien, the proper judgment to enforce it follows; but if the verdict is for the plaintiff on the issue of indebtedness only, judgment follows for the amount thereof as in other cases. And in such an action on a complaint containing the common counts and a special count, in which the structure and improvements sought to be charged are described with sufficient certainty, issue being joined on the pleas of payment and set-off, with the general issue, a verdict finding "the issues in favor of the plaintiff, \$100," though informal, is sufficient to support a judgment declaring a lien in his favor for that sum on the structure and improvements. *Bedsole v. Peters*, 79 Ala. 133.

10. Stating amount of recovery.

a. In general.—A verdict in an action in which a money judgment is sought, whether by way of liquidated or unliquidated damages, which does not state specifically the amount to which the jury deem the plaintiff entitled, is not a verdict on which a valid judgment can be entered.¹ No so, however, of a verdict which finds such facts as leave nothing for the court to do but make a simple mathematical calculation,² or of a verdict in an action in which the amount is not in issue and the verdict is unobjectionable in other respects.³

¹ *Washington v. Calhoun*, 103 Ga. 675, 30 S. E. 434; *Sellers v. Mann*, 113 Ga. 643, 39 S. E. 11; *Ft. Wayne v. Durnell*, 13 Ind. App. 669, 42 N. E. 242; *Bartle v. Plane*, 68 Iowa, 227, 26 N. W. 88; *Louisville & N. R. Co. v. Hartwell*, 99 Ky. 436, 36 S. W. 183, 38 S. W. 1041; *Miller v. Cappel*, 39 La. Ann. 881, 2 So. 807; *Gaither v. Wilmer*, 71 Md. 361, 5 L.R.A. 756, 18 Atl. 590; *Fryberger v. Carney*, 26 Minn. 84, 1 N. W. 807; *Burghart v. Brown*, 60 Mo. 24; *Gerhab v. White*, 40 N. J. L. 242; *Van Benthuyzen v. DeWitt*, 4 Johns. 213; *Murray v. King*, 30 N. C. (8 Ired. L.) 528; *Ames v. Sloat*, *Wright* (Ohio) 577; *Neville v. Northcutt*, 7 Coldw. 294; *King v. McKinstry*, 32 Pa. Super. Ct. 34. But that a verdict for plaintiff for the full amount claimed is sufficient where the complaint and testimony show what such amount is, see: *Goodman v. Steinfeld*, 20 Misc. 224, 45 N. Y. Supp. 1141; *Newton v. Ker*, 14 La. Ann. 715. So held also of a verdict for plaintiff for the debt in his petition mentioned. *Brannin v. Foree*, 12 B. Mon. 506. And *Olcott v. Hanson*, 12 Mich. 452, held that the jury properly returned a verdict, as directed by the court, for plaintiff for the sum stated by counsel for plaintiff as the amount claimed, and agreed to by the foreman as the amount the jury found, after counsel for defendant had objected to the jury retiring to find the damages, where they had returned a sealed verdict for the plaintiff the full amount claimed by him on the note sued on, and to the court's question as to what amount they assessed the foreman replied that they did not have the note and did not remember the amount, but that it was the amount claimed by plaintiff.

Thus a verdict in an action upon a breach of a bond for title to land must return in solido the total amount of the value of the land and interest, as required by statute. *Gibson v. Carreker*, 82 Ga. 46, 9 S. E. 124.

And the rule is applicable to a special verdict as well as a general verdict. *Wainwright v. Burroughs*, 1 Ind. App. 393, 27 N. E. 591, and cases cited. But failure of a special verdict to assess the amount of damages sustained by plaintiff does not prevent the entry of a judgment thereupon for the plaintiff, where the damages are assessed in the formal conclusion of the verdict. *Cole v. Powell*, 17 Ind. App.

438, 46 N. E. 1006. So, also, a special verdict in an action on an insurance policy containing a finding that arbitrators, to whom the amount of the loss had been submitted by agreement of the parties, had awarded a certain amount, is not uncertain where the finding conforms to an allegation of the petition that the question of loss or damage had been so left to arbitration, which defendant admits, but denies the award, although the verdict contains no formal conclusion assessing damages. *Imperial F. Ins. Co. v. Kiernan*, 83 Ky. 468.

It has for a long time been the settled rule of practice in Missouri, that where a petition sets up separate claims of action, stated in separate counts, with a separate demand for damages in each count, a general verdict for a general sum is improper and is a good cause for arresting the judgment. But this rule does not apply where there is really but one cause of action, stated in a different manner in different counts, so as to meet any possible state of facts that may be shown by the evidence. In such case, a finding upon any one of the counts would be a bar to any further recovery on any count in the petition, and a general verdict for plaintiff is sufficient. *Silcox v. McKinney*, 64 Mo. App. 330, and cases cited.

A verdict "for defendant" simply is proper in form, where the jury finds against plaintiff on her claim and also against defendant on a counterclaim. *Phillips v. Lewis*, 12 App. Div. 460, 42 N. Y. Supp. 707.

The only finding essential to the validity of a verdict, where no offset is pleaded, according to *Clemmons v. Clemmons*, 68 Vt. 77, 34 Atl. 34, is the balance due, without stating the sums allowed the respective parties. In Missouri, however, the jury should make affirmative findings as to counterclaims set up by defendant. *Henderson v. Davis*, 74 Mo. App. 1.

Defendant is not injured by the failure of the jury, in an action of replevin, to assess the value of the property on finding for plaintiff, as required by statute, where the property is in the plaintiff's possession. *Dykes v. Clarke*, 98 Ala. 657, 13 So. 690; *Busching v. Sunman*, 19 Ind. App. 683, 49 N. E. 1091; *Claffin v. Davidson*, 21 Jones & S. 122. So held, also, of failure to assess either the value of the property or damages. *Coit v. Waples*, 1 Minn. 134, Gil. 110. But it may properly assess damages for the detention. *Leonard v. Maginnis*, 34 Minn. 506, 26 N. W. 733.

But a verdict for plaintiff in an action to recover a way by necessity is not insufficient because of a failure to find specifically the amount of damages sustained by him. *Miller v. Richards*, 139 Ind. 203, 38 N. E. 854.

And in an action of tort for treble damages allowed by statute it is immaterial whether the jury find treble damages in their verdict, or find the actual loss or damage to plaintiff and the court enters judgment for three times that amount, the statute being silent as to

which mode should be pursued. *Galvin v. Gualala Mill Co.* 98 Cal. 268, 33 Pac. 94.

In Michigan, a statute requires the jury in an action of libel and slander to specify the amount awarded for damages to feelings separately from the amount awarded for other damages. But this statute will not avail to overcome a verdict not so separating the damages where the case was pending when the act went into effect, and it was apparently unknown to both court and counsel at the time of trial. *Hewitt v. Morley*, 111 Mich. 187, 69 N. W. 245.

Nor is defendant, in an action for malicious prosecution commenced before a Missouri statute requiring the verdict to state separately the actual and exemplary damages went into effect, prejudiced by the conformity of the verdict to such requirements, even if the statute does not apply to the case. *Hilbrant v. Donaldson*, 69 Mo. App. 92.

In Alabama, a statute requires that a verdict for plaintiff, in an action for ejectment in which there has been made the suggestion of adverse possession by the defendant, must also state whether the suggestion of adverse possession be true or false; and if false the jury must assess damages as in ordinary cases; but if true they must assess the value, at the time of trial, of the permanent improvements by defendant, or those whose estate he has, and also ascertain the value of the lands, and of the use and occupation thereof, not including the increased value by reason of the improvements, judgment to go against defendant for the excess, if any, of the value of the use and occupation over that of the permanent improvements. And a verdict which, after finding the suggestion of adverse possession and permanent improvements to be true assesses the value of the latter, on their excess over the rents, must also assess the value of the lands, without the improvements. *Coltart v. Moore*, 79 Ala. 361.

² *Knight v. Fisher*, 15 Colo. 176, 25 Pac. 78; *Fort Wayne v. Durnell*, 13 Ind. App. 669, 42 N. E. 242 (*dictum*); *Lebanon v. Twiford*, 13 Ind. App. 384, 41 N. E. 844; *Wainwright v. Burroughs*, 1 Ind. App. 393, 27 N. E. 591; *Wells v. Cox*, 1 Daly, 515.

Thus, a verdict in an action for personal injuries, that the jury find for plaintiff and assess his damages at a specified amount, "including medical attention and other incidental expenses," is not bad for uncertainty, where the evidence and charge show what such "other incidental expenses" were. *Missouri, K. & T. R. Co. v. Kirkland*, 11 Tex. Civ. App. 528, 32 S. W. 588.

A verdict for a specified amount and attorneys' fees is not void for uncertainty, when the contract in suit provides for attorney's fees at a fixed per cent. *Buchanan v. Townsend*, 80 Tex. 534, 16 S. W. 315.

And a special finding that defendant is indebted to plaintiff for the face of the notes in suit, with interest, "less the credits" will be deemed to refer to credits indorsed on the notes, and is sufficiently definite to support a judgment for plaintiff, notwithstanding defendant claims

that other payments have been made which are not credited on the notes. *Roberts v. Roberts*, 122 N. C. 782, 30 S. E. 347.

But a special verdict which neither specifically assesses damages, nor so states the facts as to leave nothing for the court in the ascertainment of the damages further than mere computation from the facts found, is fatally defective. *Wainwright v. Burroughs*, 1 Ind. App. 393, 27 N. E. 591.

³ No doubt the more orderly and regular method is to have the amount always stated in the verdict; but a statute requiring that it be done never was intended to render a verdict that failed to state the amount a nullity, in a case where the sole issue was plaintiff's right to recover anything, and the amount was admitted by the pleading. *Redmond v. Weismann*, 77 Cal. 423, 20 Pac. 544 (sustaining a verdict simply finding for plaintiff, the only issue being plaintiff's right to recover at all); *Hodgkins v. Mead*, 119 N. Y. 166, 23 N. E. 559 (where the amount was not in dispute, the court charging the jury the precise sum the plaintiff was entitled to if they found in his favor); *Buckley v. Lord*, 24 How. Pr. 455 (amount of claim admitted by counsel); *Joseph v. Mady Clothing Co.* 13 Mont. 195, 33 Pac. 1 (where the only issue was the truth of the allegations of fraud by which it was sought to show that the debt should be considered as due for the purpose of suing on it); *English v. Goodman*, 3 N. D. 129, 54 N. W. 540; *Metzger v. Huntington*, 51 Ill. App. 377 (an action upon a judgment in which defendant pleaded in abatement that he had not been served with process). See also *Hall v. First Nat. Bank*, 133 Ill. 234, 24 N. E. 546, where the court after a default judgment assessed damages and rendered final judgment, and thereafter granted leave to plead, but denied a motion to set aside the default, allowing it to stand as security until the trial of the issues raised by the pleas, in default of proof to sustain which the judgment was to stand, and a verdict finding the issues for plaintiff, without assessing damages, was upheld.

So held also of a verdict rendered at the trial of an ordinary claim case, since the issue is simply whether or not the property is subject to the execution. *Lamar v. Coleman*, 88 Ga. 417, 14 S. E. 808.

Rendering a verdict against a claimant of attached property without finding the value of the property and that the claimant has failed to establish his claim, although erroneous, was held not to be prejudicial where there is no contention as to value, in *Peterson v. Wright*, 9 Wash. 202, 37 Pac. 419.

And a verdict "for defendant for its costs" is not void as failing to specify the amount to be recovered, as required by statute, since where the jury found nothing for either plaintiff or defendant, the verdict necessarily being for defendant, they could not specify the amount of the recovery, and the words "for its costs" are but harmless surplusage.

Electric Improv. Co. v. San José & S. C. R. Co. — Cal. —, 31 Pac. 455.

But a verdict merely for "the defendant," where there is an issue whether he is liable for the whole or one half of the amount of a note guaranteed, is not sufficient to authorize a judgment, although a special finding establishes the amount due from the maker of the note to the plaintiff. *Lamb v. Briggs*, 22 Neb. 138, 34 N. W. 217.

b. Computing interest.—When the jury, by their verdict, allow interest without computing it, but it can be ascertained by a mathematical calculation, either from *data* given in the verdict itself, or furnished by the pleadings or other records of the case, it is held, by the great weight of authority, that the verdict is not bad, as being uncertain,¹ unless such computation is expressly required by statute,² since the court may make the computation. So, also, by the weight of authority, when it is undisputed that, if a party is entitled to a verdict he is entitled to interest, and the jury brings in a verdict for the principal sum without mentioning interest, and there is a mere matter of computation, the court may correct the verdict by adding interest,³ or may render judgment with the addition of interest, without correcting the verdict.⁴ But when the time from which interest should date is uncertain, the court should not compute interest.⁵ It has been held that, if the jury brings in a verdict for a named sum, with interest from a certain date, but without mentioning the rate, the court cannot compute the interest and add it to the principal sum,⁶ but the contrary has also been held.⁷

¹ *New Orleans & C. R. Co. v. Schneider*, 8 C. C. A. 571, 13 U. S. App. 655, 60 Fed. 210; *Baltimore & O. R. Co. v. Dougherty*, 7 App. D. C. 378; *Beckwith v. Carleton*, 14 Ga. 691; *Mardin v. Johnston*, 58 Ga. 522; *Clapp v. Martin*, 33 Ill. App. 438; *Lauman v. Clark*, 73 Ill. App. 659; *Gaff v. Hutchinson*, 38 Ind. 341; *McGregor v. Armill*, 2 Iowa, 30; *Stevens v. Campbell*, 6 Iowa, 538; *Citizens' Bank v. Bowen*, 25 Kan. 117; *Mills v. Mills*, 39 Kan. 455, 18 Pac. 521; *Newton v. Ker*, 14 La. Ann. 715; *McClellan Dry Dock Co. v. Farmers' Alliance S. B. Line*, 43 La. Ann. 258, 9 So. 630; *Patrick v. Carr*, 50 Miss. 199; *McCormick v. Hickey*, 24 Mo. App. 362; *Nelson Mfg. Co. v. Shreve*, 104 Mo. App. 474, 79 S. W. 488; *Butte Electric R. Co. v. Mathews*, 34 Mont. 487, 87 Pac. 460 (*dictum*); *Page v. Cady*, 1 Cow. 115; *Martin v. Silliman*, 53 N. Y. 615; *Wells v. Cox*, 1 Daly, 515; *Corcoran v. Halloran*, 20 S. D. 384, 107 N. W. 210; *Burton v. Anderson*, 1 Tex. 93; *Griffin v. Chadwick*, 44 Tex. 406; *Heidenheimer v. Johnson*, 76 Tex. 206, 13 S.

W. 46; *Barrett v. Wills*, 4 Leigh, 114, 26 Am. Dec. 315; *Lake v. Tyree*, 90 Va. 719, 19 S. E. 787; *Yakima Nat. Bank v. Knipe*, 6 Wash. 348, 33 Pac. 834.

Contra: *Calkins v. Farmers' & M. Bank*, 99 Mo. App. 509, 73 S. W. 1098; *Lashua v. Markham*, 21 R. I. 492, 44 Atl. 804 (*dictum*).

See also *Brady v. Clark*, 12 Lea, 323, where objection to the form of such a verdict was made after the court had computed the interest, and the court held the objection too late, saying that if the objection had been made when the verdict was announced the jury would have been sent back to make the calculation. But see *Silsby v. Frost*, 3 Wash. Terr. 388, 17 Pac. 188, where it is held that a verdict for a certain sum with interest is not in proper form, but that it should be for a gross sum including the principal and interest due thereon duly computed. But it is not prejudicial error that this is not done where it appears from the record that in the judgment from which defendant appealed no interest whatever was included. *Ibid*.

The form of the verdict is not material. The amount found by the jury is not uncertain because they choose to put their verdict in a form that requires a mathematical calculation to get the sum of their finding. The trial judge may require them to make the calculation, but it is not necessary that he do so. *New Orleans & C. R. Co. v. Schneider*, 8 C. C. A. 571, 13 U. S. App. 655, 60 Fed. 210.

The maxim, *Id certum est quod certum reddi potest*, is readily applicable to such verdicts. *Lauman v. Clark*, 73 Ill. App. 659.

Nor does failure to fix a rate of interest invalidate it, as interest in such case must be computed according to the rate provided by law. *Duzan v. Meserve*, 24 Or. 523, 34 Pac. 548.

But a verdict for a certain sum "with legal interest," without specifying any time from which interest is to be allowed, will not authorize a judgment for any interest whatever. Such a verdict cannot support a judgment except by treating the interest clause as surplusage. *Western Mill & Lumber Co. v. Blanchard*, 1 Wash. 230, 23 Pac. 839; *Meeker v. Gardella*, 1 Wash. 139, 23 Pac. 887. See also *Murray v. King*, 30 N. C. (8 Ired. L.) 528. And in *Ranney v. Bader*, 48 Mo. 539, the interest clause in such a verdict was rejected as surplusage, and judgment entered for the principal sum found.

So held, also, of a verdict allowing interest from a time which could only be ascertained by reference to the evidence. *Fries v. Mack*, 33 Ohio St. 52.

² Thus in Georgia, where the Code (§§ 2882, 5342) provides that all judgments shall bear interest upon the principal amount recovered, and that no part of a judgment shall bear interest except the principal due on the original debt, the verdict must specify separately the amounts due for principal and for interest. *Hubbard v. McRae*, 95 Ga. 705, 22 S. E. 714. And a verdict which manifestly includes both principal and interest, without specifying the amount of each, will require a new

trial unless plaintiff will renounce all further interest on the judgment. *Ibid.*

- ³ *Clark v. Lude*, 63 Hun, 363, 18 N. Y. Supp. 271; *Peetsch v. Quinn*, 7 Misc. 6, 27 N. Y. Supp. 323; *Lowenstein v. Lombard*, 2 App. Div. 610, 38 N. Y. Supp. 33; *Rafel v. McDermott*, 30 Misc. 208, 62 N. Y. Supp. 245; *Barber Asphalt Paving Co. v. New York Postgraduate Medical School*, 62 N. Y. Supp. 392.
 - ⁴ *McAfee v. Dix*, 101 App. Div. 69, 91 N. Y. Supp. 464; *St. Louis, E. R. & W. R. Co. v. Oliver*, 17 Okla. 589, 87 Pac. 423, 10 A. & E. Ann. Cas. 748; *Fisk v. Holden*, 17 Tex. 408. But see *Freiberg v. Brunswick-Balke-Collender Co.* 4 Tex. App. Civ. Cas. (Wilson) 204, 16 S. W. 784.
 - ⁵ *Schnauffer v. Ahr*, 53 Misc. 299, 103 N. Y. Supp. 195; *Delafield v. J. K. Armsby Co.* 124 App. Div. 621, 109 N. Y. Supp. 314; *Lashua v. Markham*, 21 R. I. 492, 44 Atl. 804.
 - ⁶ *Educational Asso. v. Hitchcock*, 4 Kan. 36; *Wilson v. Means*, 25 Kan. 83.
 - ⁷ *Page v. Cady*, 1 Cow. 115; *B. C. Evans Co. v. Reeves*, 6 Tex. Civ. App. 254, 26 S. W. 219.
- For other cases on right of court to add interest, see note in 25 L.R.A. (N.S.) 311.

11. Allowing more than demanded.

The verdict should not award a greater amount of damages than is demanded.¹ But the objection is waived unless taken before entry of judgment.²

It is no objection, however, that the verdict exceeds the amount indorsed on the writ if it corresponds with the amount demanded or claimed in the declaration.³

- ¹ *Wathen v. Byrne*, 11 Ky. L. Rep. 495, 12 S. W. 197. And *Georgia R. & Bkg. Co. v. Crawley*, 87 Ga. 191, 13 S. E. 508, holds that a new trial should be granted upon a verdict for a larger amount than is claimed in the declaration, where there is no amendment or offer to amend to recover the excess, and no order is made requiring plaintiff to write off the excess, although such excess is merely the amount of interest upon the damages claimed.

But *Excelsior Electric Co. v. Sweet*, 57 N. J. L. 224, 30 Atl. 553, holds that a verdict for more than the amount of damages claimed in the *ad damnum* clause of the declaration will not require reversal, as that clause is merely formal. And *Wainwright v. Satterfield*, 52 Neb. 403, 72 N. W. 359, holds that the mere fact that a verdict for plaintiff is for \$5 more than he claimed in his petition does not justify the conclusion that the verdict is the result of the jury's passion or prejudice.

In *Schultz v. Third Ave. R. Co.* 89 N. Y. 242, where the complaint con-

tained several counts all of which referred to the same cause of action, and in reality alleged but one tort in different forms, it was held that the allegation at the end of each count of damages sustained might be disregarded; and a verdict, although for more than any one of the allegations of damages, but not exceeding the general prayer for judgment, was upheld. But in *McIntyre v. Clark*, 7 Wend. 330, an action to recover for services the value of which was certified at a specified sum, in which the declaration alleged damages on a special contract in the sum certified in the first count, and in the second count demanded the same sum for the same services on a quantum meruit, a verdict for more than either count, but less than the general prayer, was set aside.

² *Brown v. Schoonmaker*, 10 Rep. 745. In *Brown v. Reed*, 81 Me. 158, 16 Atl. 504, the court, in disposing of the objection that the verdict exceeded the sum declared for in the writ, said: "That is undoubtedly so, if a recovery by the plaintiff is to be limited to such items as are with strict technicality declared for. But such construction will exclude the allowance of items which, though not accurately declared for, were presented in evidence and considered by the jury without any objection, as far as the writ and declaration are concerned on the part of the defendant. He neither demurred to the writ, nor objected to the evidence in support of any of the items, nor excepted to any rulings in regard to them. On motion for verdict this objection comes too late." See also post, chapter XXIX.

³ *Williams v. Williams*, 11 Smedes & M. 393, and cases cited.

12. Allowing excessive damages.

A verdict allowing damages so excessive and disproportioned as to warrant the inference that the jury have been swayed by prejudice, passion, preference, partiality, corruption, ignorance, or any other improper motive, is invalid and should not be allowed to stand.¹

Not so, however, where the elements of prejudice, passion, etc., are wanting, the objection being that the excess is unsupported by the evidence, and a remittitur for such excess is entered.²

¹ *Harrison v. Sutter Street R. Co.* 116 Cal. 156, 47 Pac. 1019; *Steinbuchel v. Wright*, 43 Kan. 307, 23 Pac. 560; *N. Y. Code Civ. Proc.* § 999; *Coxhead v. Johnson*, 20 App. Div. 605, 47 N. Y. Supp. 389; *Schaffer v. Baker Transfer Co.* 29 App. Div. 459, 51 N. Y. Supp. 1092; *Libby v. Towle*, 90 Me. 262, 38 Atl. 171; *Musser v. Lancaster City Street R. Co.* 15 Pa. Co. Ct. 430; *Texas & N. O. R. Co. v. Demille*, —Tex. Civ. App. —, 41 S. W. 147 (affirmed on other grounds in 91 Tex. 215, 42 S. W. 540.) See also the following cases where this principle was

recognized, but held inapplicable to the verdicts under consideration. *Shumacher v. St. Louis & S. F. R. Co.* 39 Fed. 174; *Meeks v. St. Paul*, 64 Minn. 220, 66 N. W. 966; *Gurley v. Missouri P. R. Co.* 101 Mo. 211, 16 S. W. 11; *Burdiet v. Missouri P. R. Co.* 123 Mo. 221, 26 L.R.A. 384, 27 S. W. 453; *Wainwright v. Satterfield*, 52 Neb. 403, 72 N. W. 359; *Lucier v. Larose*, 66 N. H. 141, 20 Atl. 249; *Tennessee Coal & R. Co. v. Roddy*, 85 Tenn. 400, 5 S. W. 286; *Ray v. Lake Superior Terminal & Transfer R. Co.* 99 Wis. 617, 75 N. W. 420; *Smalley v. Appleton*, 75 Wis. 18, 43 N. W. 826.

- ² Although the court has no right to substitute its own estimate of damages for that of the jury, yet it has the right to determine the amount beyond which there is no evidence, upon any reasonable view of the case, to support the verdict, and to order a new trial unless plaintiff consents to reduce the verdict to such amount. *Hutchins v. St. Paul, M. & M. R. Co.* 44 Minn. 5, 46 N. W. 79. See also *Galveston, H. & S. A. R. Co. v. Porfert*, 72 Tex. 344, 10 S. W. 207; *Wainwright v. Satterfield*, 52 Neb. 403, 72 N. W. 359, where it is held that in an action *ex contractu*, (and said that even in an action *ex delicto*) a verdict erroneous because of excessive damages awarded may be cured by a remittitur, when it does not appear that such verdict was the result of passion or prejudice.

As to what are excessive verdicts, and what are not, see note to *Standard Oil Co. v. Tierney*, 14 L.R.A. 677.

As to the power of the appellate court to interfere with a verdict for excessive damages, see note to *Burdiet v. Missouri P. R. Co.* 123 Mo. 221, 26 L.R.A. 384, 27 S. W. 453.

13. Allowing inadequate damages.

The court may in a proper case, of its own motion, vacate a verdict and order a new trial when it deems the amount awarded by the jury inadequate.¹

And a verdict in an action to recover damages capable of ascertainment by some standard of measurement, but which awards an amount not only not commensurate with, but glaringly disproportioned to, that justified by the evidence, is invalid.²

But where there is no such standard of measurement, and the damages are unliquidated, and the amount to be awarded is discretionary with the jury, a verdict cannot be deemed objectionable for inadequacy merely because, in the opinion of the court, more might have been awarded, but the verdict must be so small as to indicate that the jury must have found it while under the influence of passion, prejudice, or gross mistake, or, in

other words, that it is the result of accident or perverted judgment, and not of cool and impartial deliberation.³

¹ Ft. Wayne & B. I. R. Co. v. Wayne Circuit Judge, 110 Mich. 173, 68 N. W. 115.

² Georgia Southern & F. R. Co. v. Jones, 90 Ga. 292, 15 S. E. 824; Greenlee v. Schoenheit, 23 Neb. 669, 37 N. W. 600; Wilson v. Morgan, 58 N. J. L. 426, 34 Atl. 752; N. Y. Code Civ. Proc. § 999; Meyer v. Hart, 23 App. Div. 131, 48 N. Y. Supp. 904; Morrissey v. Westchester Electric R. Co. 30 App. Div. 424, 61 N. Y. Supp. 945. See also cases in note to Benton v. Collins, 47 L.R.A. 33.

So held of a verdict for a sum greatly less than the damages suffered as shown by the evidence in writing, which was practically undisputed. Porter v. Sherman County Bkg. Co. 36 Neb. 271, 54 N. W. 424.

And of a finding for plaintiff in an action of ejectment, but allowing him no damages, where there was no question as to his being entitled to mesne profits, and their value was fixed by the testimony. Duncan v. Jackson, 16 Fla. 338.

And of a verdict for one half the amount which the proof of the value of the services sued for justified the jury in finding, there being no evidence to warrant the finding of the less amount. Shropshire v. Doxey, 25 Tex. 127.

And of a verdict in an action for wages *quantum meruit*, finding an amount less than that fixed by any witness in the case as the value of the services rendered. Howe v. Lincoln, 23 Kan. 468.

But the fact that the jury found a verdict for a less sum than that fixed by any of the witnesses as the amount of damages, in an action for breach of contract, is no objection where the amount of the damages was merely a matter of opinion. Brewer v. Tyringham, 12 Pick. 547.

And in actions on contract, in which the damages may be more or less a matter of calculation, although the plaintiff may be *prima facie* entitled to a full measure of damages, it is a legitimate element of consideration for which the jury are at liberty to diminish the damages that the actual amount has been affected by his conduct or that of his agent; but if they do so unreasonably and arbitrarily, the verdict may be successfully attacked as against evidence. Wilson v. Hicks, 26 L. J. Exch. N. S. 242.

A verdict for one cent in favor of the plaintiff in an action for trespass for taking property from his premises will be set aside and a new trial granted, as the jury are bound to find damages, at least to the value of the property taken. Porteous v. Hazel, Harp. L. 332.

But the rule has been held to be different with reference to a mere naked trespass. Thus, the court will not grant a new trial in an action sounding in damages, as trespass, etc., because the jury assess only half a farthing for damages, as in such a case it is in their power to

assess such damages as they please. *Marsham v. Buller*, 2 Rolle Rep. 21.

The judgment of witnesses as to value, however, is not, as a matter of law, to be accepted by the jury in place of their own; and a party against whom damages are assessed by a jury cannot complain that such damages have been placed at a lower sum than fixed by the witnesses. *Powell v. Missouri P. R. Co.* 59 Mo. App. 335.

Statutes, however, sometimes forbid vacating a verdict and granting a new trial for smallness of damages in any action for injury to the person or reputation, or in any action where the damages equal the actual pecuniary injury to the plaintiff. Thus, in Ohio (*Ohio Rev. Stat. § 5306*), *Gentile v. Cincinnati Street R. Co.* 4 Ohio N. P. 9, 6 Ohio S. & C. P. Dec. 111. But such a statute has no application to special damages, or to the assessment of actual pecuniary damages resulting directly from the wrong. And if the damages can be measured, and the injury is such as to demonstrate that the proof and the law have been disregarded, the verdict should not be allowed to stand. *Ray v. Jeffries*, 86 Ky. 367, 5 S. W. 867.

But such a state statute can have no force or application in a case in a Federal court sitting in that state. *Hughey v. Sullivan*, 80 Fed. 72.

³ *Carter v. Wells F. & Co.* 64 Fed. 1005; *Allison v. Gulf, C. & S. F. R. Co.* — Tex. Civ. App. —, 29 S. W. 425; *McDermott v. Chicago & N. W. R. Co.* 85 Wis. 102, 55 N. W. 179.

Or that there must have been mistake or oversight in failing to take into consideration the proper elements of damage in assessing the amount of recovery. *Berry v. Lake Erie & W. R. Co.* 72 Fed. 488.

Or the damages must be such as to induce the conviction that the jury have shrunk from deciding the issue submitted to them. *Lee v. George Knapp & Co.* 137 Mo. 385, 38 S. W. 1107.

Or that there were some objectionable compromises. *O'Shea v. M'Lear*, 15 N. Y. Civ. Proc. Rep. 69, 1 N. Y. Supp. 407.

As a general rule the injury inflicted by a libel or a slander is purely personal, and not susceptible of measurement by any standard. Libel and slander cases, therefore, fall within that class of cases in which a verdict will not be set aside for inadequacy unless it is such as to shock the understanding and show bias, passion, or prejudice; and some of the cases, notably the early English ones, seem to have adopted the more stringent rule that a verdict cannot be set aside for inadequacy unless there has been some mistake of law by the court, or in calculation by the jury. See for instance, *Rendall v. Hayward*, 5 Bing. N. C. 424, 7 Scott, 407, 2 Arn. 14, 3 Jur. 363, 8 L. J. C. P. N. S. 243; *Fosdick v. Stone*, L. R. 3 C. P. 607, 37 L. J. C. P. N. S. 301. See also cases in note to *Benton v. Collins*, 47 L.R.A. 42.

And the injury caused by malicious prosecution and false imprisonment, like libel and slander, seems to have been formerly regarded, at least in England, as not susceptible of legal measurement, so that a verdict

in an action therefor would be conclusive, however small it may be. *Apps v. Day*, 14 C. B. 112. For other cases see note to *Benton v. Collins*, 47 L.R.A. 43.

So, actions for assault and battery seem to be governed by the same rule as those for malicious prosecution and false imprisonment, and the verdict was formerly deemed conclusive without reference to its smallness. *Benton v. Collins*, 47 L.R.A. 33, and note thereto, p. 44.

As to what is sufficient to show bias or prejudice, or that the jury omitted to consider some of the elements of damage, see note to *Benton v. Collins*, 47 L.R.A. 45.

That uncertainty as to the cause of the injury suffered, and as to the defendant's responsibility for it, and as to whether or not the plaintiff might not be equally to blame, appears to have been made a subject of consideration on the question of setting aside a verdict for inadequacy as going to sustain the verdict, see note to *Benton v. Collins*, 47 L.R.A. 48.

As to the power of the court to increase the verdict given to such an amount as it deems just, instead of granting a new trial for inadequacy of damages, see cases in note to *Benton v. Collins*, 47 L.R.A. 51.

But error, if any, in giving the plaintiff less than he is entitled to recover upon the finding of the issues, is one of which the plaintiff alone can complain; and if he submits to the verdict, the defendant cannot be heard to insist that it shall be set aside because it is unjust to the plaintiff.¹

¹ *Fischer v. Holmes*, 123 Ind. 525, 24 N. E. 377; *Wolf v. Goodhue F. Ins. Co.* 43 Barb. 400; *Lambert v. Roberts*, 31 N. Y. S. R. 148, 9 N. Y. Supp. 607. See also note to *Benton v. Collins*, 47 L.R.A. 49.

14. Improper allowance of interest.

Nor does the improper allowance of interest, either because no interest is allowable by law,¹ or because the interest allowed is excessive,² vitiate the verdict, if the interest improperly allowed is remitted.

¹ *Chattanooga, R. & C. R. Co. v. Palmer*, 89 Ga. 161, 15 S. E. 34. See also *Hepburn v. Dundas*, 13 Gratt. 219, where interest so improperly allowed was held to be mere surplusage, and was disregarded by the court in entering judgment.

² So held where the jury allowed interest for one month more than was proper. *Duzan v. Meserve*, 24 Or. 523, 34 Pac. 548. See also *Denike v. Denike*, 8 Misc. 604, 29 N. Y. Supp. 320 (where the appellate court

reversed an order denying a new trial, and granted a new trial unless such excess was remitted); *McCormick v. Hickey*, 24 Mo. App. 362, where the action of the trial court in allowing a remittitur of the excess to be entered was approved.

And a verdict making the unsuccessful party liable to interest on interest is not ground for a new trial, if the successful party will vacate the judgment entered on the verdict, and enter judgment for the specific amount, expressly renouncing interest. *Buice v. McCrary*, 94 Ga. 418, 20 S. E. 632.

Including interest not demanded is error. *Haner v. Northern P. R. Co.* 7 Idaho, 305, 62 Pac. 1028.

As to the allowance of interest on actual damages, and the propriety of a charge thereon, see ante, chapter XXIII., The Instructions, § 51.

15. Reception of verdict.

a. When, where, and by whom received.—A verdict rendered after the expiration of the term is a nullity.¹ And where a term of court is limited to one week,² or to four weeks,³ beginning on Monday, it has been held that the term expires on Saturday night at 12 o'clock, and therefore a verdict rendered after 12 o'clock Saturday night is irregular, and will not be sustained. But, on the other hand, it has been held that court may be opened on Sunday to receive a verdict in a cause submitted to the jury on the previous day,⁴ and then may be adjourned over.⁵ The verdict must be received in open court.⁶ And it is error to receive the verdict during adjournment.⁷ And a verdict received by the judge at his house,⁸ or at his hotel,⁹ is invalid. But it has been held that the court may, when necessary, on account of illness of a juror, adjourn to where he is, to receive the verdict.¹⁰

¹ *Ex parte Juneman*, 28 Tex. App. 486, 13 S. W. 783.

² *Nabors v. State*, 6 Ala. 200.

³ *Ex parte Juneman*, 28 Tex. App. 486, 13 S. W. 783.

⁴ *Cory v. Silcox*, 5 Ind. 370; *Baxter v. People*, 8 Ill. 385; *Stone v. Bird*, 16 Kan. 488; *Hoghtaling v. Osborn*, 15 Johns. 119; *Taylor v. Ervin*, 119 N. C. 274, 25 S. E. 875; *Webber v. Merrill*, 34 N. H. 202; *Hiller v. English*, 4 Strobb. L. 486; *Stone v. United States*, 12 C. C. A. 451, 29 U. S. App. 32, 64 Fed. 667; *Weaver v. Carter*, 101 Ga. 206, 28 S. E. 869 (holding *obiter* *Bass v. Irvin*, 49 Ga. 436). And see notes to *Henderson v. Reynolds*, 7 L.R.A. 327, and *Stone v. United States*, 12 C. C. A. 451, 29 U. S. App. 32, 64 Fed. 667.

The statutory provision against opening court or transacting business therein on Sunday, except receiving a verdict or discharging a jury

(2 N. Y. Rev. Stat. 275, § 7, same statute revised in Code Civ. Proc. § 6), impliedly allows the court on committing a cause to the jury on a Saturday to adjourn till Sunday. Such provision does not preclude the giving of further instructions on Sunday when a jury on that day report their disagreement. *Jones v. Johnson*, 61 Ind. 257. Or if it does the prohibition may be to that extent waived by neither party objecting. *Roberts v. Bower*, 5 Hun, 558.

⁵ *Reid v. State*, 53 Ala. 402, 25 Am. Rep. 627, and cases cited.

⁶ *Rosser v. McColly*, 9 Ind. 587; *Crotty v. Wyatt*, 3 Ill. App. 388; *Johnson v. Depuy*, 2 N. J. L. 165; *Labar v. Koplin*, 4 N. Y. 547; *Root v. Sherwood*, 6 Johns. 68, 5 Am. Dec. 191; *Lawrence v. Stearns*, 11 Pick. 501.

⁷ *Chicago v. Rogers*, 61 Ill. 188; *Shamokin Coal & I. Co. v. Mitman*, 3 Pa. St. 379; *Person v. Neigh*, 52 Pa. 199; *Peart v. Chicago, M. & St. P. R. Co.* 5 S. D. 337, 58 N. W. 806; *Johnson v. Depuy*, 2 N. J. L. 165; *Young v. Seymour*, 4 Neb. 86; contra, *Tim v. Rosenfeld*, 168 Mass. 393, 47 N. E. 106; *East St. Louis Connecting R. Co. v. Eggmann*, 71 Ill. App. 32. And where the jury returned with the verdict, just as the crier had finished announcing the adjournment, and the judges had risen to their feet, but were still on the bench, and counsel were present, it was held that there was no error in receiving the verdict, whether objected to or not, as the court had not yet actually adjourned. *Person v. Neigh*, 52 Pa. 199.

⁸ *Rosser v. McColly*, 9 Ind. 587; *Whitlow v. Moore*, 1 Tex. App. Civ. Cas. (White & W.) 589.

⁹ *Jackson v. State*, 102 Ala. 76, 15 So. 351 (verdict received at hotel because of judge's illness).

¹⁰ In *King v. Faber*, 51 Pa. 387, where a juror was taken ill after the verdict was sealed, it was held no error for the court to adjourn to his house and there have the verdict rendered in the presence of court officers and all parties in the same manner as if in court, the verdict being afterward publicly announced by the clerk in the courtroom.

The judge should not delegate the receiving of the verdict to the clerk,¹ or to an attorney,² and it has been held that even the consent of the parties does not justify him in doing so³ But there are other authorities that hold that the verdict may be received by the clerk, where the parties consent thereto.⁴

¹ *Morris v. Harburger*, 100 App. Div. 357, 91 N. Y. Supp. 409.

² *Britton v. Fox*, 39 Ind. 369. And in this case the fact that the attorney of the party objecting was present when the appointment was made was held not to make the appointment effective.

³ *Willett v. Porter*, 42 Ind. 250; *Baltimore & O. R. Co. v. Polly*, 14 Gratt. 447.

⁴ Ferrell v. Hales, 119 N. C. 199, 25 S. E. 821; Burlingame v. Burlingame, 18 Wis. 286; Sorrelle v. Craig, 9 Ala. 535.

And where the parties agreed that the jury should seal their verdict and hand it to the officer in charge, to be delivered to the clerk, who should open it and record it, in the absence of the presiding judge and the jury, with the same effect as if the verdict had been received in open court in the presence of judge and jury, it was held, in *Chichester v. Winton Motor Carriage Co.* 110 App. Div. 78, 96 N. Y. Supp. 1006, that they were bound by their consent.

b. Presence of parties.—The judge ought not, without necessity, to receive a verdict unless the parties are present or represented, or have had fair notice and opportunity to be present if within reasonable call. But in the absence of an adjournment to a fixed hour it is their duty to be within call.¹

¹ Counsel cannot rely on having a new trial because of the inadequacy or omission of notice to them that the jury have come in.

At common law a verdict could not be received by the court in the absence, or even without the consent of the plaintiff or his counsel, for his nonconsent was a voluntary nonsuit. *People v. Mayor's Court of Albany*, 1 Wend. 36. See also ante, chapter XIX. Stopping the Case. Under the new procedure a cause cannot be thus stopped at this point. Counsel for each party must hold himself in readiness to attend without notice, if there is no fixed adjournment or understanding that notice is to be given. *Christie v. Bowne*, 76 Hun, 42, 27 N. Y. Supp. 657; *Strowger v. Sample*, 44 Kan. 298, 24 Pac. 425; *Fitzgerald v. Clark*, 17 Mont. 100, 30 L.R.A. 803, 42 Pac. 273. A judgment will not be reversed because the verdict was received in the absence of counsel during a fixed adjournment, the court having announced that a verdict would be received during the recess if one was returned,—especially where no prejudice appears and counsel had made no arrangement to be given notice. *McCormick Harvesting Mach. Co. v. Lauber*, 7 Kan. App. 730, 52 Pac. 577. And a verdict may be received in the absence of both parties and their counsel after proclamation of adjournment until the next day, under a statute providing that courts shall be always open, and that any business of the court may be transacted at any time. *Tim v. Rosenfeld*, 168 Mass. 393, 47 N. E. 106. And even where there was an understanding between counsel and court that the former, who was permitted to retire from the court room, was to be notified when the jury returned into court with their verdict, the neglect of the court so to notify counsel is not reversible error where no prejudice resulted. *Seaton v. Smith*, 45 Kan. 43, 25 Pac. 222.

The mere fact that a verdict was received in the absence of defendant and his counsel when neither had opportunity to be present, or—in jurisdictions where, after giving the case to the jury, there is no voluntary

nonsuit—it was received in the absence of plaintiff and his counsel when neither had opportunity to be present, is not alone error, without some other informality, or some resulting prejudice to the party. *Perry v. Mulligan*, 58 Ga. 479 (defendant absent); *Stiles v. Ford*, 2 Colo. 128 (plaintiff absent; a well-considered case); *Merwin v. Wheeler*, 41 Conn. 14 (plaintiff absent). It is not necessarily a matter of right for the prisoner to have his counsel present on the reception of the verdict. *Sutcliffe v. State*, 18 Ohio, 469.

“It was their business to be in court when the judge was in court. . . . Counsel must see to it that they are near when the judge moves and be ready to move with him.” *Perry v. Mulligan*, 58 Ga. 479. That verdict may be received in the absence of counsel, see also *Kuhl v. Supreme Lodge, S. K. & L.* 18 Okla. 383, 89 Pac. 1126; *Grace & H. Co. v. Sanborn*, 225 Ill. 138, 80 N. E. 88.

c. Polling the jury (1) *In general*.—To poll the jury is to require that each juror shall himself declare what his verdict is.¹ The object of polling the jury is to ascertain whether the verdict, as announced by the foreman, was concurred in by all the jurors,² and to enable them to correct a verdict mistakenly reached, or about which, on further rejection, they have doubt, and to declare in open court their judgment *in præsentia*.³

Either party has an absolute right to have the jury polled on the rendering of their verdict, whether sealed or oral, at any time before it is recorded, unless the right has been expressly waived.⁴

But this rule does not apply to a verdict fixed by the direction of the court.⁵ Denial of the right to poll a jury does not render a judgment entered on the verdict a nullity or subject to motion to vacate it at a succeeding term of court.⁶ And in some jurisdictions it is held that the polling of the jury is not a matter of right, but rests in the discretion of the court.⁷ And it has been held that the consent to a sealed verdict waives the right to poll the jury.⁸

¹*Bouvier's Law Dict.*; *Anderson's Law Dict.*; *State L. Ins. Co. v. Postal*, 43 Ind. App. 144, 84 N. E. 156, 1093; *Poulson v. Collier*, 18 Mo. App. 583.

²*State v. Bogain*, 12 La. Ann. 264; *Laber v. Koplin*, 4 N. Y. 547; *Humphries v. District of Columbia*, 174 U. S. 190, 43 L. ed. 944, 19 Sup. Ct. Rep. 637.

³*State L. Ins. Co. v. Postal*, 43 Ind. App. 144, 84 N. E. 156, 1093.

4 **Crotty v. Wyatt**, 3 Ill. App. 388; **Rigg v. Cook**, 9 Ill. 336, 46 Am. Dec. 462; **Bond v. Wood**, 69 Ill. 282; **Martin v. Morelock**, 32 Ill. 485; **Thornburgh v. Cole**, 27 Kan. 490; **Bishop v. Mugler**, 33 Kan. 145, 5 Pac. 756; **James v. State**, 55 Miss. 57, 30 Am. Rep. 496; **Norvell v. Deval**, 50 Mo. 272, 71 Am. Rep. 413; **Poulson v. Collier**, 18 Mo. App. 583; **Hubble v. Patterson**, 1 Mo. 392; **Fox v. Smith**, 3 Cow. 23; **Jackson ex dem. Fink v. Hawks**, 2 Wend. 619; **Root v. Sherwood**, 6 Johns. 68, 5 Am. Dec. 191; **Labar v. Koplin**, 4 N. Y. 547; **Warner v. New York C. R. Co.** 52 N. Y. 437, 11 Am. Rep. 724, and cases cited; **Smith v. Paul**, 133 N. C. 66, 45 S. E. 348; **District of Columbia v. Humphries**, 11 App. D. C. 68; **White v. Archbald School Dist.** 2 Pa. Co. Ct. 1; **Peart v. Chicago, M. & St. P. R. Co.** 5 S. D. 337, 58 N. W. 806; **Whitlow v. Moore**, 1 Tex. Civ. App. Cas. (White & W.) 589; **Baltimore & O. R. Co. v. Polly**, 14 Gratt. 447.

The right to poll the jury is not affected by an agreement that the jury may seal their verdict. **Steele v. Etheridge**, 15 Minn. 503, Gil. 413, *dictum*. But if the jury after agreeing upon their verdict disperse with the consent of the parties the court is not bound upon the subsequent return of the verdict to poll the jury. **Rutland v. Hathorn**, 36 Ga. 380. But permitting the jury to seal their verdict and separate without the consent of the parties does not take away the privilege of polling the jury under a statute providing that such a proceeding had with consent of parties is equivalent to a rendition and recording in open court, and that the jury shall not be polled or permitted to disagree thereto, unless by consent of parties in open court entered upon the record. **Walker v. Dailey**, 87 Iowa, 375, 54 N. W. 344.

5 **Kinser v. Calumet Fire Clay Co.** 165 Ill. 505, 46 N. E. 372; **Donoghue v. Indiana & L. M. R. Co.** 87 Mich. 13, 49 N. W. 512; **Jameson v. Officer**, 15 Tex. Civ. App. 212, 39 S. W. 190; **McClaren v. Indianapolis & V. R. Co.** 83 Ind. 319 (where, upon directing a verdict, it was held no error to refuse to allow the jury to be polled, although the statute provided that "either party may poll the jury").

6 **Humphries v. District of Columbia**, 174 U. S. 190, 43 L. ed. 944, 19 Sup. Ct. Rep. 637.

7 **Blum v. Pate**, 20 Cal. 70; **Hindrey v. Williams**, 9 Colo. 371, 12 Pac. 436; **State v. Hoyt**, 47 Conn. 533, 36 Am. Rep. 89; **Rutland v. Hathorn**, 36 Ga. 380; **Beale v. Hall**, 22 Ga. 431; **Smith v. Mitchell**, 6 Ga. 458; **School Dist. No. 1 v. Bragdon**, 23 N. H. 507; **Landis v. Dayton, Wright (Ohio)** 659; **Martin v. Maverick**, 1 M'Cord, L. 24; **Whitner v. Hamlin**, 12 Fla. 18; **Ropps v. Barker**, 4 Pick. 239.

8 **Koon v. Phoenix Mut. L. Ins. Co.** 104 U. S. 106, 26 L. ed. 670; **Whitner v. Hamlin**, 12 Fla. 18; **Miller v. Mabon**, 6 Iowa, 456.

In Texas in the case of a sealed verdict brought in by consent, it is held that it is not a matter of right to have the jury polled, except to ascertain whether they agreed when the verdict was sealed. **Hancock**

v. Winans, 20 Tex. 320. The polling of a jury which has returned a sealed verdict is waived by a failure to object to the rendering of such a verdict, under a court rule that an agreement on the part of counsel to receive a sealed verdict shall be treated as a waiver of the right to poll the jury, and that in all cases where the jury retired without objection to a sealed verdict such a verdict may be rendered. *Drda v. Schmidt*, 47 Ill. App. 267.

But, as shown by the cases in note 4, *supra*, it is usually held that the right to poll the jury is not affected by consent to a sealed verdict.

(2) *When request to poll should be made.*—The request to poll the jury must be made before the verdict is recorded,¹ or before the jury has dispersed.²

¹ *Steele v. Etheridge*, 15 Minn. 501, Gil. 413; *Peart v. Chicago, M. & St. P. R. Co.* 5 S. D. 337, 58 N. W. 806; *Blum v. Pate*, 20 Cal. 70; *High v. Johnson*, 28 Wis. 72.

But the mere entry of the verdict in the clerk's rough minutes does not necessarily constitute a recording within the rule until after the jury are discharged. *Warner v. New York C. R. Co.* 52 N. Y. 437, 11 Am. Rep. 724 (where the jury, not yet discharged, were held properly polled after the entry of a sealed verdict in the clerk's minutes). Compare *Steele v. Etheridge*, 15 Minn. 503, Gil. 413, where it was held that a polling after recording was of no effect, even though it took place before the jury were discharged, and one of the jurors dissented. Held, also, that affidavits would not be received to prove that the polling really took place before the recording, when the record stated that the polling was after the verdict was recorded.

² *Smith v. Mitchell*, 6 Ga. 458; *Springfield Consol. R. Co. v. Welsch*, 155 Ill. 511, 40 N. E. 1034.

(3) *Mode of polling.*—As to the mode of polling the jury, the party has no right to dictate the manner in which the jury shall be polled.¹ The form varies in different jurisdictions, as well as in different courts of the same jurisdiction. Where the statutes do not prescribe the form of the question to be propounded, any form of words that, in a concise manner, will elicit the information desired, is sufficient, the exact form of the question being immaterial.² The form most in use, however, is the question, "Is this your verdict?"³ The manner of polling the jury is not ground for reversal, where the answer of each juror clearly shows that the verdict was, when signed and at the time of the polling, the verdict of each juror.⁴ And when, in reply

to the usual question, one juror answered, "I consented to it," and another, "I agreed to it," this, though irregular, was held not cause for disturbing the verdict, where the attention of the court was not called at the time to the manner in which the jurors answered.⁵ So, the answer of a juror to the question, "Is this your verdict," "It is, as far as it goes," does not invalidate the verdict.⁶ But when, in answer to the usual question, a juror replied, "Under the evidence, it is not my verdict," it was held improper to permit plaintiff's attorney to inquire into the juror's reason for making the answer or for entertaining the opinion expressed in the answer.⁷

¹ *Labar v. Koplin*, 4 N. Y. 547; *Bowen v. Bowen*, 74 Ind. 470.

² *State L. Ins. Co. v. Postal*, 43 Ind. App. 144, 84 N. E. 156, 1093.

³ *Labor v. Koplin*, 4 N. Y. 547 (holding that the court cannot be required to put the question, "Is this your verdict against each and both the defendants?"); *Campbell v. Murray*, 62 Ga. 86 (holding that, while the better form is, "Is this, or is it not, your verdict?" yet the question, "Did you consent to that verdict, and do you now consent?" was held not to be substantially different from the regular form); *Black v. Thornton*, 31 Ga. 641 (holding that question, "How do you find?—for the plaintiffs or for the defendants?" was equivalent to the usual question); *Bowen v. Bowen*, 74 Ind. 470 (holding that request to put question, "Is this your verdict, and are you still satisfied with it?" was properly refused).

⁴ *Chicago City R. Co. v. Shreve*, 128 Ill. App. 462, affirmed in 226 Ill. 530, 80 N. E. 1049.

⁵ *Green v. Bliss*, 12 How. Pr. 428.

⁶ *Rankin v. Harpe*, 23 Mo. 579.

⁷ *Poulson v. Collier*, 18 Mo. App. 583.

(4) *Right and consequence of dissent.*—A juror has a right to dissent from the verdict, whether sealed or oral, at any time before it is recorded and before they have been discharged.¹ Upon such dissent they should be sent back for further deliberation.²

¹ *Bunn v. Hoyt*, 3 Johns. 255; *Blackley v. Sheldon*, 7 Johns. 32; *Douglass v. Tousey*, 2 Wend. 352, 20 Am. Dec. 616; *Weeks v. Hart*, 24 Hun. 181; *Warner v. New York C. R. Co.* 52 N. Y. 437, 11 Am. Rep. 724 (sealed verdict); *Adkins v. Blake*, 2 J. J. Marsh. 40; *Lawrence v. Stearns*, 11 Pick. 501; *Scott v. Scott*, 110 Pa. 387, 2 Atl. 531. But

a juror who dissents from a sealed verdict he signed may be punished for contempt in signing what was not his verdict, if the act be not excused. Van Vorst, J., in an unreported case. In Iowa, by express statutory provision, no dissent from a sealed verdict is permissible, unless reserved by agreement of parties where "by consent the jury have been permitted to seal their verdict and separate before it is rendered." *Miller v. Mabon*, 6 Iowa, 456. The refusal to permit a juror to change his vote is not error if on the evidence the court could have directed the verdict returned. *Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483, *sub nom.* *W. B. Grimes Dry Goods Co. v. Malcolm*, 41 L. ed. 524, 17 Sup. Ct. Rep. 158.

- A juror's answer that he consented to the verdict under protest, and his statement to the court when asked if it was his verdict, "It is, but I consented to it under protest," will not require the rejection of the verdict. *Wyley v. Bull*, 41 Kan. 206, 20 Pac. 855. And that, on polling the jury, some of them, after answering that the verdict was their verdict, added that they hesitated to agree to it, and had given their assent reluctantly and with doubt, will not vitiate the finding. *Conyers v. Kirk*, 78 Ga. 480, 3 S. E. 442. And the fact that a juror who twice interrupted the judge in his address to the jury just before discharging them, and expressed a desire to speak, was not allowed to do so, is not ground for a new trial, where such juror had twice answered on a poll of the jury, that the verdict rendered was his verdict. *Hughes v. Detroit, G. H. & M. R. Co.* 78 Mich. 399, 44 N. W. 396. An evasive answer, such as "I consented to it" must be objected to at the time, if at all. *Green v. Bliss*, 12 How. Pr. 428. Dissent and change induced from being told that the legal effect of their special findings would be contrary to the general verdict, held not to avail. *Fitzpatrick v. Himmelmann*, 48 Cal. 588.
- ² *Weeks v. Hart*, 24 Hun, 181; *Nickelson v. Smith*, 15 Or. 200, 14 Pac. 40; *Jessup v. Chicago & N. W. R. Co.* 82 Iowa, 243, 48 N. W. 77 (statute expressly requiring such a course). So held even where the jury have separated after sealing their verdict. *Bunn v. Hoyt*, 3 Johns. 255; *Douglass v. Tousey*, 2 Wend. 352; *Warner v. New York C. R. Co.* 52 N. Y. 437, 11 Am. Rep. 724; *Lagrone v. Timmerman*, 46 S. C. 372, 24 S. E. 290. And see *Johnson v. Oakes*, 80 Ga. 722, 6 S. E. 274, in which it was held that a jury whose verdict, through a misconception, represented the intention of but one juror out of the twelve, may be sent back for further deliberation, even though they had dispersed after agreeing upon the verdict where they had not been discharged from the consideration of the cause and there was no suggestion that the jury had been tampered with. Contra in Pennsylvania, where a dissent from a sealed verdict upon a polling of the jury, who had separated after sealing the verdict, makes it necessary for the judge to treat it as a mistrial and discharge the jury. *Kramer v. Kister*, 187 Pa. 227, 44 L.R.A. 432, 40 Atl. 1008. See also *Morgan v. Bell*, 41 Kan.

345, 21 Pac. 255, where sending back the jury for further deliberation upon dissent of a juror to a sealed verdict was upheld, on the grounds that the record failed to show that the jury had been permitted to separate or disband, and that no objection was made at the time.

16. Chance verdict.

A verdict which is not the result of the intelligent discussion and the honest and conscientious deliberation, and the expression of the ultimate conviction of each and all the jurors as to the rights of the parties under the law and the evidence, is unauthorized and should not be permitted to stand.¹

¹ As where the jury left it to lot whether the verdict should be for one party or the other. *Mitchell v. Ehle*, 10 Wend. 595. See also cases in note to *Hauk v. Allen*, 11 L.R.A. 706.

17. Compromise or quotient verdict.

And a verdict which is the result of marking, aggregation, and division in pursuance of a previous agreement by the jurors is invalid.¹

Otherwise, however, if there is no previous agreement by the jurors to abide the result so reached.²

And a verdict is not vitiated by the fact that the jurors agreed among themselves to render a quotient verdict, if they did not in fact arrive at their verdict in that manner.³

¹ Thus, where the jurors severally mark down the amount to which they think the prevailing party is entitled, the amounts so indicated are added together, and the total is divided by twelve, the quotient to be the verdict of the jury. *Dixon v. Pluns*, 98 Cal. 384, 20 L.R.A. 698, 31 Pac. 931, 33 Pac. 268; *Pawnee Ditch & Improv. Co. v. Adams*, 1 Colo. App. 250, 28 Pac. 662; *Flood v. McClure*, 3 Idaho, 587, 32 Pac. 254; *Chicago & I. Coal R. Co. v. McDaniel*, 134 Ind. 166, 32 N. E. 728, 33 N. E. 769; *Houk v. Allen*, 126 Ind. 568, 11 L.R.A. 706, 25 N. E. 897; *Roberts v. Ferris*, 1 Cow. 238; *Harvey v. Rickett*, 15 Johns. 87; *East Tennessee & W. N. C. R. Co. v. Winters*, 85 Tenn. 240, 1 S. W. 790; *Williams v. Dean*, 134 Iowa, 216, 11 L.R.A. (N.S.) 410, 111 N. W. 931; *Milbourne v. Robison*, 132 Mo. App. 198, 110 S. W. 598; *Clark v. Ford*, 10 Kan. App. 579, 62 Pac. 543; *Texas Midland R. Co. v. Atherton*. — *Tex. Civ. App.* —, 123 S. W. 704. And in *Roy v. Goings*, 112 Ill. 656, where it appears on receiving the verdict that the jury had thus reached the sum awarded, it was held that the court properly

sent the jury out again under a proper instruction to further consider their verdict. See also cases in note to *Hauk v. Allen*, 11 L.R.A. 706.

So held, even though it is not clear that all jurors understood they were bound by the agreement. *Johnson v. Husband*, 22 Kan. 277. But *Wichita v. Stallings*, 59 Kan. 779, appx. 54 Pac. 689, holds otherwise where most of the jurors deny by affidavit that the verdict was so reached.

A quotient verdict will not be set aside solely because it is the result of a compromise, if there is nothing to indicate that each member of the jury did not determine that plaintiff was entitled to recover exactly the sum awarded. *McCormick v. Rochester R. Co.* 133 App. Div. 760, 117 N. Y. Supp. 1110.

And where the individual members of the jury might have reached different conclusions, from the evidence, as to the precise amount of the plaintiff's claim and of the defendant's counterclaim, the verdict will not be set aside solely because it was the result of a compromise. *Driscoll v. Nelligan*, 46 App. Div. 324, 61 N. Y. Supp. 692.

² *Consolidated Ice Mach. Co. v. Trenton Hygeian Ice Co.* 57 Fed. 898; *Knight v. Fisher*, 15 Colo. 176, 25 Pac. 78; *Dorr v. Fenno*, 12 Pick. 521; *Cortelyou v. McCarthy*, 37 Neb. 742, 56 N. W. 620; *Moses v. Central Park N. & E. River R. Co.* 3 Misc. 322, 23 N. Y. Supp. 23; *Tinkle v. Dunivant*, 16 Lea, 503; *State ex rel. Senter v. Cowell*, 125 Mo. App. 348, 102 S. W. 573; *Groves & S. R. R. Co. v. Herman*. 206 Ill. 34, 69 N. E. 36; *Hogan v. Gibson Min. Co.* 131 Mo. App. 386, 111 S. W. 608.

As to what is proper evidence to show that the verdict is objectionable on this ground, see note to *Hauk v. Allen*, 11 L.R.A. 706.

³ *Western U. Teleg. Co. v. Hill*, 163 Ala. 18, 23 L.R.A.(N.S.) 648, 50 So. 248, 19 A. & E. Ann. Cas. 1058.

18. Number and unanimity of jurors.

The only verdict which can be received and regarded as the complete and valid verdict of the jury, upon which a judgment can be entered, is an open and public verdict by twelve men,¹ given in and assented to in open court as their unanimous act,² unless the parties expressly agree to a trial by a less number,³ or unless the number of jurors,⁴ concurring,⁵ necessary to a valid verdict, is otherwise expressly fixed by Constitution or statute.

¹ At common law a jury consisted of twelve men. See cases cited in note to *State v. Bates*, 43 L.R.A. 33.

And, either expressly or impliedly, the Constitutions of most of the states have adopted the common-law jury of twelve men as the only lawful jury. See for cases so holding: *Woodward Iron Co. v. Cabaniss*, 87 Ala. 328, 6 So. 300; *Larillian v. Lane*, 8 Ark. 372; *Allen v. Anderson*, 57 Ind. 389; *Eshelman v. Chicago, R. I. & P. R. Co.* 67 Iowa, 296, 25 N. W. 251; *Kansas City, C. & S. R. Co. v. Story*, 96 Mo. 611, 10 S. W. 203; *Opinion of the Justices*, 41 N. H. 550; *People ex rel. Murray v. New York City & County Justices*,* 74 N. Y. 406; *Lamb v. Lane*, 4 Ohio St. 176; *Deane v. Willamette Bridge Co.* 22 Or. 167, 15 L.R.A. 614, 29 Pac. 440; *Plimpton v. Somerset*, 33 Vt. 283; *Norval v. Rice*, 2 Wis. 22. See also cases cited in note to *State v. Bates*, 43 L.R.A. 33.

* *Lawrence v. Stearns*, 11 Pick. 501; *Scott v. Scott*, 110 Pa. 387, 2 Atl. 531; *Jacksonville, T. & K. W. R. Co. v. Adams*, 33 Fla. 608, 24 L.R.A. 272, 15 So. 257; *Carroll v. Byers*, 4 Ariz. 158, 36 Pac. 499; *Chicago & M. L. S. R. Co. v. Sanford*, 23 Mich. 418 (where it was said that if the term "jury," as used in the Michigan Constitution, authorizes anything else than an unanimous verdict, it means what it does not signify in any part of the Constitution or in any of the old statutes of the state). In *Adkins v. Blake*, 2 J. J. Marsh. 40, where the jury came into court and announced their verdict, two of the jurors declared that it was not their verdict and that they would not agree to it; but the court, on ascertaining that the jurors agreed in the room to submit to a majority, directed the verdict to be entered. This was held error, the court holding that where the verdict is reported the jurors must all sanction it, or it is not their finding. See also cases cited in notes to *State v. Bates*, 43 L.R.A. 33; *Jacksonville, T. & K. W. R. Co. v. Adams*, 24 L.R.A. 272.

And by express constitutional provision in Texas, a verdict in the county court must be rendered as the unanimous verdict of the jury. *Jackson v. J. A. Coates & Sons*, — Tex. Civ. App. —, 43 S. W. 24.

the same way and by the same method of reasoning. To require unanimity, not only in their conclusions, but also in the mode by which those conclusions are arrived at, would in most cases involve an impossibility, and would be practically destructive of the entire system of jury trials. *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15. So, it is not necessary that a jury should, in order to find a verdict, concur in a single view of the transaction disclosed by the evidence; and if the conclusion may be justified upon either of two interpretations of the evidence, the verdict cannot be impeached by showing that part of the jury proceeded upon one interpretation, and the rest upon another. *Murray v. New York L. Ins. Co.* 96 N. Y. 614, 48 Am. Rep. 658.

As to the right of a juror to dissent from the verdict, and the effect of such dissent, see *supra*, § 15, c (4).

³ In considering the question of the validity of the verdict of less than the common-law number of jurors, the point has often been raised as to whether or not the fact that a trial by the full jury of twelve has been waived, and a verdict by less than that number consented to, will validate the verdict; and it is generally held that where there has been such waiver and consent, and it so appears of record, the verdict will be upheld. See for example, *Scott v. Russell*, 39 Mo. 407; *Bishop v. Mugler*, 33 Kan. 145, 5 Pac. 756; *Roach v. Blakey*, 89 Va. 767, 17 S. E. 228. See also note to *State v. Bates*, 43 L.R.A. 33, 59.

And in several of the states there are express constitutional provisions permitting the waiver of a jury of twelve, and statutes making provision for consent to try with a less number of jurors than twelve. Thus, the Arkansas Constitution (art. 2, § 7, of the Declaration of Rights) provides that the right to trial by jury may be waived by the parties in all cases, in the manner prescribed by law; and statute (Mansf. Dig. § 2219) provision is made for the trial of causes other than felonies, by agreement of parties, by a jury of less than twelve.

So, in Texas, a statute (Tex. Rev. Stat. art. 3227) provides that the parties may by consent agree in a particular case to try with a less number than twelve. See note to *State v. Bates*, 43 L.R.A. 33, 59.

⁴ Express provision is sometimes made by the Constitutions and statutes with reference to the mode of procedure to be adopted in case of a trial by less than the full number of jurors, where the number has been reduced by one or more of the jurors dying pending trial, or becoming disabled from sitting. Such a provision is contained in the Texas Constitution (art. 5, § 13), and by statute the verdict of the remaining jurors is rendered valid (Tex. Rev. Stat. art. 3229). But in such case the verdict of the remaining jurors must be signed by all of them (2 Sayles's Civ. Stat. art. 3101), unless the trial by the less number is with the consent of the parties. See *supra*, § 4, note 2. See also note to *State v. Bates*, 43 L.R.A. 33.

And a similar statute is in force in Iowa (Code, § 3713), except that, in such case, continuing the trial with the remaining jurors must be by consent entered by the court or shorthand reporter as a part of the record; otherwise the jury must be discharged. See *Eshelman v. Chicago, R. I. & P. R. Co.* 67 Iowa, 296, 25 N. W. 251; *Kelsh v. Dyersville*, 68 Iowa, 137, 26 N. W. 38. See further on this question, note to *State v. Bates*, 43 L.R.A. 33.

The degree of the court has also been made a question for consideration in determining the constitutionality of a verdict by a less number of jurors than those constituting a jury at common law. If the court is one of record, it is generally held that it has jurisdiction only over causes triable by a common-law jury, and that, therefore, a verdict in those courts by a less number of jurors is unconstitutional. See for instance, *Norwell v. Deval*, 50 Mo. 272; *Baxter v. Putney*, 37 How. Pr. 140.

But in courts not of record it is competent for the legislature to provide for a jury of less than twelve men; and the Missouri Constitution expressly empowers the legislature to so provide. *State ex rel. Kansas City Auditorium Co. v. Allen*, 45 Mo. App. 551. Unanimity is not required. *Shaw v. Goldman*, 183 Mo. 461, 81 S. W. 1223; *Kelly-Goodfellow Shoe Co. v. Sally*, 114 Mo. App. 222, 89 S. W. 889.

And the constitutionality of the verdict in civil cases by less than the common-law jury of twelve men has been upheld—especially in cases in inferior and justices' courts and courts not of record—under statutes of many of the states, notwithstanding that the Constitutions have provided that the right of jury trial shall remain inviolate. The constitutionality of those statutes has generally been upheld upon the ground that juries did not form any part of the machinery of such tribunals at common law, and upon the further ground that in such cases there is an appeal to the courts of common law, where the parties are entitled to a trial by jury unless the same is waived. This doctrine will be found admitted by the court in *Vaughn v. Scade*, 30 Mo. 600 (although that case turned upon the constitutionality of a verdict of a jury of six in a court of law commissioners,—a court of record in which a jury of less than twelve could not sit); *Ward v. Farwell*, 97 Ill. 593; *Rhodes Burford Furniture Co. v. Mattox*, 135 Ind. 372, 34 N. E. 326, 35 N. E. 11; *Berry v. Chamberlain*, 53 N. J. L. 463, 23 Atl. 115. See also cases cited in note to *State v. Bates*, 43 L.R.A. 33.

Sometimes, however, the Constitution makes express provision for a jury of less than twelve in courts not of record. Such a clause is found in the Constitutions of Washington (art. I, § 21) and North Dakota (art. I, § 7). See also note to *State v. Bates*, 43 L.R.A. 33, for other similar constitutional provisions.

For an exhaustive treatment of the question of the number and agreement of jurors necessary to constitute a valid verdict, and the constitutionality of a verdict by less than twelve jurors, see notes to *State v. Bates*, 43 L.R.A. 33, and *Jacksonville, T. & K. W. R. Co. v. Adams*, 24 L.R.A. 272.

⁵ Some of the state Constitutions expressly provide that a verdict may be rendered, although not unanimous, provided the concurring jurors constitute a majority. Thus, the Declaration of Rights in the California Constitution (art. I, § 7) provides that in civil actions three fourths of the jury may render a verdict. So also in Utah (art. 1, § 10). *Scott v. Provo City*, 14 Utah, 31, 45 Pac. 1005. See also note to *State v. Bates*, 43 L.R.A. 33, 80.

19. Amendment of verdict.

a. Power of jury to correct verdict.—A verdict is not regarded as final, until it is pronounced and recorded in open court,¹ and at any time before the verdict has been recorded

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and their relation to the case as jurors has ceased, the jury may alter their verdict either in form or substance, whether it be oral or sealed.²

¹ Root v. Sherwood, 6 Johns. 68, 5 Am. Dec. 191; Blackley v. Sheldon, 7 Johns. 32; Labar v. Koplin, 4 N. Y. 547; Goodwin v. Appleton, 22 Me. 453.

² Bishop v. Mugler, 33 Kan. 145, 5 Pac. 756; Herzberg v. Murray, 8 Jones & S. 271; Hamilton v. Barton, 20 Iowa, 505; Comer v. Jackson, 50 Ala. 384; Watertown Ecclesiastical Soc.'s Appeal, 46 Conn. 230; Foote v. Woodworth, 66 Vt. 216, 28 Atl. 1034; Farmers' Packing Co. v. Brown, 87 Md. 1, 39 Atl. 625; Warner v. New York C. R. Co. 52 N. Y. 437, 11 Am. Rep. 724; Blackley v. Sheldon, 7 Johns. 32; State L. Ins. Co. v. Postal, 43 Ind. App. 144, 84 N. E. 156, 1093; Beal v. Cunningham, 42 Me. 362 (insertion of "not" before "guilty" allowed); article in 20 Cent. L. J. 145, and cases cited.

The jury may, before separating and without communicating with anyone, be permitted to correct their verdict, on the ground of mistake, so as to carry out their original intention. Cole v. Laws, 104 N. C. 651, 10 S. E. 172; Almand v. Scott, 83 Ga. 402, 11 S. E. 653. And they may be allowed to make the correction in open court without again retiring. Twomey v. Linnehan, 161 Mass. 91, 36 N. E. 590. But the correction must be made at the time of announcing the mistake. Thus, where the jury announced when their verdict was returned, that it did not express their real intention, they should have been required then to correct it and should not have been allowed to separate without the consent of the parties, nor permitted on the next day to return and complete their verdict against objection. Nickelson v. Smith, 15 Or. 200, 14 Pac. 40.

A sealed verdict may be corrected by a jury who have separated and afterwards come into court, at any time before it is recorded. Loudy v. Clarke, 45 Minn. 477, 48 N. W. 25; Thomas v. Upper Merion Twp. 10 Pa. Co. Ct. 414; Warner v. New York C. R. Co. 52 N. Y. 437, 11 Am. Rep. 724. Filing a sealed verdict not recording, within this rule. Rees v. Stille, 38 Pa. 138. Contra, Miller v. Mabon, 6 Iowa, 456, under a statute providing that sealing is "equivalent to a rendition and recording thereof in open court," where sealing and separation is with consent of parties.

b. Power of court to require jury to correct.—Before a verdict, whether oral or sealed, is recorded, and the jury have been dismissed from their relation as such to the case, the court has power to require them to reconsider their verdict, not merely to correct a mistake in form or make that plain

which is obscure, but to supply what is wanting, or alter it in substance, if they so agree.¹

This rule applies, whether they have announced agreement,² or dissent appears.³

¹ Warner v. New York C. R. Co. 52 N. Y. 437, 11 Am. Rep. 724; Tyrrell v. Lockhart, 3 Blackf. 136; Goodwin v. Appleton, 22 Me. 453; Bolster v. Cummings, 6 Me. 85; Champ Spring Co. v. Roth Tool Co. 103 Mo. App. 103, 77 S. W. 344; King v. Lane, 68 S. C. 430, 47 S. E. 704; Hackett v. Alston, 3 Ind. Terr. 432, 58 S. W. 675; Atchison, T. & S. F. R. Co. v. Hale, 64 Kan. 751, 68 Pac. 612. To the same effect are Reitenbaugh v. Ludwick, 31 Pa. 131 (sealed verdict); Crane Lumber Co. v. Otter Creek Lumber Co. 79 Mich. 307, 44 N. W. 788, and Sutliff v. Gilbert, 8 Ohio, 405 (computation which verdict directed to be made); Mason v. Massa, 122 Mass. 477 (arithmetical addition); Brown v. Dean, 123 Mass. 254 (verdict, nominal damages and that defendant lower his milldam. Correction, substantial damages allowed); Smith v. First Nat. Bank, 45 Neb. 444, 63 N. W. 796; Fort Wayne v. Durnell, 13 Ind. App. 669, 42 N. E. 242, and Maclin v. Bloom, 54 Miss. 365 (omission to state amount supplied); Rush v. Pedigo, 63 Ind. 479 (omission to answer special questions supplied); Wightman v. Chicago & N. W. R. Co. 73 Wis. 169, 2 L.R.A. 185, 40 N. W. 689 (determination of questions submitted required to be in accordance with a correct understanding of the instructions); Smith v. Lynch, 7 Colo. App. 383, 43 Pac. 670; Hatch v. Attrill, 118 N. Y. 383, 23 N. E. 549; Rogan v. Mullins, 22 App. Div. 117, 47 N. Y. Supp. 920, and Newell v. Wilgus, 8 Sadler (Pa.) 535, 11 Atl. 365 (verdict for less sum than party is entitled to, if entitled to verdict at all). But see Morris v. Burke, 15 Mont. 214, 38 Pac. 1065 (holding that the court is not justified in refusing to accept a verdict because for a less amount than that which the successful party is entitled to receive, if entitled to any verdict, under a statute providing that if a verdict be informal or insufficient in not covering the whole issue submitted, or in any particular, it may be corrected by the jury under the advice of the court); Jackson County v. Nichols, 139 Ind. 611, 38 N. E. 526 (holding that failure of evidence to support answers to interrogatories is not a ground for returning them to the jury for further answers). And see note to Gaither v. Wilmer, 5 L.R.A. 756, and article in 20 Cent. L. J. 145, and cases cited. If the verdict is inadequate in form the court has power to interrogate the jury upon it and send them out for further deliberation necessary to put it in proper form. Dorr v. Fenno, 12 Pick. 521.

The court may require a jury which have separated after sealing a verdict to put the verdict in proper form. Rogers v. Sample, 28 Neb. 141, 44 N. W. 86; Tyrrell v. Lockhart, 3 Blackf. 136; Moore v. Merchants' Loan & T. Co. 70 Ill. App. 210; Childs v. Carpenter, 87 Me. 114, 32

Atl. 780. As, to supply their omission to answer certain questions, there being no claim of dishonesty or suggestion of improper influence. *Olvell v. Milwaukee Street R. Co.* 92 Wis. 330, 66 N. W. 362; *Spencer v. Williams*, 160 Mass. 17, 35 N. E. 88. But it would be improper to send the jury out to alter the substance of their verdict, or to settle any new principle. *Sutliff v. Gilbert*, 8 Ohio, 405.

² *Florence Sewing Mach. Co. v. Grover & B. Sewing Mach. Co.* 110 Mass. 70, 14 Am. Rep. 579.

³ *Root v. Sherwood*, 6 Johns. 68, 5 Am. Dec. 191; *Warner v. New York C. R. Co.* 52 N. Y. 437, 11 Am. Rep. 724.

c. Power of court to correct.—The court has power to correct an informality in the verdict, or to correct the entry thereof so as to make it conform to the real finding of the jury.¹ If a verdict disregards instructions properly given, the court may (if the case affords the means of so doing without a further finding upon a question which ought to be determined only by the jury) correct the verdict in substance to conform to such instructions;² otherwise the court cannot alter a verdict in substance.³

¹ *Lincoln v. Cambria Iron Co.* 103 U. S. 412, 26 L. ed. 518; *Woodruff v. Webb*, 32 Ark. 612; *Western & A. R. Co. v. Brown*, 102 Ga. 13, 29 S. E. 130; *Clapp v. Martin*, 33 Ill. App. 438; *Chittenden v. Evans*, 48 Ill. 52; *Humphreys v. Woodstown*, 48 N. J. L. 588, 7 Atl. 301. To the same effect are *D. M. Osborne & Co. v. Morris*, 21 Or. 367, 28 Pac. 70 and *Dalrymple v. Williams*, 63 N. Y. 361, 20 Am. Rep. 544 (verdict against both when intended only against one; the latter case overruling in effect *dictum* in *Warner v. New York C. R. Co.* 52 N. Y. 437, 11 Am. Rep. 724); *Murphy v. Stewart*, 2 How. 263, 11 L. ed. 261 (correcting general verdict so as to apply to single count); *Trevor v. Hawley*, 99 Mich. 504, 58 N. W. 466 (correcting general verdict so as to make it correspond with the special findings); *O'Brien v. Palmer*, 49 Ill. 72 (rejecting surplusage); *High v. Johnson*, 28 Wis. 72 (inserting nominal damages where no damages were found); *Chamberlain v. Brady*, 17 Jones & S. 484 (correcting errors in adding); *West v. Bank of Americus*, 63 Ga. 230 (referring to pleadings to determine a great ambiguity in respect to amount, *viz.*, meaning of "eighteen 1800 dollars"). And see note to *Gaither v. Wilmer*, 5 L.R.A. 756.

The court may correct a formal omission in a verdict, where it is defective in failing to find a material, but not controverted, issue, if done before the discharge and with the joint action of the jury. *Fathmam v. Tumilty*, 34 Mo. App. 236. And where the written verdict of the jury in ejectment was for the amount of land claimed, it was

proper for the court to direct counsel to formulate the verdict by setting out the land by metes and bounds, where it was done in the presence of the jury and sanctioned by them as in accordance with their finding. *Goebel v. Pugh*, 88 Ky. 34, 10 S. W. 1.

Even after discharge of jury, verdict may be corrected in matters of form. *Italian-Swiss Agri. Colony v. Pease*, 194 Ill. 98, 62 N. E. 317.

As to computation of interest by court, where jury fails to compute it, see *supra*, § 10, b.

² *Schweitzer v. Connor*, 57 Wis. 177, 14 N. W. 922; *Hilburn v. Harrell*, — Tex. Civ. App. —, 29 S. W. 925 (correction made at jury's request and in their presence); *Lowenstein v. Lombard*, 2 App. Div. 610, 38 N. Y. Supp. 33.

³ *Donahue v. Wippert*, 7 Misc. 506, 28 N. Y. Supp. 495; *Dyer v. Combs*, 65 Mo. App. 148; *Fiore v. Ladd*, 29 Or. 528, 46 Pac. 144; *Clouser v. Patterson*, 122 Pa. 372, 15 Atl. 444; *Sheehy v. Duffy*, 89 Wis. 6, 61 N. W. 295; *Electric Vehicle Co. v. Price*, 138 Ill. App. 594 (after discharge of jury). Under a statute giving the jury the power in suits for divorce to determine the rights and liabilities of the parties, the court has no authority to revise a verdict which gives to both parties the right to marry again, by denying such right to either party. *Montfort v. Montfort*, 88 Ga. 641, 15 S. E. 688.

Trial court cannot, on his own motion, amend verdict by reducing amount found by jury. *Howard v. Bank of Metropolis*, 115 App. Div. 326, 100 N. Y. Supp. 1003.

d. Argument on question of correcting.—It is in the discretion of the judge whether to hear, in presence of the jury, argument of counsel on the question of correcting a verdict.¹

¹ *Ruffing v. Tilton*, 12 Ind. 259.

e. Exception to correction.—An exception lies to error in directing a correction.¹

¹ *Chittenden v. Evans*, 48 Ill. 52.

f. Amendment after discharge of jury.—After the jury have been discharged, they cannot be recalled for the purpose of amending the verdict,¹ except by consent of the parties.² But merely formal amendments by the court are permissible after the discharge of the jury;³ and the judge's notes,⁴ or the juror's testimony,⁵ may be used to show what the verdict really was, for the purpose of correcting the minutes.

¹ *St. Clair v. Caldwell*, 72 Ala. 527; *Rigg v. Cook*, 9 Ill. 336; *Trout v.*

West, 29 Ind. 51; Settle v. Alison, 8 Ga. 201; Richards v. Page, 81 Me. 563, 18 Atl. 289; Mitchell v. Mitchell, 122 N. C. 332, 29 S. E. 367; Walters v. Junkins, 16 Serg. & R. 414, 16 Am. Dec. 585; Denison & P. S. R. Co. v. Giersa, — Tex. Civ. App. —, 50 S. W. 1039; Sargent v. State, 11 Ohio, 472 (criminal case); People v. Reagle, 60 Barb. 527, 546 (so held in a criminal case even where discharge was illegal). Contra, Dearborn v. Newhall, 63 N. H. 301.

Otherwise where the court directed them to be discharged, and before the direction was recorded or they had separated, they found they could agree. Koontz v. Hammond, 62 Pa. 177. And they may be recalled after discharge to correct their verdict as to a mere matter of form which might have been corrected by the court. Schoolfield v. Brunton, 20 Colo. 139, 36 Pac. 1103; Howard v. Kopperl, 74 Tex. 494, 5 S. W. 627. Or to amend their unrecorded verdict by reducing it to the amount claimed by the party in whose favor it was rendered. Patrick Red Sandstone Co. v. Skoman, 1 Colo. App. 323, 29 Pac. 21. So the recalling of a jury a few minutes after they have rendered their verdict and been discharged, for the purpose of correcting an unintentional mistake with reference to a description of property, is not reversible error where the correction was made before any improper influence could have been exerted upon the jury. Signal v. Miller, — Tex. Civ. App. —, 25 S. W. 1012.

² Poor v. Madison River Power Co. 41 Mont. 236, 108 Pac. 645.

³ Crary v. Carradine, 4 Ark. 216; Gordon v. Higley, Morris (Iowa) 13; Acton v. Dooley, 16 Mo. App. 448; Beckman v. Bemus, 7 Cow. 29; Cohn v. Schaefer, 115 Pa. 178, 8 Atl. 421; Foster v. Caldwell, 18 Vt. 176; Swofford Bros. Dry-Goods Co. v. Smith-McCord Dry-Goods Co. 29 C. C. A. 239, 56 U. S. App. 355, 85 Fed. 417.

⁴ Murphy v. Stewart, 2 How. 263, 281, 11 L. ed. 261, 268; Clark v. Lamb, 8 Pick. 415, 19 Am. Dec. 332. But even if the judge's notes can be used for such purpose, a substantial amendment to a recorded verdict cannot be made after the jury have separated, upon counsel's affidavit or the judge's own recollection of what occurred at the trial. Gaither v. Wilmer, 71 Md. 361, 5 L.R.A. 756, 18 Atl. 590.

⁵ This is the settled rule in New York. Dalrymple v. Williams, 63 N. Y. 361, 20 Am. Rep. 544; Hodgkins v. Mead, 119 N. Y. 166, 23 N. E. 559; Dayton v. Church, 7 Abb. N. C. 367; Burlingame v. Central R. Co. 23 Blatchf. 142, 23 Fed. 706 (where a jury was recalled two days after their verdict was rendered and it was corrected on their affidavits that interest was intended to be added). But the contrary rule prevails in a number of jurisdictions. Parker v. Lake Shore & M. S. R. Co. 93 Mich. 607, 53 N. W. 834; Little v. Larrabee, 2 Me. 37, 11 Am. Dec. 43; Gaither v. Wilmer, 71 Md. 361, 5 L.R.A. 756, 18 Atl. 590, *dictum*; Walters v. Junkins, 16 Serg. & R. 414, 16 Am. Dec. 585; Reitenbaugh v. Ludwick, 31 Pa. 131, *dictum*; Wertz v. Cincinnati, H.

& D. R. Co. 30 Ohio L. J. 280; *Sargent v. State*, 11 Ohio, 472, *dictum*. So by statute in Georgia. *Shelton v. O'Brien*, 76 Ga. 820.

20. Sealed verdict.

The court may direct the jury to return a sealed verdict into open court,¹ even without the consent of the parties.² A sealed verdict may be opened at any time by the court, notwithstanding an agreement with the parties to open it on a particular day.³ But the jury must all be present in open court,⁴ at the opening of a sealed verdict,⁵ though this may be expressly waived.⁶ Each juror should sign the verdict, but failure to do so is only a technical irregularity, which is cured by failure to object to the reception of the verdict when it is delivered.⁷ And the accidental unsealing of the verdict by a foreman,⁸ or the fact that counsel, out of curiosity, opened it,⁹ does not vitiate the verdict.

¹ *Douglass v. Tousey*, 2 Wend. 352, 20 Am. Dec. 616; *High v. Johnson*, 28 Wis. 72; *Parmlee v. Sloan*, 37 Ind. 469; *Warner v. New York C. R. Co.* 52 N. Y. 437, 440, 11 Am. Rep. 724; *Mt. Vernon v. Cockrum*, 59 Ill. App. 540.

St. Louis, V. & T. H. R. Co. v. Faitz, 19 Ill. App. 88; *Willard v. Shaffer*, 6 Phila. 520; *Chicago v. Langlass*, 66 Ill. 361; *Leas v. Cool*, 68 Ind. 166.

² *Green v. Bliss*, 12 How. Pr. 428; *Bunker Hill & S. Min. & Concentrating Co. v. Oberder*, 25 C. C. A. 171, 48 U. S. App. 339, 79 Fed. 726; *Bunker Hill & S. Min. & Concentrating Co. v. Schmelling*, 24 C. C. A. 564, 48 U. S. App. 331, 79 Fed. 263.

As to stating amount of recovery in sealed verdict, see *supra*, § 10, a, note 1.

As to polling jury in case of sealed verdict, see *supra*, § 15, c, and notes.

An instruction to the jury that they may seal up their verdict if they agree not erroneous, where no objection was made thereto, and the fact of dispersion is not shown. *Bosley v. Farquar*, 2 Blackf. 61.

Nor would separation appear to vitiate the verdict in the absence of a suggestion that the jury were improperly practised upon. *Harter v. Seaman*, 3 Blackf. 27; *Evans v. Foss*, 49 N. H. 490.

This is true although they were not admonished not to converse with anyone concerning the trial. *Crocker v. Hoffman*, 48 Ind. 207.

An instruction to the jury that they may seal up their verdict if they agree before the incoming of the court in the morning, and they will be discharged until court convenes, but that if they do not agree they will not be allowed to go, is not objectionable as a statement that they

will be kept indefinitely unless they agree. *Knapp v. Chicago & W. M. R. Co.* 114 Mich. 199, 72 N. W. 200.

³ *Pierce v. Hasbrouck*, 49 Ill. 23.

⁴ Act of judge in receiving verdict in absence of parties and clerk, held to make it a privy verdict and of no effect, although read in court next morning. *Young v. Seymour*, 4 Neb. 86.

⁵ *Bishop v. Mugler*, 3 Kan. 145, 5 Pac. 756, 34 Kan. 254, 8 Pac. 103; *Norvell v. Deval*, 50 Mo. 272, 11 Am. Rep. 413 (juror taken insane after verdict sealed, and before opening); *District of Columbia v. Humphries*, 11 App. D. C. 68 (juror unable to appear because of illness); *King v. Wyatt*, 3 Ill. App. 388 (party deprived of right to poll); *King v. Faber*, 51 Pa. 387 (court adjourned to house of sick juror in order to secure presence; held no error); *Sargent v. State*, 11 Ohio, 472 (*dictum* in criminal case); *Tifield v. Adams*, 3 Iowa, 487 (presence presumed if record does not show the contrary); *Bass v. Hanson*, 9 Iowa, 563 (accidental unsealing in the hands of foreman disregarded). Omission to ask jurors whether they agreed to the verdict held no error where objection was not made at the time. *Paige v. O'Neal*, 12 Cal. 483.

⁶ *Woods v. Van Buren County Comrs.* 1 Morris (Iowa) 441; presence of the jury was held expressly waived where the parties had stipulated that the jury might deliver it "to the officer in charge, and disperse," this being a waiver of the right to poll. *Koon v. Phoenix Mut. L. Ins. Co.* 104 U. S. 106, 26 L. ed. 670. So also of an agreement that they "need not return." *Pierce v. Hasbrouck*, 49 Ill. 23; *Burlingame v. Burlingame*, 18 Wis. 285. Otherwise of a mere agreement that they might render a sealed verdict. *Steele v. Etheridge*, 15 Minn. 503, Gil. 413; *Root v. Sherwood*, 6 Johns. 68, 5 Am. Dec. 191; *Fox v. Smith*, 3 Cow. 23; *Rigg v. Bias*, 44 Kan. 148, 24 Pac. 56. An order to seal and deliver to the clerk, made under agreement of parties, held to dispense with return of the jury, and to preclude their amending the verdict afterward. *Trout v. West*, 29 Ind. 51.

⁷ *Green v. Bliss*, 12 How. Pr. 428.

⁸ *Bass v. Hanson*, 9 Iowa, 563.

⁹ *Smoots v. Foster*, 16 Ohio C. C. 612, 9 Ohio C. D. 218.

XXVII.—SPECIAL VERDICT AND SPECIAL QUESTIONS AND FINDINGS.

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A. SPECIAL VERDICT.

1. Definitions.

A special verdict is one which finds all the facts involved in the case, but refers the decision of the cause upon those facts to the court.¹ In special verdicts the jury states the naked facts as it finds them to be proved, and prays the advice of the court thereon, concluding, conditionally, that if, upon the whole matter, the court should be of the opinion that the plaintiff has a cause of action, then it finds for the plaintiff; if otherwise, for the defendant.² And a verdict which finds in general terms for one party or the other is a general verdict, and is not rendered special by the fact that it designates the grounds on which it is based.³

¹ *Suydam v. Williamson*, 20 How. 441, 15 L. ed. 983; *Re Keithley*, 134 Cal. 9, 66 Pac. 5; *Day v. Webb*, 28 Conn. 140; *Louisville, N. A. & C. R. Co. v. Balch*, 105 Ind. 93, 4 N. E. 288; *State v. Turner*, 19 Iowa, 144; *Gover v. Turner*, 28 Md. 600; *Manning v. Monaghan*, 23 N. Y. 539, reversing 1 Bosw. 459; *Williams v. Willis*, 7 Abb. Pr. 90; *Porter v. Western North Carolina R. Co.* 97 N. C. 66, 2 Am. St. Rep. 272, 2 S. E. 581; *Russell v. Meyer*, 7 N. D. 335, 47 L.R.A. 637, 75 N. W. 262; *Morrison v. Lee*, 13 N. D. 591, 102 N. W. 223; *Dray v. Crich*, 3 Or. 298; *McCormick v. Royal Ins. Co.* 163 Pa. 184, 29 Atl. 747; *Wallingford v. Dunlap*, 14 Pa. 33; *M'Michen v. Amos*, 4 Rand. (Va.) 134; *Hall v. Ratliff*, 93 Va. 327, 24 S. E. 1011; *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644; *Pea v. Pea*, 35 Ind. 387; *Toledo, W. & W. R. Co. v. Hammond*, 33 Ind. 379, 5 Am. Rep. 221.

² *Trafflet v. Empire L. Ins. Co.* 64 N. J. L. 387, 46 Atl. 204; *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15; *Mumford v. Wardwell*, 6 Wall. 423, 18 L. ed. 756; *Peterson v. United States*, 2 Wash. C. C. 36, Fed. Cas. No. 11,036.

³ *Shifflet v. Morelle*, 68 Tex. 382, 4 S. W. 843.

2. Office of.

The office of a special verdict is to determine such facts embraced within the issues as give rise to legal conclusions.¹ It is its province to find and place on record all the essential facts of the case.² A special verdict is in lieu of a general verdict, and its design is to exhibit all the ultimate facts and leave the legal conclusions entirely to the court.³

¹ *Wysong v. Nealis*, 13 Ind. App. 165, 41 N. E. 388; *Richmond Street & Interurban R. Co. v. Beverley*, 43 Ind. App. 105, 84 N. E. 558, rehearing denied in 43 Ind. App. 114, 85 N. E. 721; *Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 582; *Parker v. Hubble*, 75 Ind. 580; *Ginn v. Myrick*, 3 Ohio N. P. N. S. 448, 16 Ohio S. & C. P. Dec. 558; *Severy v. Chicago, R. I. & P. R. Co.* 6 Okla. 153, 50 Pac. 162.

² *Kelchner v. Nanticoke*, 209 Pa. 412, 58 Atl. 851; *Standard Sewing Mach. Co. v. Royal Ins. Co.* 201 Pa. 645, 51 Atl. 354; *Durfee v. Abbott*, 50 Mich. 479, 15 N. W. 559.

³ *Morbey v. Chicago & N. W. R. Co.* 116 Iowa, 84, 89 N. W. 105.

3. Right of jury to render special verdict.

Where the jury have a right to render a special verdict a refusal to instruct them that they have such a right is error.¹

¹ *Adams & Co.'s Exp. v. Pollock*, 12 Ohio St. 618.

By the New York statute the jury have this right in any action to recover a sum of money only, or real property, or a chattel. N. Y. Code Civ. Proc. § 1187.

In an action for the recovery of money only, it is, under Colo. Code, § 180, within the discretion of the jury to render a special or general verdict. *Thompson v. Gregor*, 11 Colo. 531, 19 Pac. 461.

Under the Iowa Code, § 2808, a jury in a civil case have a right to return a special verdict in their discretion. *Hall v. Carter*, 74 Iowa, 364, 37 N. W. 956.

It is not error, under Iowa Code, § 2807, to refuse to submit to the jury a question which calls for an answer as to an ultimate fact which would completely determine the case, as it is in the discretion of the jury whether the verdict should be general or special. *White v. Adams*, 77 Iowa, 295, 42 N. W. 199.

The jury may render a general or special verdict in their discretion in an action for the recovery of money only or specific real property under Cal. Code Civ. Proc. § 625. *Hunt v. Elliott*, 77 Cal. 588, 20 Pac. 132.

The right to render a special verdict is not necessarily taken away by a statute allowing special questions to be put. *Hendrickson v. Walker*, 32 Mich. 68.

4. Power of judge to require it.

By the New York statute, in any other action than one for money only or real property or a chattel, except where one or more specific questions of fact stated under the direction of the court are tried by a jury, the judge may direct the jury to find a special verdict upon any or all of the issues.¹

¹ N. Y. Code Civ. Proc. § 1187.

The reference to "specific questions of fact," in the statute is to §§ 970, 971. of N. Y. Code Civ. Proc. providing for the trial by jury of questions of fact arising upon the issues.

A special verdict may be taken in a Federal court. *Daube v. Philadelphia & R. Coal & I. Co.* 23 C. C. A. 420, 46 U. S. App. 591, 77 Fed. 713.

A special verdict may be directed to determine a jurisdictional question depending on the plaintiff's incorporation and consequent citizenship. *Imperial Ref. Co. v. Wyman*, 3 L.R.A. 503, 38 Fed. 574.

Under the Ohio Code Civ. Proc. § 276, the power of the court to direct a special verdict is discretionary. *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 570, 586.

The jury may find a special verdict, but the court cannot direct or compel them to do so. *Peck v. Snyder*, 13 Mich. 21.

The trial judge may in an equity case, without a request from either party, require the jury to render a special verdict, under Ga. Civ. Code, § 4850, providing that "special verdicts may be found" in equity cases. *Hardin v. Foster*, 102 Ga. 180, 29 S. E. 174.

The supreme court in the District of Columbia may require the jury to render a special verdict in an action at law. *Baltimore & O. R. Co. v. Adams*, 10 App. D. C. 97.

The submission of special issues is within the discretion of the court under Tex. Rev. Stat. arts. 1327-1329. *Cole v. Crawford*, 69 Tex. 124, 5 S. W. 646.

The correct practice in rendering a special verdict "is that the jury find the facts of the case and refer the decision of the cause upon those facts to the court, with a conditional conclusion that if the court should be of opinion, upon the whole matter as found, that the plaintiff is entitled to recover, then they find for the plaintiff; but if otherwise, then they find for defendant. By leave of the court such a verdict may be prepared by the parties, subject to the correction of the court, and it may include agreed facts in addition to those found by the jury. When the facts are settled and the verdict is reduced to form, it is then entered of record, and the questions of law arising on the facts so found are then before the court for hearing, as in case of a demurrer." *Mumford v. Wardwell*, 6 Wall. 423, 18 L. ed. 756.

See also *Ross's Case*, 12 Ct. Cl. 565.

The power of the court to direct a special verdict is usually discretionary. *Worsham v. Vignal*, 14 Tex. Civ. App. 324, 37 S. W. 17.

A Federal court is not required to submit a special verdict as provided by the rules of practice in the state. *United States Mut. Acci. Asso. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755.

The court is not obliged in an ordinary damage suit to charge the jury that they may render a general or a special verdict, as the provisions of Mont. Code Civ. Proc. § 275, are directory merely. *Hamilton v. Great Falls Street R. Co.* 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

In an action for damages for tort, in Georgia, it is not the duty of the court to instruct the jury that they may return a special verdict, even though both justification and set-off be pleaded. *Henderson v. Fox*, 83 Ga. 233, 9 S. E. 839.

The court is bound, when asked, to direct a special verdict, but also has the discretion to order the finding of a general verdict. *Louisville & N. R. Co. v. Brice*, 84 Ky. 298, 1 S. W. 483.

The submission to the jury of special interrogatories for a special verdict is a matter resting in the discretion of the trial court. *Omaha & R. Valley R. Co. v. Crow*, 54 Neb. 747, 74 N. W. 1066.

The court may, at the request of a party after the jury have announced that they cannot agree on the verdict, submit special questions to them as the basis of a special verdict, without requiring them to render a general verdict, under Mansf. (Ark.) Dig. § 5142, in force in Indian Territory, providing that in all actions the jury in their discretion may render a general or a special verdict, but may be required by the court in any case in which they render a general verdict to find specially upon questions of fact. *Williams v. Love*, 1 Ind. Terr. 585, 43 S. W. 856.

5. When request therefor should be made.

A demand for a special verdict is made too late after the testimony is closed and argument commenced,¹ and may properly be refused after a request to instruct the jury generally and the court has intimated the character of its instructions,² or after argument on instructions requested.³ But it is not erroneous if the court then require the jury to return a special verdict.⁴

It is not too late to ask for a special verdict at the close of the argument and before the charge to the jury.⁵

¹ *United States Exp. Co. v. Jenkins*, 73 Wis. 471, 41 N. W. 957 (citing Wis. Rev. Stat. § 2858).

² *Ohio & M. R. Co. v. Wrape*, 4 Ind. App. 100, 30 N. E. 428.

³ *Sandford Tool & Fork Co. v. Mullen*, 1 Ind. App. 204, 27 N. E. 448 (citing Ind. Rev. Stat. 1881, § 546).

⁴ *Lowman v. Sheets*, 124 Ind. 416, 7 L.R.A. 784, 24 N. E. 351.

⁵ *Baltimore & O. R. Co. v. McCamey*, 12 Ohio C. C. 543, 5 Ohio C. D. 631 (citing Ohio Rev. Stat. § 5201).

6. Statement of facts and issues.

a. General rules.—The general, if not universal, rule, is that it is essential to a special verdict that it contain all the ultimate facts upon which the law is to arise and the judgment of the court is to rest.¹ And, if it fails to do this, it is defective, and should be set aside and a new trial ordered.² A special verdict should be of such a nature that nothing remains for the court but to draw from such facts the proper conclusions of law.³ Nor can anything be taken by implication or intendment.⁴ And in determining what judgment may be properly entered upon a special verdict, nothing can be looked at by the court except the pleadings and the verdict.⁵

¹ *Pittsburgh, Ft. W. & C. R. Co. v. Evans*, 53 Pa. 250; *McCormick v. Royal Ins. Co.* 163 Pa. 184, 29 Atl. 747; *Sewall v. Glidden*, 1 Ala. 52; *McCarley v. White*, 154 Ala. 295, 45 So. 155; *Phoenix Water Co. v. Fletcher*, 23 Cal. 481, 15 Mor. Min. Rep. 185; *Galentine v. Brubaker*, 147 Ind. 458, 46 N. E. 903; *Louisville & N. R. Co. v. Brice*, 84 Ky. 298, 1 S. W. 483; *Nicholson v. Maine C. R. Co.* 100 Me. 342, 61 Atl. 834; *Hatton v. McClish*, 6 Md. 407; *Pint v. Bauer*, 31 Minn. 4, 16 N. W. 425; *Knickerbocker & N. Silver Min. Co. v. Hall*, 3 Nev. 194; *Birckhead v. Brown*, 5 Hill, 634; *Manning v. Monaghan*, 23 N. Y. 539, reversing 1 Bosw. 459; *Hill v. McMahon*, 81 App. Div. 324, 81 N. Y. Supp. 431; *Rogers v. Eagle Fire Co.* 9 Wend. 611; *Blake v. Davis*, 20 Ohio, 231; *Texas Brewing Co. v. Meyer*, — Tex. Civ. App. —, 38 S. W. 263; *May v. Taylor*, 22 Tex. 349; *Hall v. Ratliff*, 93 Va. 327, 24 S. E. 1011; *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644; *Elliott v. Miller*, 158 Fed. 868; *Daube v. Philadelphia & R. Coal & I. Co.* 23 C. C. A. 420, 46 U. S. App. 591, 77 Fed. 713; *Ward v. Cochran*, 150 U. S. 597, 37 L. ed. 1195, 14 Sup. Ct. Rep. 230.

² *Walsh v. Bowery Sav. Bank*, 10 N. Y. Civ. Proc. Rep. 32; *Brush v. Batten*, 15 N. Y. S. R. 548; *Hann v. Field*, Litt. Sel. Cas. (Ky.) 376; *Sherman v. Menominee River Lumber Co.* 77 Wis. 14, 45 N. W. 1079; *Ronge v. Dawson*, 9 Wis. 246; *Street v. Roberts*, 2 Sid. 86.

³ *Nicholson v. Maine C. R. Co.* 100 Me. 342, 61 Atl. 834; *Re Keithley*, 134 Cal. 9, 66 Pac. 5; *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15; *Wainright v. Burroughs*, 1 Ind. App. 393, 27 N. E. 591.

See also cases in note in 24 L.R.A.(N.S.) 6.

- ⁴ *McCormick v. Royal Ins. Co.* 163 Pa. 184, 29 Atl. 747; *Vansyckel v. Stewart*, 77 Pa. 124; *Lee v. Campbell*, 4 Port. (Ala.) 198; *Sewall v. Glidden*, 1 Ala. 52; *Noblesville Gas & Improv. Co. v. Loehr*, 124 Ind. 79, 24 N. E. 579; *Lake Shore & M. S. R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246; *State v. Burdon*, 38 La. Ann. 357; *Com. v. Dooly*, 6 Gray, 360; *Birckhead v. Brown*, 5 Hill, 634; *Williams v. Willis*, 7 Abb. Pr. 90; *Brush v. Batten*, 15 N. Y. S. R. 548; *State v. Belk*, 76 N. C. 10; *Jones v. State*, 2 Swan, 399; *Tunnell v. Watson*, 2 Munf. 283; *Farr v. Newman*, 4 T. R. 621, 2 Revised Rep. 479.
- ⁵ *Collins v. Whiteside*, 75 N. J. L. 865, 69 Atl. 174; *Seabright v. New Jersey C. R. Co.* 72 N. J. L. 8, 60 Atl. 64; *Williams v. Willis*, 7 Abb. Pr. 90.

b. Limitation to material and litigated issues.—Many of the cases hold the rule that a special verdict is not bad merely because it does not cover all the issues in the case.¹ Under this view, the office of a special verdict or finding is not to find specifically upon all the issues, but to find only the facts proved within the issues.² And a special verdict is sufficient where it covers all the issues formed and litigated in the action.³ It is sufficient where it finds the substance of the issues, though the facts alleged are not found in detail.⁴ And no particular form is necessary.⁵ But to entitle the party having the burden of proof to a judgment, a special verdict must contain a finding of every fact necessary to sustain a recovery.⁶ And where there is no general verdict, but special findings only, all the material issues must be passed upon, to authorize the court to order a judgment in the case.⁷

- ¹ *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. 956; *Branson v. Studabaker*, 133 Ind. 147, 33 N. E. 98; *Carroll v. Chicago, B. & Q. R. Co.* 99 Wis. 399, 67 Am. St. Rep. 872, 75 N. W. 176; *Miller v. Shackelford*, 4 Dana, 274.
- ² *Ex parte Walls*, 73 Ind. 95; *Fairmount Union Joint Stock Agri. Asso. v. Downey*, 146 Ind. 503, 45 N. E. 696.
- ³ *Rockville Nat. Bank v. Second Nat. Bank*, 69 Ind. 479, 35 Am. Rep. 236; *Fairmount Union Joint Stock Agri. Asso. v. Downey*, 146 Ind. 503, 45 N. E. 696; *Ward v. Busack*, 46 Wis. 407, 1 N. W. 107; *Wisconsin Farm Land Co. v. Bullard*, 119 Wis. 320, 96 N. W. 833.
- ⁴ *Heckelman v. Rupp*, 85 Ind. 286.
- ⁵ *Mace v. Provident Life Asso.* 101 N. C. 122, 7 S. E. 674.
- ⁶ *Bloomington v. Rogers*, 9 Ind. App. 230, 36 N. E. 439; *Boyer v. Robertson*, 144 Ind. 604, 43 N. E. 879; *Standard Sewing Mach. Co. v. Royal*

Ins. Co. 201 Pa. 645, 51 Atl. 354; Vinton v. Baldwin, 95 Ind. 433; Krug v. Davis, 101 Ind. 75; McCarley v. White, 154 Ala. 295, 45 So. 155; Tuigg v. Treacy, 14 Pittsb. L. J. N. S. 226; Sneed v. Sabinal Min. & Mill. Co. 20 C. C. A. 230, 34 U. S. App. 688, 73 Fed. 925.

7 Coleman v. St. Paul, M. & M. R. Co. 38 Minn. 260, 36 N. W. 638; Walsh v. Bowery Sav. Bank, 10 N. Y. Civ. Proc. Rep. 32; Brush v. Batten, 15 N. Y. S. R. 548; Humpfner v. D. M. Osborne & Co. 2 S. D. 310, 50 N. W. 88; Bartow v. Northern Assur. Co. 10 S. D. 132, 72 N. W. 86; Bell v. Shafer, 58 Wis. 223, 16 N. W. 628; Cotzhausen v. Simon, 47 Wis. 103, 1 N. W. 473; Hutchinson v. Chicago & N. W. R. Co. 41 Wis. 541.

See also cases in note in 24 L.R.A.(N.S.) 9.

c. Facts as distinguished from evidence.—A special verdict must determine specifically the ultimate facts which are in issue and upon which the rights of the parties directly depend, and not merely the evidential facts on which such ultimate facts rest.¹ And where, in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, the court will not render a judgment, but will remand the case to the court below for a venire de novo.² And, generally, questions relating to evidentiary facts should not be submitted for special verdict.³ But no general rule can be laid down for the determination of the distinction between evidentiary facts and ultimate facts in a special verdict. Each case must depend largely upon its own particular issues, character, and circumstances.⁴ And where facts are so close to the line dividing inferential facts from evidential ones, that they may not be readily distinguished, the safe way is for the jury to put them into the special verdict, where they can do no harm in any event.⁵ And a special verdict is sufficient when probative facts are found, and the court can declare that the ultimate facts necessarily result from the facts which are found.⁶ So, a special verdict is good, though some evidence is stated in it, if, eliminating all such matters, there are substantive facts sufficient to authorize a judgment.⁷ And though a special verdict omits to find a fact essential to the judgment, and not admitted by the pleadings, judgment will not be reversed for such omission, where it appears that the fact was established by the uncontradicted evidence.⁸

¹ Russell v. Meyer, 7 N. D. 335, 47 L.R.A. 637, 75 N. W. 262; State v.

Hanner, 143 N. C. 632, 24 L.R.A.(N.S.) 1, 57 S. E. 154; Tucker v. Hyatt, 151 Ind. 332, 44 L.R.A. 129, 51 N. E. 469; Lanagin v. Nowland, 44 Ark. 84; Coveny v. Hale, 49 Cal. 552; Locke v. Merchants' Nat. Bank, 66 Ind. 353; Pekin v. Egger, 104 Ill. App. 546; Langley v. Warner, 3 N. Y. 327; Hill v. Covell, 1 N. Y. 522; Behring v. Sommerville, 63 N. J. L. 568, 49 L.R.A. 578, 44 Atl. 641; Leach v. Church, 10 Ohio St. 148; Hallum v. Omro, 122 Wis. 337, 99 N. W. 1051.

The facts involved in the judgment of a special verdict are divided into two classes—evidentiary facts and inferential facts. It is the duty of the jury to consider the evidentiary facts, but to find the inferential facts; and if the special verdict shows upon its face that the jury found the evidentiary, but not the inferential, facts, the verdict is ill, because it shows that the jury ought to have found other facts, *viz.*, the inferential. *Locke v. Merchants' Nat. Bank*, 66 Ind. 353.

² *Prentice v. Zane*, 8 How. 484, 12 L. ed. 1166; *Barnes v. Williams*, 11 Wheat. 415, 6 L. ed. 508; *Waterbury v. Miller*, 13 Ind. App. 197, 41 N. E. 383; *Cherry v. Slade*, 7 N. C. (3 Murph.) 82; *Kinsley v. Coyle*, 58 Pa. 461; *Texas Loan Agency v. Hunter*, 13 Tex. Civ. App. 402, 35 S. W. 399.

³ *Blankavag v. Badger Box & Lumber Co.* 136 Wis. 380, 117 N. W. 852; *Cullen v. Hanisch*, 114 Wis. 24, 89 N. W. 900; *Freedman v. New York, N. H. & H. R. Co.* 81 Conn. 601, 71 Atl. 901, 15 A. & E. Ann. Cas. 464; *Manning v. Gasharie*, 27 Ind. 399.

⁴ *Waterbury v. Miller*, 13 Ind. App. 197, 41 N. E. 383.

⁵ *Louisville, N. A. & C. R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343; *Fraser v. Churchman*, 43 Ind. App. 200, 86 N. E. 1029.

⁶ *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15.

⁷ *Puterbaugh v. Puterbaugh*, 131 Ind. 288, 15 L.R.A. 341, 30 N. E. 519; *Branson v. Studabaker*, 133 Ind. 147, 33 N. E. 98.

The elementary and familiar rule is that verdicts are to receive a reasonable construction, and not to be disregarded, if, upon a reasonable construction, they can be sustained. It is quite difficult for the trained lawyer, with ample time and deliberation, to nicely and accurately draw the line between facts and evidence. There is, it is true, a difference; for facts are the result of proof, and evidence the means by which the proof is made. *Parks v. Satterthwaite*, 132 Ind. 411, 32 N. E. 82. But there are cases where the dividing lines so shade into each other that it is quite difficult to trace them, under any circumstances; and where the hurry and excitement of a trial are pressing upon counsel they cannot be expected to be entirely and absolutely accurate in preparing special verdicts in all cases. It is evident that, if the rule upon the subject of special verdicts was very illiberal or extremely strict, few verdicts would stand; and yet, in justice all ought to stand, unless it clearly appears that material facts are

absent. Facts may be clouded and obscured by improper matters of surplusage, but, if they are actually in the verdict, judgment should nevertheless be given upon it. For instances of the application of this rule, see *Branson v. Studabaker*, 133 Ind. 147, 33 N. E. 98, and cases cited; *Brush Electric Lighting Co. v. Kelley*, 126 Ind. 220, 10 L.R.A. 250, 25 N. E. 812; *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889; *New York, C. & St. L. R. Co. v. Ostman*, 146 Ind. 452, 45 N. E. 651; *Louisville, N. A. & C. R. Co. v. Bates*, 146 Ind. 564, 45 N. E. 108; *Terre Haute & I. R. Co. v. Brunker*, 128 Ind. 542, 26 N. E. 178; *Voris v. Star City Bldg. & L. Asso.* 20 Ind. App. 630, 50 N. E. 779. See also *Surplusage*, supra, § 8, a.

⁸ *Ward v. Busack*, 46 Wis. 407, 1 N. W. 107; *Berg v. Chicago, M. & St. P. R. Co.* 50 Wis. 419, 7 N. W. 347; *Williams v. Porter*, 41 Wis. 422; *Hutchinson v. Chicago & N. W. R. Co.* 41 Wis. 541; *Mills & L. C. Lumber Co. v. Chicago, St. P. M. & O. R. Co.* 94 Wis. 336, 68 N. W. 996; *Trapp v. New Birdsall Co.* 109 Wis. 543, 85 N. W. 478; *Union Cent. L. Ins. Co. v. Hollowell*, 20 Ind. App. 150, 50 N. E. 399; *La Frombois v. Jackson*, 8 Cow. 589, 18 Am. Dec. 463.

See also cases in note in 24 L.R.A. (N.S.) 24.

d. Facts as distinguished from conclusions of law.—A special verdict should find the facts of the case essential to recovery, and not conclusions of law.¹ And if a special verdict of a jury includes conclusions of law, they are to be disregarded by the court in applying the law to the facts found.² But if sufficient facts to support a judgment are stated in a special verdict, the presence of conclusions of law will not vitiate it.³ The inference of fact which must be stated is an inference or conclusion from the evidentiary facts, and such conclusions are not conclusions of law, but are inferences or conclusions of fact.⁴ And facts which give rise to legal conclusions are usually the ultimate facts, as contradistinguished from the evidence.⁵ But, if the ultimate facts are such that only one inference may be drawn from them, the jury need not find in a special verdict the inferential fact also, and the court will determine as matter of law, from the facts found, whether such ultimate facts existed or not.⁶

But if the ultimate facts in a case are such that reasonable men of equal intelligence may honestly and rationally differ as to the inferences and conclusions to be drawn from such facts, it is for the jury to determine what the inferences are.⁷

¹ *Equitable Acci. Ins. Co. v. Stout*, 135 Ind. 444, 33 N. E. 623; *Indianapolis*,

P. & C. R. Co. v. Bush, 101 Ind. 582; First Nat. Bank v. Peck, 8 Kan. 660; Frost v. Frost, 45 Tex. 324; Ross v. United States, 12 Ct. Cl. 565; Miller v. Shackelford, 4 Dana, 274; Peterson v. United States, 2 Wash. C. C. 36, Fed. Cas. No. 11,036.

² Louisville, N. A. & C. R. Co. v. Bates, 146 Ind. 564, 45 N. E. 108; Louisville, N. A. & C. R. Co. v. Flanagan, 113 Ind. 488, 3 Am. St. Rep. 674, 14 N. E. 370; Indiana, B. & W. R. Co. v. Barnhart, 115 Ind. 399, 16 N. E. 121; Butler v. Hopper, 1 Wash. C. C. 499, Fed. Cas. No. 2,241.

³ Branson v. Studabaker, 133 Ind. 147, 33 N. E. 98; Puterbaugh v. Puterbaugh, 131 Ind. 288, 15 L.R.A. 341, 30 N. E. 519; Smith v. Ireland, 4 Utah, 187, 7 Pac. 749.

For other cases, see note in 24 L.R.A.(N.S.) 28.

⁴ Louisville, N. A. & C. R. Co. v. Miller, 141 Ind. 533, 37 N. E. 343.

⁵ Wysong v. Nealis, 13 Ind. App. 165, 41 N. E. 388.

⁶ Cleveland, C. C. & St. L. R. Co. v. Hadley, 12 Ind. App. 516, 40 N. E. 760; Seward v. Jackson, 8 Cow. 406; Hallum v. Omro, 122 Wis. 337, 99 N. W. 1051; Monkhouse v. Hay, 8 Price, 256.

⁷ Cleveland, C. C. & St. L. R. Co. v. Hadley, 12 Ind. App. 516, 40 N. E. 760; Wysong v. Nealis, 13 Ind. App. 165, 41 N. E. 388; Zeller McC. & Co. v. Wright, 41 Ind. App. 403, 83 N. E. 1030; Republic Iron & Steel Co. v. Jones, 32 Ind. App. 189, 69 N. E. 191; Smith v. Wabash R. Co. 141 Ind. 92, 40 N. E. 270; State v. Newby, 64 N. C. 23; Rysdorp v. George Pankratz Lumber Co. 95 Wis. 622, 70 N. W. 677; Butler v. Hopper, 1 Wash. C. C. 499, Fed. Cas. No. 2,241.

See also cases in note in 24 L.R.A.(N.S.) 28.

e. Facts implied by law.—Why nothing can be intended to supply any defect in a special verdict, it is still the duty of the court to take into consideration all that may be plainly and reasonably inferred from the facts that have been found, when declaring the law upon such facts.¹ And a special verdict finding matters which the law has made conclusive evidence of a fact is tantamount to the finding of such fact.² No finding is required as to a fact implied by law.³

¹ Indiana, B. & W. R. Co. v. Barnhart, 115 Ind. 399, 16 N. E. 121.

² John v. Bates, Litt. Sel. Cas. (Ky.) 106; Gordon v. Stockdale, 89 Ind. 240.

³ Aydelotte v. Billing, 8 Cal. App. 673, 97 Pac. 693.

f. Facts admitted or not controverted.—It is not necessary to include in a special verdict facts admitted by the pleadings.¹

And the court, in rendering a judgment, is authorized to assume the existence of a fact admitted in the pleadings, though the jury makes no finding in regard thereto.² Interrogatories submitted to a jury in connection with a general verdict should not ask for a finding of uncontroverted facts.³ And it is not error for the court to strike out a finding of a special verdict where the facts stated were undisputed in the case.⁴

¹ Fenske v. Nelson, 74 Minn. 1, 76 N. W. 785; Miller v. Luco, 80 Cal. 257, 22 Pac. 195; Burton v. Boyd, 7 Kan. 17; Barto v. Himrod, 8 N. Y. 485, 59 Am. Dec. 506; Humpfner v. D. M. Osborne & Co. 2 S. D. 310, 50 N. W. 88; Hawkes v. Dodge County Mut. Ins. Co. 11 Wis. 189.

² Blakeley v. El Paso Bldg. & L. Asso. — Tex. Civ. App. —, 26 S. W. 292.

³ Freedman v. New York, N. H. & H. R. Co. 81 Conn. 601, 71 Atl. 901, 15 A. & E. Ann. Cas. 464; Hart v. West Side R. Co. 86 Wis. 483, 57 N. W. 91.

⁴ St. Paul Boom Co. v. Kemp, 125 Wis. 138, 103 N. W. 259.

See also cases in note in 24 L.R.A.(N.S.) 35.

g. Immaterial facts.—A failure in a special verdict to find upon an issue is not error where the issue is immaterial.¹ And only such facts as are material to the issues should be elicited in interrogatories to the jury.² The particular questions of fact which are to be separately submitted to the jury must be such as involve legal consequences and have some controlling force in reaching a conclusion.³ And the failure of a jury to whom a case is submitted upon special issues of fact, to answer a question which is immaterial, does not vitiate the verdict.⁴ And the rejection of a question for a special verdict, though properly framed, cannot be successfully assigned as error, where the verdict rendered clearly covers all the issuable facts in the case,⁵ or where the question was not material to any issue.⁶ Generally, refusal to submit to the jury special interrogatories asked by a party is not error, where no answer which could have been given would have controlled the general verdict, in the absence of other special findings.⁷ Nor is rejection of interrogatories propounded to a jury error where there were other interrogatories covering the same facts.⁸ But an inquiry for a special verdict which is material should not be rejected merely because an immaterial inquiry is joined with it.⁹ Nor do improper findings in a special verdict defeat the verdict, but they should be disre-

garded.¹⁰ And a motion to strike out part of a special verdict will not lie if the part objected to is immaterial. It will be treated by the court as surplusage.¹¹ Nor is the submission to the court of interrogatories which do not call for ultimate facts material to the issues prejudicial error, where all the inquiries are relevant.¹²

¹ *Louvall v. Gridley*, 70 Cal. 507, 11 Pac. 777; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Johnson v. Putnam*, 95 Ind. 57; *Bentley v. Standard F. Ins. Co.* 40 W. Va. 729, 23 S. E. 584.

² *Ft. Wayne Cooperage Co. v. Page*, 170 Ind. 585, 23 L.R.A.(N.S.) 946, 84 N. E. 145.

³ *Dubois v. Campau*, 28 Mich. 304.

⁴ *Columbus Power Co. v. City Mills Co.* 114 Ga. 558, 40 S. E. 800.

⁵ *Goesel v. Davis*, 100 Wis. 678, 76 N. W. 768; *Monture v. Regling*, 140 Wis. 407, 122 N. W. 1129; *Rahr v. Manchester Fire Assur. Co.* 93 Wis. 355, 67 N. W. 727; *Udell v. Citizens' Street R. Co.* 152 Ind. 507, 71 Am. St. Rep. 336, 52 N. E. 799; *Cawker City State Bank v. Jennings*, 89 Iowa, 230, 56 N. W. 494; *Morrisett v. Elizabeth City Cotton Mills*, 151 N. C. 31, 65 S. E. 514.

⁶ *Cormac v. Western White Bronze Co.* 77 Iowa, 32, 41 N. W. 480; *Scagel v. Chicago, M. & St. P. R. Co.* 83 Iowa, 380, 49 N. W. 990; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Ross v. United States*, 12 Ct. Cl. 565.

⁷ *Cormac v. Western White Bronze Co.* 77 Iowa, 32, 41 N. W. 480; *Scagel v. Chicago, M. & St. P. R. Co.* 83 Iowa, 380, 49 N. W. 990; *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa, 530, 63 Am. St. Rep. 399, 70 N. W. 769; *Thompson v. Brown*, 106 Iowa, 367, 76 N. W. 819; *Van Horn v. Overman*, 75 Iowa, 421, 39 N. W. 679; *Hablichtel v. Yambert*, 75 Iowa, 539, 39 N. W. 877; *Sheahan v. Barry*, 27 Mich. 217; *Harbaugh v. People*, 33 Mich. 241; *Singer Mfg. Co. v. Sammons*, 49 Wis. 316, 5 N. W. 788.

⁸ *Huntington County v. Bonebrake*, 146 Ind. 317, 45 N. E. 470; *Muncie & P. Traction Co. v. Hall*, 173 Ind. 95, 89 N. E. 484; *Coleman v. Slade*, 75 Ga. 61; *Baxter v. Krainik*, 126 Wis. 421, 105 N. W. 803; *Byington v. Merrill*, 112 Wis. 211, 88 N. W. 26; *Werner v. Chicago & N. W. R. Co.* 105 Wis. 300, 81 N. W. 416.

⁹ *Haley v. Jump River Lumber Co.* 81 Wis. 412, 51 N. W. 321, 956.

¹⁰ *Huntington County v. Bonebrake*, 146 Ind. 317, 45 N. E. 470.

¹¹ *Louisville, N. A. & C. R. Co. v. Hart*, 119 Ind. 273, 4 L.R.A. 549, 21 N. E. 753.

¹² *Nodle v. Hawthorn*, 107 Iowa, 383, 77 N. W. 1062.

See also note in 24 L.R.A.(N.S.) 36.

h. Facts not sustained by proof.—The discretion of the jury to find a general or special verdict can be exercised only as to issues with reference to which there is evidence, and this discretion is not interfered with by a failure or refusal to submit issues on which no evidence has been given.¹ Only the facts which are proved on the trial of a cause are to be found in a special verdict.² It is not the office of a special verdict to find expressly upon the issues, but to find the facts proved within the issues; and if there are issues on which no evidence was offered, no findings should be made upon them, and issues on which no facts are found should be regarded as not proved by the party on whom the burden lay of proving such issues.³

¹ Jones v. Brooklyn L. Ins. Co. 61 N. Y. 79; Cormac v. Western White Bronze Co. 77 Iowa, 32, 41 N. W. 480; Morrisett v. Elizabeth City Cotton Mills, 151 N. C. 31, 65 S. E. 514; Reed v. Madison, 85 Wis. 667, 56 N. W. 182.

² Glantz v. South Bend, 106 Ind. 305, 6 N. E. 632; Jones v. Brooklyn L. Ins. Co. 61 N. Y. 79.

³ Lafayette v. Allen, 81 Ind. 166; Jones v. Baird, 76 Ind. 164.

See also cases in note in 24 L.R.A.(N.S.) 38.

i. Findings outside of issues.—There need be no findings in a special verdict upon facts proved, but not within the issues.¹ A special verdict which varies from the issues in a substantial manner, or finds only a part of that which is in issue, is defective, and no valid judgment can be rendered upon it.² A finding of fact in a special verdict not within the issues presented by the pleadings cannot form the basis for a conclusion of law;³ it is a nullity, and cannot affect the rights of either party.⁴ And if a special verdict includes matters without the issues, such findings will be disregarded in the determination and rendition of judgment.⁵

¹ Brazil Block Coal Co. v. Hoodlet, 129 Ind. 327, 27 N. E. 741; Howard v. Beldenville Lumber Co. 129 Wis. 98, 108 N. W. 48; Hart v. West Side R. Co. 86 Wis. 483, 57 N. W. 91.

² Taft v. Baker, 2 Kan. App. 600, 42 Pac. 502; Patterson v. United States, 2 Wheat. 221, 4 L. ed. 224.

³ Cincinnati Barbed Wire Fence Co. v. Chenoweth, 22 Ind. App. 685, 54 N. E. 403.

⁴ Cole v. Crawford, 69 Tex. 126, 5 S. W. 646; Dorr v. Fenno, 12 Pick. 521.

⁵ Indianapolis, P. & C. R. Co. v. Bush, 101 Ind. 582; Bloomington v. Rogers, 9 Ind. App. 230, 36 N. E. 439; Fisher v. Louisville, N. A. & C. R. Co. 146 Ind. 558, 45 N. E. 689; Evansville & T. H. R. Co. v. Taft, 2 Ind. App. 237, 28 N. E. 443; Louisville, N. A. & C. R. Co. v. Bates, 146 Ind. 564, 45 N. E. 108; San Antonio v. L. A. Marshall & Co. — Tex. Civ. App. —, 85 S. W. 315.

See also cases in note in 24 L.R.A. (N.S.) 39.

j. Responsiveness to pleadings or charge.—The verdict and judgment in a case should be the end, and not the basis for a continuance of the same controversy; and the verdict should be rendered on the issues made by the pleadings in apt language, which cannot admit of mistake.¹ And the judgment is contrary to law and subject to reversal when the finding on which it is based is not responsive to the issues made by the pleadings.² Special verdicts should be limited to questions with reference to such facts as are controverted and put in issue by the pleadings, or such as might properly have been put in issue by the pleadings.³ And when the material facts stated in the special verdict are wholly outside of the issues, the defendant is entitled to judgment, for the plaintiff can recover only according to the allegations of his complaint.⁴ In framing and returning a special verdict, the whole duty of the jury is discharged when it has found and set forth all the principal facts which were proved within the issues submitted to them.⁵ And if a jury finds specially all the facts put in issue by the pleadings, their findings form a good special verdict.⁶

¹ Moore v. Moore, 67 Tex. 293, 3 S. W. 284.

² Wilson v. City Nat. Bank, 51 Neb. 87, 70 N. W. 501; Thompson v. Tinnin, 25 Tex. Supp. 56.

³ Montreal River Lumber Co. v. Mihills, 80 Wis. 540, 50 N. W. 507.

⁴ Puterbaugh v. Puterbaugh, 131 Ind. 288, 15 L.R.A. 341, 30 N. E. 519.

⁵ Conner v. Citizens' Street R. Co. 105 Ind. 62, 55 Am. Rep. 177, 4 N. E. 441.

⁶ Burton v. Boyd, 7 Kan. 17.

See also cases in note in 24 L.R.A. (N.S.) 41.

k. Reference to extrinsic facts.—A special verdict is the complete result of the jury's deliberation upon the whole case, and the judgment thereon must be the logical, legal conclusion from

facts found by the jury, unaided by the evidence of any extrinsic matter.¹ When a verdict is found upon special issues alone, the court cannot look beyond it to any other fact apparent in the record, in aid of the judgment.² And the court cannot, from the facts found, infer other facts which the jury might have inferred, but have not.³ And when a case was submitted on special issues, it is reversible error to assume a material fact not admitted by the pleadings, though the evidence on that issue was uncontroverted.⁴ Nor can the court on appeal look to the evidence to determine whether special findings by the jury are inconsistent with the general verdict.⁵ And if there be a general and a special verdict in a case, and the special verdict is not full, explicit, consistent, and free from evasion, the general verdict will not cure the defect.⁶

¹ *Loew v. Stocker*, 61 Pa. 347; *Vansyckel v. Stewart*, 77 Pa. 124; *Lee v. Campbell*, 4 Port. (Ala.) 198; *Brock v. Louisville & N. R. Co.* 114 Ala. 431, 21 So. 994; *Williams v. Jackson*, 5 Johns. 502; *Silliman v. Gano*, 90 Tex. 637, 39 S. W. 559, 40 S. W. 391; *Hall v. Ratliff*, 93 Va. 327, 24 S. E. 1011.

² *Kuhlman v. Medlinka*, 29 Tex. 385; *Ledyard v. Brown*, 27 Tex. 393; *Lee v. Campbell*, 4 Port. (Ala.) 198; *State v. Blue*, 84 N. C. 807; *Tuigg v. Treacy*, 14 Pittsb. L. J. N. S. 226; *Allen v. Fogler*, 6 Rich. L. 54; *Butts v. Bilke*, 4 Price, 240; *Tancred v. Christy*, 12 Mees. & W. 316.

³ *Bank of Alexandria v. Swann*, 4 Cranch, C. C. 136, Fed. Cas. No. 853.

⁴ *Thomas v. Salmons*, — Tex. Civ. App. —, 39 S. W. 1094.

⁵ *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15.

⁶ *Davis v. Farmington*, 42 Wis. 425.

See also cases in note in 24 L.R.A.(N.S.) 44.

l. Definiteness and certainty required. (1) *Generally.*—A special verdict must directly, fairly, and fully respond to the material issues in the case, and should be sufficiently certain to stand as a final decision of the special matters with which it deals.¹ One which is so uncertain that it cannot be clearly ascertained whether the jury intended to find the issues or not is bad.² A special verdict which will not support a judgment cannot stand.³ And if no conclusion of law in favor of either party can be drawn from the facts found, a special verdict is insufficient.⁴ And if a special verdict is defective or uncertain, and cannot be amended, judgment ought not to be entered upon it;

and when it is entered, it must be reversed as erroneous.⁵ Interrogatories submitted to a jury in connection with a general verdict should be so clear and concise as readily to be understood and answered by the jury.⁶ And special questions submitted to be propounded to a jury, which are wholly inconclusive, should be excluded.⁷ And where the issues submitted to the jury for a special verdict are confused and calculated to mislead the jury, a new trial will be directed.⁸ A special verdict is sufficient, however, if it expresses the intention of the jury, and when, upon the matters in issue, it is sufficiently definite to enable the court to pronounce judgment thereon.⁹ And a verdict is not bad for informality if the matter in issue may be determined from it.¹⁰ A special verdict good in substance is good though inartificially worded by the jury.¹¹ Nor will a motion for a venire de novo be sustained unless the verdict is so defective and uncertain that no judgment can be rendered upon it.¹²

¹ McGowan v. Chicago & N. W. R. Co. 91 Wis. 147, 64 N. W. 891; Wysong v. Nealis, 13 Ind. App. 165, 41 N. E. 388; Kirby v. Panhandle & G. R. Co. 39 Tex. Civ. App. 252, 88 S. W. 281; Dunlap v. Raywood Rice Canal & Mill Co. 43 Tex. Civ. App. 269, 95 S. W. 43.

² Allen v. Aldrich, 29 N. H. 63; Loew v. Stocker, 61 Pa. 347.

³ Nicholson v. Maine C. R. Co. 100 Me. 342, 61 Atl. 834; Finley v. Meadows. 134 Ky. 70, 119 S. W. 216; Alderman v. Manchester, 49 Mich. 48, 12 N. W. 905.

⁴ Miller v. Shackelford, 4 Dana, 274.

⁵ Wallingford v. Dunlap, 14 Pa. 33; Puffer v. Lucas, 107 N. C. 322, 12 S. E. 130, 464.

⁶ Freedman v. New York, N. H. & H. R. Co. 81 Conn. 601, 71 Atl. 901, 15 A. & E. Ann. Cas. 464.

⁷ Frankenberg v. First Nat. Bank, 33 Mich. 46.

⁸ Bottoms v. Seaboard & R. R. Co. 109 N. C. 72, 13 S. E. 738; Pint v. Bauer, 31 Minn. 4, 16 N. W. 425.

⁹ Helphrey v. Chicago & R. I. R. Co. 29 Iowa, 480.

¹⁰ Allen v. Aldrich, 29 N. H. 63; Cleghorn v. Love, 24 Ga. 590.

¹¹ Fenn v. Blanchard, 2 Yeates, 543.

¹² Spaulding v. Mott, 167 Ind. 58, 76 N. E. 620; Robinson v. Alexander, 65 Ga. 406.

(2) *Singleness and independence*.—Special verdicts should submit single, direct, and plain questions, and should have posi-

tive, direct and intelligent answers. Indirect, evasive, uncertain, or unmeaning answers should never be received.¹ They should be made up of sufficient direct questions to cover singly all material issues of fact raised by the pleadings and controverted on the evidence, each question admitting of an answer in the affirmative or negative.² And each interrogatory submitted to a jury in connection with a general verdict should call for a finding of but a single fact.³ Nor, as a general rule, should a question for a special verdict be framed in the alternative or disjunctive, since the answer to such a question may not necessarily express the unanimous verdict of the jurors.⁴ The inclusion in a question for a special verdict of several inquiries capable of answer in different ways, however, is not a material error, unless, measured by the answer, it leaves the jury's decision ambiguous and uncertain.⁵ And where a single issue is submitted in the form of several closely connected questions, a failure to require the jury to answer each question categorically is not error, where the answer made covered the fact in issue.⁶ Nor is a special verdict rendered invalid by the fact that the assessment of damages therein is made in the alternative form.⁷

¹ *Murray v. Abbot*, 61 Wis. 198, 20 N. W. 910; *Carroll v. Bohan*, 43 Wis. 218.

² *Hallum v. Omro*, 122 Wis. 337, 99 N. W. 1051; *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816; *Goesel v. Davis*, 100 Wis. 678, 76 N. W. 768; *Flannery v. Kansas City, St. J. & C. B. R. Co.* 23 Mo. App. 120.

³ *Freedman v. New York, N. H. & H. R. Co.* 81 Conn. 601, 71 Atl. 901, 15 A. & E. Ann. Cas. 464; *Phoenix Water Co. v. Fletcher*, 23 Cal. 481, 15 Mor. Min. Rep. 185.

⁴ *Geisinger v. Beyl*, 80 Wis. 443, 50 N. W. 501; *Gay v. Milwaukee Electric R. & Light Co.* 138 Wis. 348, 120 N. W. 283; *Gunther v. Ullrich*, 82 Wis. 222, 33 Am. St. Rep. 32, 52 N. W. 88; *Gehl v. Milwaukee Produce Co.* 116 Wis. 263, 93 N. W. 26; *Du Cate v. Brighton*, 133 Wis. 628, 114 N. W. 103; *Dugal v. Chippewa Falls*, 101 Wis. 533, 77 N. W. 878; *Graham v. Chicago & N. W. R. Co.* 143 Iowa, 604, 119 N. W. 708, 122 N. W. 573.

⁵ *Shaw v. Gilbert*, 111 Wis. 165, 86 N. W. 188.

⁶ *Southern Cotton Oil Co. v. Wallace*, 23 Tex. Civ. App. 12, 54 S. W. 638.

⁷ *Cole v. Powell*, 17 Ind. App. 438, 46 N. E. 1006.

(3) *Inconsistency*.—Inconsistent and conflicting findings in special verdicts and answers to interrogatories neutralize each

other, and must be disregarded.¹ So, judgment cannot be pronounced in an action to recover possession of specific personal property on a special verdict or finding that each party was in possession of the property sued for, when the action was commenced.² A special verdict will be upheld, however, where it is not so contradictory as not to authorize a decree thereon.³

¹ *Zeller, McC. & Co. v. Wright*, 41 Ind. App. 403, 83 N. E. 1030; *Ballard v. Citizens' Street R. Co.* 18 Ind. App. 522, 47 N. E. 643; *Deatherage v. Henderson*, 43 Kan. 684, 23 Pac. 1052; *Atchison, T. & S. F. R. Co. v. Hamlin*, 67 Kan. 476, 73 Pac. 58; *Pint v. Bauer*, 31 Minn. 4, 16 N. W. 425; *Morrison v. Watson*, 95 N. C. 479; *Dickerson v. Waldo*, 13 Okla. 189, 74 Pac. 505; *Diehl v. Evans*, 1 Serg. & R. 367; *McHale v. McDonnell*, 175 Pa. 632, 34 Atl. 966; *Waller v. Liles*, 96 Tex. 21, 70 S. W. 17; *Ortell v. Chicago, M. & St. P. R. Co.* 89 Wis. 127, 61 N. W. 289; *Pautz v. Plankinton Packing Co.* 118 Wis. 47, 94 N. W. 654; *Haas v. Chicago & N. W. R. Co.* 41 Wis. 44; *McBride v. Union P. R. Co.* 3 Wyo. 247, 21 Pac. 687.

² *Carman v. Ross*, 64 Cal. 249, 29 Pac. 510.

³ *Ruffin v. Paris*, 75 Ga. 653.

(4) *Subdivision of issues*.—In framing a special verdict, issues that are single should not be subdivided and covered by several questions.¹ Nor should they be submitted in various forms.² It is the purpose of a special verdict to obtain the findings of the jury upon the material, controverted issues in answer to a few questions, rather than in answer to many.³ A special verdict should be composed only of a sufficient number of questions to cover singly the material issues controverted on the evidence.⁴ Thus, submission of thirty-eight questions to be answered in the form of a special verdict in a case involving only two or three simple issues is open to criticism, as tending to confuse and mislead the jury.⁵

¹ *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816; *Cullen v. Hanisch*, 114 Wis. 24, 89 N. W. 900; *Cushman v. Masterson*, — Tex. Civ. App. —, 64 S. W. 1031.

² *Byington v. Merrill*, 112 Wis. 211, 88 N. W. 26.

³ *Ward v. Chicago, M. & St. P. R. Co.* 102 Wis. 215, 78 N. W. 442; *Haley v. Jump River Lumber Co.* 81 Wis. 412, 51 N. W. 321, 956; *Freedman v. New York, N. H. & H. R. Co.* 81 Conn. 601, 71 Atl. 901, 15 A. & E. Ann. Cas. 464.

⁴ Howard v. Beldenville Lumber Co. 129 Wis. 98, 108 N. W. 48.

⁵ Fromer v. Stanley, 95 Wis. 56, 69 N. W. 820.

(5) *Clearness and directness.*—While irrelevant and unwarranted conclusions may be disregarded in drawing the legal conclusions from a special verdict, and in pronouncing judgment, the party having the burden of proof on any issue is entitled to have a finding thereon, which is clear, certain, and unambiguous.¹ And a special verdict will not support a judgment when it cannot certainly be determined from it what the jury intended.² So, the interrogatories should present the main issues clearly and fully to the jury, so that their verdict shall unmistakably speak the exact amount due from one party to the other.³ And a verdict in an action in which various questions were submitted to the jury, wherein several of the questions were answered by saying: "We do not know," and "Unknown to us," is not a verdict upon which a decree can be based, and a new trial should be allowed.⁴ And answers to interrogatories which are important and material, that "We think not," or "We think it was," are insufficient to support the judgment.⁵ And a special verdict finding that the material allegations in plaintiff's complaint and replication are true, and those in the defendant's answer are not true, is insufficient where there is nothing to show what allegations are material and what are not.⁶ Specific statements in special findings, however, are not to be controlled or modified by inferences suggested by uncertain or equivocal expressions.⁷ And an answer to an interrogatory, "In our opinion it did," is not rendered indistinct and uncertain by the use of the word "opinion."⁸ Nor is a finding that a train was supposed to have been derailed by coming in contact with ice, and the giving way of the ties, rendered objectionable by the use of the word "supposed."⁹

¹ Wysong v. Nealis, 13 Ind. App. 165, 41 N. E. 388.

² Scottish-American Mortg. Co. v. Scripture, — Tex. Civ. App. —, 40 S. W. 210; Devine v. United States Mortg. Co. — Tex. Civ. App. —, 48 S. W. 585; State v. Blue, 84 N. C. 807; Cotzhausen v. Simon, 47 Wis. 103, 1 N. W. 473.

³ Lake v. Hardee, 57 Ga. 459; Mussina v. Goldthwaite, 34 Tex. 132, 7 Am. Rep. 281; Reffke v. Patten Paper Co. 136 Wis. 535, 117 N. W. 1004.

⁴Cooper v. Branch, 86 Ga. 234, 12 S. E. 808; Larsen v. Leonardt, 8 Cal. App. 226, 96 Pac. 395.

⁵Hopkins v. Stanley, 43 Ind. 553.

⁶Breeze v. Doyle, 19 Cal. 101.

⁷Sneed v. Sabinal Min. & Mill. Co. 20 C. C. A. 230, 34 U. S. App. 688, 73 Fed. 925.

⁸Cincinnati v. Johnson, 7 Ohio C. C. N. S. 167, 28 Ohio C. C. 377.

⁹Scagel v. Chicago, M. & St. P. R. Co. 83 Iowa, 380, 49 N. W. 990.

For other cases as to definiteness and certainty of special verdict, see note in 24 L.R.A.(N.S.) 46.

m. Formal conclusion.—It is proper practice for a special verdict to contain a formal conclusion, such as, "if, upon the facts found, the law is with the plaintiff, then we find for the plaintiff; if the law is with the defendant, then we find for the defendant."¹ But the prevailing, if not the universal, rule, now seems to be that, where the facts are properly stated in a special verdict, the omission of mere formal statements or the usual formal conclusion will not vitiate it.² So, though a special verdict is defective as such, because it does not contain a conditional conclusion, still, where it was certified by the parties to be correct, and was entered of record, it may be regarded as an agreed statement of facts.³

¹Bower v. Bower, 146 Ind. 393, 45 N. E. 595; State v. Nies, 107 N. C. 820, 12 S. E. 443; Hall v. Ratliff, 93 Va. 327, 24 S. E. 1011.

²Louisville, N. A. & C. R. Co. v. Lucas, 119 Ind. 583, 6 L.R.A. 193, 21 N. E. 968; Helwig v. Beckner, 149 Ind. 131, 46 N. E. 644, 48 N. E. 788; Bower v. Bower, 146 Ind. 393, 45 N. E. 595; Hendrickson v. Walker, 32 Mich. 68; State v. Spray, 113 N. C. 686, 18 S. E. 700; Imperial F. Ins. Co. v. Kiernan, 83 Ky. 468.

³Mumford v. Wardwell, 6 Wall. 423, 18 L. ed. 756. See also note in 24 L.R.A.(N.S.) 57.

n. Effect of omission to find.—What is not found in a special verdict is presumed not to exist.¹ And this is so although the circumstances stated may warrant the inference of matter omitted.² A special verdict which omits to find upon an issue will not support a judgment on such issue.³ Where a special verdict or a special finding is silent upon an issue, it is equivalent to a finding upon that issue against the party who has the

burden of the issue.⁴ Such failure of a special verdict to find material facts is not a cause for a venire de novo.⁵ Where a special verdict or finding is silent upon any issue, it will be presumed that there was no evidence to support such issue.⁶

¹ *Kelchner v. Nanticoke*, 209 Pa. 412, 58 Atl. 851; *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15; *Belshaw v. Chitwood*, 141 Ind. 377, 40 N. E. 908; *State v. Burdon*, 38 La. Ann. 357; *Lawrence v. Beaubien*, 2 Bail. L. 623, 23 Am. Dec. 155.

² *Loew v. Stocker*, 61 Pa. 347.

³ *Dodd v. Gaines*, 82 Tex. 429, 18 S. W. 618; *Cleveland, C. C. & St. L. R. Co. v. Moneyhun*, 146 Ind. 147, 34 L.R.A. 141, 44 N. E. 1106; *Noblesville Gas & Improv. Co. v. Loehr*, 124 Ind. 79, 24 N. E. 579.

⁴ *Spraker v. Armstrong*, 79 Ind. 577; *Jones v. Baird*, 76 Ind. 164; *Archibald v. Long*, 144 Ind. 451, 43 N. E. 439; *Louisville, N. A. & C. R. Co. v. Hart*, 119 Ind. 273, 4 L.R.A. 549, 21 N. E. 753; *Louisville, N. A. & C. R. Co. v. Buck*, 116 Ind. 566, 2 L.R.A. 520, 9 Am. St. Rep. 883, 19 N. E. 453; *Dennis v. Louisville, N. A. & C. R. Co.* 116 Ind. 42, 1 L.R.A. 448, 18 N. E. 179; *Hayes v. Smith*, 15 Ohio C. C. 300, 8 Ohio C. D. 92; *Tuigg v. Treacy*, 14 Pittsb. L. J. N. S. 226; *Reeves v. Chicago, M. & St. P. R. Co.* 24 S. D. 84, 123 N. W. 498.

⁵ *Meyer v. Green*, 21 Ind. App. 138, 69 Am. St. Rep. 344, 51 N. E. 942; *Glantz v. South Bend*, 106 Ind. 305, 6 N. E. 632.

⁶ *Heiney v. Lontz*, 147 Ind. 417, 46 N. E. 665; *Fisher v. Louisville, N. A. & C. R. Co.* 146 Ind. 558, 45 N. E. 689; *Johnson v. Putnam*, 95 Ind. 57. See also note in 24 L.R.A.(N.S.) 58.

7. Preparation, construction, and effect of verdict.

a. The formal preparation.—A special verdict must be made up by a submission to the jury of a sufficient number of questions to cover singly every material fact in issue under the pleadings, which is in dispute on the evidence.¹ And each question submitted to a jury for a special verdict should be limited to a single, direct, and controverted issue of fact, and should be so stated that the answer will necessarily be positive, direct, and intelligible.² So, interrogatories should, whenever possible, be so framed as to call for categorical answers.³ And a special verdict should be so worded that each question, so far as practicable, shall be susceptible of an affirmative or negative answer.⁴

But there is no uniform practice determining the mode of forming and submitting special issues to a jury.⁵ Either party may request the court to direct the jury to find upon particular

questions of fact.⁶ But a mere request by one party that certain specific questions, and no others, be submitted for a special verdict, is not sufficient to require the court to make such submission.⁷ And the court is not required to direct a special verdict when not so requested by either party.⁸ And where the jury in an action is instructed by the court to return a special verdict, either party has the right, under the supervision of the court, to submit to the jury a draft of a special verdict embracing the facts in the case which he believes the evidence tends to prove.⁹ But it is proper for the trial court to revise interrogatories submitted by the parties, and to prepare and propound for itself proper interrogatories to the jury.¹⁰ Usually, the formal preparation of a special verdict is made by counsel of the parties, and it is usually settled by them subject to the correction of the court, and after it is arranged and reduced to form, it is then entered on the record.¹¹ The failure of the foreman of the jury to sign a special finding is not such an irregularity as to affect any substantial rights of the parties.¹²

The jury to whom a draft special verdict is submitted may modify it or frame one themselves,¹³ and should be instructed that they may do so.¹⁴

¹ *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644; *Knowlton v. Milwaukee City R. Co.* 59 Wis. 278, 18 N. W. 17; *Werner v. Chicago & N. W. R. Co.* 105 Wis. 300, 81 N. W. 416; *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 416.

² *Jewell v. Chicago, St. P. & M. R. Co.* 54 Wis. 610, 41 Am. Rep. 63, 12 N. W. 83; *Union Cent. L. Ins. Co. v. Hollowell*, 20 Ind. App. 150, 50 N. E. 399.

³ *Morbey v. Chicago & N. W. R. Co.* 116 Iowa, 84, 89 N. W. 105; *Freedman v. New York, N. H. & H. R. Co.* 81 Conn. 601, 71 Atl. 901, 15 A. & E. Ann. Cas. 464.

⁴ *Howard v. Beldenville Lumber Co.* 129 Wis. 98, 108 N. W. 48; *Hallum v. Omro*, 122 Wis. 337, 99 N. W. 1051.

⁵ *Heflin v. Burns*, 70 Tex. 347, 8 S. W. 48.

⁶ *Foster v. Turner*, 31 Kan. 58, 1 Pac. 145.

⁷ *Fenelon v. Butts*, 53 Wis. 344, 10 N. W. 501.

⁸ *Ibid.*; *J. I. Case Threshing Mach. Co. v. Fisher*, 144 Iowa, 45, 122 N. W. 575.

⁹ *Lake Shore & M. S. R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246; *Louisville, N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488, 3 Am. St. Rep. 674, 14 N. E. 370; *Heflin v. Burns*, 70 Tex. 347, 8 S. W. 48.

- ¹⁰ Louisville, N. A. & C. R. Co. v. Worley, 107 Ind. 320, 7 N. E. 215; Chicago & A. R. Co. v. Pearson, 184 Ill. 386, 56 N. E. 633.
- ¹¹ Suydam v. Williamson, 20 How. 441, 15 L. ed. 983; Munford v. Wardwell, 6 Wall. 423, 18 L. ed. 756; Foster v. Turner, 31 Kan. 58, 1 Pac. 145.
- ¹² Cincinnati v. Johnson, 7 Ohio C. C. N. S. 167, 28 Ohio C. C. 377.
- ¹³ Pittsburgh, Ft. W. & C. R. Co. v. Ruby, 38 Ind. 294, 310, 10 Am. Rep. 111 (*dictum*); Hopkins v. Stanley, 43 Ind. 553, 558 (so held even under the Indiana statute, which gives each party the right to demand a special verdict).
- ¹⁴ Miller v. Shackelford, 4 Dana, 264, 270. But if their finding is not sufficiently definite the court may require them to amend it. Kansas P. R. Co. v. Pointer, 14 Kan. 37, 51.
- The court may properly direct the jury as to the form of their general verdict after they have found all the issuable facts. Doran v. Ryan, 81 Wis. 63, 51 N. W. 259.

The form of a special verdict is largely in the discretion of the trial court.¹ And one which covers the issues will not be disturbed because of objection to its form.² And a refusal to submit questions for a special verdict in the form in which they are proposed is not error, if they are substantially and intelligibly submitted in other forms.³

- ¹ Pratt v. Peck, 65 Wis. 463, 27 N. W. 180; McLimans v. Lancaster, 63 Wis. 596, 23 N. W. 689; Hoppe v. Chicago, M. & St. P. R. Co. 61 Wis. 357, 21 N. W. 227; Freedman v. New York, N. H. & H. R. Co. 81 Conn. 601, 71 Atl. 901, 15 A. & E. Ann. Cas. 464; Louisville, N. A. & C. R. Co. v. Flanagan, 113 Ind. 488, 3 Am. St. Rep. 674, 14 N. E. 370; Keane v. Seattle, 55 Wash. 622, 104 Pac. 819.

In practice, the formal preparation of a special verdict is made by the counsel for the parties, and it is usually settled by them, subject to the correction of the court, according to the state of facts as found by the jury, with respect to all particulars on which they have passed, and with respect to other particulars, according to the state of facts which it is agreed they ought to find upon the evidence before them. After the special verdict is arranged and it is reduced to form, it is then entered on the record, together with the other proceedings in the cause, and the questions of law arising on the facts found are then decided by the court, as in case of a demurrer; and if either party is dissatisfied with the decision, he may resort to a court of error, where nothing is open for revision except the question of law inferentially arising on the facts stated in the general verdict. Suydam v. Williamson, 20 How. 427, 15 L. ed. 978. And ordinarily no com-

petent or careful attorney would neglect so important a matter as this. *Louisville, N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488, 14 N. E. 370.

But the verdict proposed should fairly cover and include all the controverted issues, and be reasonably specific. *Hoppe v. Chicago, M. & St. P. R. Co.* 61 Wis. 358, 21 N. W. 227; *McLimans v. Lancaster*, 63 Wis. 604, 23 N. W. 689. Otherwise there must necessarily be a failure to determine such issues and the result must be a mistrial. *Pratt v. Peck*, 65 Wis. 463, 27 N. W. 180. But the court should not be required to prepare the verdict. *Case v. Ellis*, 4 Ind. App. 224, 31 N. E. 917.

It should not be in the form of interrogatories submitted to the jury and their answers thereto. *Hall v. Ratliff*, 93 Va. 327, 24 S. E. 1011.

In Indiana, however, the legislature changed the practice as it formerly existed, of permitting the court to submit to the jury two special verdicts drafted by the respective parties in a narrative form, leaving the jurors to accept and return the one which they considered the evidence sustained (see *Hopkins v. Stanley*, 43 Ind. 558, for the former rule), and now requires that a special verdict shall be framed by the means of interrogatories, each of which is to be answered by the jury, under the evidence, and each to be so framed as to require the finding thereon to embrace but a single fact. The statute as amended directs that counsel on either side shall prepare such special verdict, meaning and intending that counsel on each side shall prepare such a number of interrogatories as may be necessary to cover all of the facts material to the issues in the action, all of which interrogatories are to be submitted to the court, subject to its change, modification, and final approval. When so approved, the court causes them to be numbered, not in separate sets, but as an entirety from one to the close, and submit them to the jury with the instruction that each be answered and all returned as a special verdict in the cause. *Bower v. Bower*, 146 Ind. 393, 45 N. E. 595.

So, also, in Wisconsin, a special verdict is in the form of interrogatories submitted to the jury to be answered by them. *Sanborn & B. Stat. (Wis.)* § 2858. Compare other Codes and statutes on this question.

²*Lindner v. St. Paul F. & M. Ins. Co.* 93 Wis. 526, 67 N. W. 1125. As where it is inartificially worded. *Fenn v. Blanchard*, 2 Yeates, 543.

Nor is the formal conclusion, finding in the alternative on the facts found, necessary to the validity of a special verdict otherwise unobjectionable. *Helwig v. Beckner*, 149 Ind. 131, 46 N. E. 644, 48 N. E. 788; *Bower v. Bower*, 146 Ind. 393, 45 N. E. 595, and cases cited; *Hendrickson v. Walker*, 32 Mich. 68. Although it is proper for the court in case of such omission to send the jury back with instructions to add the proper formal conclusion. *Toler v. Keiher*, 81 Ind. 383.

And it is no objection that a special verdict, after finding the facts
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upon which it calls for the application of the law for the plaintiff, makes a further finding of fact before asking for the conclusion of law for defendant. *Evansville & T. H. R. Co. v. Taft*, 2 Ind. App. 237, 28 N. E. 443.

- ³ *Reed v. Madison*, 85 Wis. 667, 56 N. W. 182; *Berg v. Chicago, M. & St. P. R. Co.* 50 Wis. 419, 7 N. W. 347; *Rowley v. Chicago, M. & St. P. R. Co.* 135 Wis. 208, 115 N. W. 865; *Heflin v. Burns*, 70 Tex. 347, 8 S. W. 48.

b. Instruction of jury as to.—Instructions to the jury in respect to questions for a special verdict should be directed there to specifically, and be confined to such explanation thereof and the law in respect thereto as to enable the jury to answer them intelligently, having regard to the burden of proof, care being exercised not to suggest as to any question the effect of the answer thereto upon the ultimate rights of either party.¹ And where a special verdict is requested, no instructions are proper except such as are necessary to inform the jury as to the issues made by the pleadings, the rules for weighing and reconciling testimony, and who has the burden of proof as to the facts to be found, and whatever else may be necessary to enable the jury clearly to understand their duties concerning such special verdict and the facts to be found therein.² When a special verdict is taken, general instructions on any subject involved should not be given.³ And instructions regarding the effect of an answer or the answers as a whole should not be given.⁴ The jury may be instructed, however, as to the nature of the action, the issues, the form of the verdict, and their general duties.⁵ So, the trial judge may properly admonish the jury to make their answers to the several questions submitted consistent with one another.⁶ So, questions of law may arise in the process of investigation, requiring special instructions by the court.⁷ And it is error for the court to refuse proper instructions as to the measure of damages, provided all legal rules relative to the request for and submission of such instructions are complied with.⁸

¹ *Schrunk v. St. Joseph*, 120 Wis. 223, 97 N. W. 946.

² *Udell v. Citizens' Street R. Co.* 152 Ind. 507, 71 Am. St. Rep. 336, 52 N. E. 799; *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594.

- ³ *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816; *Goesel v. Davis*, 100 Wis. 678, 76 N. W. 768; *Reed v. Madison*, 85 Wis. 667, 56 N. W. 182; *Louisville, N. A. & C. R. Co. v. Hart*, 119 Ind. 273, 4 L.R.A. 549, 21 N. E. 753; *Bower v. Bower*, 146 Ind. 393, 45 N. E. 595; *Morrison v. Lee*, 13 N. D. 591, 102 N. W. 223; *Cole v. Crawford*, 69 Tex. 126, 5 S. W. 646.
- ⁴ *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644; *Missinskie v. McMurdo*, 107 Wis. 578, 83 N. W. 758; *Bottoms v. Seaboard & R. R. Co.* 109 N. C. 72, 13 S. E. 738; *Morrison v. Lee*, 13 N. D. 591, 102 N. W. 223.
- ⁵ *Louisville, N. A. & C. R. Co. v. Hart*, 119 Ind. 273, 4 L.R.A. 549, 21 N. E. 753.
- ⁶ *Hoppe v. Chicago, M. & St. P. R. Co.* 61 Wis. 357, 21 N. W. 227.
- ⁷ *Paducah & L. E. R. Co. v. Letcher*, 5 Ky. L. Rep. 252.
- ⁸ *Western U. Teleg. Co. v. Newhouse*, 6 Ind. App. 422, 33 N. E. 800. For instruction to jury as to, see also note in 24 L.R.A.(N.S.) 62.

c. Union of special with general verdict.—The rule has been laid down in a Federal court that a special verdict, however constructed, should state all the facts essential to the determination of the issues of the case, and should not be accompanied by a general verdict, and that a judge may properly refuse to require a jury to answer special interrogatories in addition to returning a general verdict.¹ And a state law that a judge shall require the jury to answer special interrogatories in addition to their general verdict has no application to the courts of the United States.² The right of state courts to order and render special verdicts would seem to depend upon statutory provisions; but it seems to be the general, if not universal, practice to permit them, unless the statute is so worded as to effect a prohibition.³ And a statute authorizing special findings of fact by a jury, and providing for judgment upon them if they are inconsistent with the general verdict, does not violate the constitutional right of trial by jury.⁴

¹ *Daube v. Philadelphia & R. Coal & I. Co.* 23 C. C. A. 420, 46 U. S. App. 591, 77 Fed. 713.

² *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *McElwee v. Metropolitan Lumber Co.* 16 C. C. A. 233, 37 U. S. App. 266, 69 Fed. 302.

³ See cases in note in 24 L.R.A.(N.S.) 64.

⁴ Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421.

The general rule is that, when a special verdict or special findings of fact by a jury, taken and construed together, are irreconcilable and inconsistent with their general verdict, the former must control the latter, and the courts shall give judgment accordingly on the special verdict or findings, notwithstanding the general verdict.¹ When a general verdict is found, and particular questions of fact are also answered by the jury, however, the general verdict decides all the issues, and if the findings upon the particular questions are not inconsistent therewith, judgment follows the general verdict.² To entitle a party to a judgment upon a special verdict, against a general verdict in favor of the other party, the special findings must be irreconcilably inconsistent with the general verdict.³ And where a general verdict is rendered and also a special verdict or answers to interrogatories, no presumption can be indulged in favor of the special verdict or answers to the interrogatories, but all reasonable presumptions will be indulged to sustain the general verdict.⁴

To entitle a party having the burden of proof to a judgment upon a special verdict, notwithstanding a general verdict in favor of the other party, the special findings must of themselves, or when taken together with the facts admitted by the pleadings, be sufficient to establish or defeat, as the case may be, the right to recover.⁵

And where the facts specially found in a verdict, when construed together, are manifestly inconsistent with each other, and contradictory and uncertain in their meaning, such special findings of fact will not control the general verdict, though they are inconsistent, but the latter must stand, and judgment must be rendered without regard to the special findings of the jury.⁶ Nor can judgment *non obstante veredicto* be given for either party, where the special verdict is inconsistent and contradictory, until the conflicting portions of it are set aside.⁷

¹ Grand Rapids & I. R. Co. v. McAnnally, 98 Ind. 412; Morford v. Chicago, I. & L. R. Co. 158 Ind. 494, 63 N. E. 857; Warring v. Freear, 64 Cal. 54, 28 Pac. 115; Simmons v. Hamilton, 56 Cal. 493; Stanley v. Atchison, T. & S. F. R. Co. 78 Kan. 87, 96 Pac. 34; Missouri, K. &

- T. R. Co. v. Bussey, 66 Kan. 735, 71 Pac. 261; Severy v. Chicago, R. I. & P. R. Co. 6 Okla. 153, 50 Pac. 162; Reeves v. Chicago, M. & St. P. R. Co. 24 S. D. 84, 123 N. W. 498; Davis v. Farmington, 42 Wis. 425; Lemke v. Chicago, M. & St. P. R. Co. 39 Wis. 449.
- ² Eisemann v. Swan, 6 Bosw. 668; M'Michen v. Amos, 4 Rand. (Va.) 134.
- ³ Hardin v. Branner, 25 Iowa, 364; Tate v. Missouri P. R. Co. 143 Ill. App. 289; Hershman v. Hershman, 63 Ind. 451; Thompson v. Cincinnati, L. & C. R. Co. 54 Ind. 197; Wabash R. Co. v. Keister, 163 Ind. 609, 67 N. E. 521.
- ⁴ Jeffersonville v. Gray, 165 Ind. 26, 74 N. E. 611; Union Traction Co. v. Vandercook, 32 Ind. App. 621, 69 N. E. 486; Central Union Teleph. Co. v. Fehring, 146 Ind. 189, 45 N. E. 64; Chicago & N. W. R. Co. v. Dunleavy, 129 Ill. 132, 22 N. E. 15.
- ⁵ Hardin v. Branner, 25 Iowa, 364; Rice v. Evansville, 108 Ind. 7, 58 Am. Rep. 22, 9 N. E. 139; McCoy v. Kokomo R. & Light Co. 158 Ind. 662, 64 N. E. 92; Louisville & N. R. Co. v. Brice, 84 Ky. 298, 1 S. W. 483.
- ⁶ Redelsheimer v. Miller, 107 Ind. 485, 8 N. E. 447; Wabash R. Co. v. Savage, 110 Ind. 156, 9 N. E. 85; St. Louis & S. F. R. Co. v. Brieker, 61 Kan. 224, 59 Pac. 268; Stanley v. Atchison, T. & S. F. R. Co. 78 Kan. 87, 96 Pac. 34.
- ⁷ Conroy v. Chicago, St. P. M. & O. R. Co. 96 Wis. 243, 38 L.R.A. 419, 70 N. W. 486. For union of special with general verdict, see also note in 24 L.R.A.(N.S.) 64.

d. Construction.—A special verdict should be construed reasonably and fairly, giving no heed to slight defects and subtle and refined distinctions, and giving no aid by intendment or inferences other than those which necessarily follow.¹ And in construing a special verdict, the court should look to the entire verdict, and not to isolated or detached parts of it.² All the parts should be considered together with a view to harmonize them, and if this is possible without violating the apparent sense of any material finding when so compared with all other parts of the verdict, there is no such ambiguity as will render the verdict insufficient to sustain a judgment.³ And facts gathered from several findings of a special verdict, although not stated in logical or consecutive order, must be considered as an entirety, and not in fragmentary parts.⁴ So, findings of fact in special verdicts must be fairly construed with reference to the pleadings and the manifest intention of the trial court.⁵ The true meaning of the jury is to be sought for, and the verdict

is not to be construed with the strictness applicable to pleadings, but liberally and with a view that it shall stand rather than fall.⁶ So, it is the duty of the court to harmonize the special findings with the general verdict in support of the judgment rendered, if possible.⁷ However, it is error for the court to assume a fact about which the evidence is conflicting, and fail to submit to the jury the issue relative to such fact.⁸ And courts are confined to the facts found in a special verdict,⁹ and cannot resort to the evidence to supply substantial omissions.¹⁰ A special verdict will be construed most strongly against the party having the burden of proof.¹¹ And where a finding, regarded either by itself or in the light of other findings, is not specific and certain, and the jury is discharged without any objection to it, or any effort to have it made specific and certain, it will thereafter be construed against the party in whose favor it was found.¹²

¹ Becknell v. Hosier, 10 Ind. App. 5, 37 N. E. 580; Keller v. Gaskill, 20 Ind. App. 502, 50 N. E. 363; Branson v. Studabaker, 133 Ind. 147, 33 N. E. 98; Woodward v. Davis, 127 Ind. 172, 26 N. E. 687; Pullman Palace Car Co. v. Gaylord, 9 Ky. L. Rep. 58; Mayo v. Keaton, 78 Ga. 125, 2 S. E. 687; Cobb v. Wise, 71 Ga. 103.

² Voris v. Star City Bldg. & L. Asso. 20 Ind. App. 630, 50 N. E. 779; Tate v. Missouri P. R. Co. 143 Ill. App. 289.

³ Keller v. Gaskill, 20 Ind. App. 502, 50 N. E. 363; Branson v. Studabaker, 133 Ind. 147, 33 N. E. 98; Alhambra Addition Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379; Fenn v. Blanchard, 2 Yeates, 543.

⁴ Louisville, N. A. & C. R. Co. v. Lynch, 147 Ind. 165, 34 L.R.A. 293, 44 N. E. 997, 46 N. E. 471.

⁵ Fenske v. Nelson, 74 Minn. 1, 76 N. W. 785; Everit v. Walworth County Bank, 13 Wis. 420.

⁶ Miller v. Shackleford, 4 Dana, 274.

⁷ Missouri, K. & T. R. Co. v. Bussey, 66 Kan. 735, 71 Pac. 261.

⁸ Kilgore v. Moore, 14 Tex. Civ. App. 20, 36 S. W. 317.

⁹ Fenn v. Blanchard, 2 Yeates, 543; McCormick v. Royal Ins. Co. 163 Pa. 184, 29 Atl. 747; Loew v. Stocker, 61 Pa. 347.

¹⁰ Louisville, N. A. & C. R. Co. v. Quinn, 14 Ind. App. 554, 43 N. E. 240; Mayo v. Keaton, 78 Ga. 125, 2 S. E. 687; Cobb v. Wise, 71 Ga. 103.

¹¹ Louisville, N. A. & C. R. Co. v. Costello, 9 Ind. App. 462, 36 N. E. 299.

¹² Kansas P. R. Co. v. Pointer, 14 Kan. 37.

For other cases as to construction of special verdict, see note in 24 L.R.A. (N.S.) 70.

8. Correction of verdict.

a. By rejection of surplusage.—Where there is enough in a special verdict to authorize a judgment, other facts insufficient, but not inconsistent, may be regarded as surplusage.¹ And probative facts or conclusions of law contained in the findings must be totally disregarded by the court when it comes to scrutinize the legal value of the facts found.² Where a special verdict includes findings of evidence, conclusions of law, or matters outside the issues, such findings will be disregarded, and if the verdict, stripped of such superfluities, is still sufficient to support a judgment either way under the issues, a motion for a venire de novo will be overruled.³

¹ Miller v. Shackelford, 4 Dana, 274.

² Ginn v. Myrick, 3 Ohio N. P. N. S. 448, 16 Ohio S. & C. P. Dec. 558.

³ Pittsburgh, C. & St. L. R. Co. v. Adams, 105 Ind. 151, 5 N. E. 187; Reeves v. Grottendick, 131 Ind. 107, 30 N. E. 889; Paxton v. Vincennes Mfg. Co. 20 Ind. App. 253, 50 N. E. 583; Wysong v. Nealis, 13 Ind. App. 165, 41 N. E. 388; Ginn v. Myrick, 3 Ohio N. P. N. S. 448, 16 Ohio S. & C. P. Dec. 558.

b. By amendment.—The trial court may at any time, by amendment, correct a clerical error in a verdict to make it conform to the real issue which has been submitted to the jury, and the power to do so is not limited to the period before the verdict has been returned by the jury.¹ And if important, undisputed facts are omitted by mistake from a special verdict, or are incorrectly recited therein, the court may, upon full proof thereof, so amend or mold the verdict as to make it conform to the undisputed facts.² So, where any one of the findings of a special verdict is not specific and certain, either party may require that it be made so before the jury is discharged.³ And where there are two or more issues in an action, and a verdict is found as to some issues, but is silent as to others, the verdict is amendable, if, by the certificate of the judge, it shall appear that there was no other matter in trial except what is embraced in the issues on which the verdict is sufficient, and this may be corrected even pending a writ of error.⁴ So, if the in-

consistency between the findings arises from a mistake in framing the question submitted to the jury, the proper course is to amend the questions so as to conform to the true intention.⁵ A verdict may be amended by the judge's notes in the appellate court after error brought and joinder in error.⁶ And where the verdict is sufficient in substance to conclude the parties upon the issues tried, the appellate court may make it right and give it appropriate words by amending the transcript and ordering the record below to be corrected.⁷ And in a civil case it may be amended by the notes of the clerk of assize.⁸ But a special verdict cannot be amended by the minutes of the judge without the consent of both parties.⁹ So, where there is the slightest doubt as to what transpired on the trial, or if any exists that the whole case has been disposed of by the court and jury, an amendment to a special verdict should not be allowed.¹⁰ And a material finding in favor of the plaintiff cannot be stricken from the record, and a judgment rendered for defendant, where there is any evidence to support it.¹¹ Nor can a material finding in a special verdict be amended by the court, and a different one, in whole or in part, substituted for it, though there is evidence to support it.¹² And the omission of a jury to find a verdict on one of the issues joined in a case cannot be corrected on writ of error.¹³

¹ *Acton v. Dooley*, 16 Mo. App. 441.

² *McCormick v. Royal Ins. Co.* 163 Pa. 184, 29 Atl. 747; *Crich v. Williamsburg City F. Ins. Co.* 45 Minn. 441, 48 N. W. 198.

³ *Kansas P. R. Co. v. Pointer*, 14 Kan. 37.

⁴ *Clark v. Lamb*, 6 Pick. 516; *Jones v. Kennedy*, 11 Pick. 125.

⁵ *McHale v. McDonnell*, 175 Pa. 632, 34 Atl. 966.

⁶ *Clark v. Lamb*, 8 Pick. 415, 19 Am. Dec. 332; *Walker v. Dewing*, 8 Pick. 520; *Petrie v. Hannay*, 3 T. R. 659.

⁷ *Burhans v. Tibbits*, 7 How. Pr. 21.

⁸ *R. v. Keat*, 1 Salk. 47.

⁹ *Walker v. Dewing*, 8 Pick. 520.

¹⁰ *Burhans v. Tibbits*, 7 How. Pr. 21.

¹¹ *Conroy v. Chicago, St. P. M. & O. R. Co.* 96 Wis. 243, 38 L.R.A. 419, 70 N. W. 486.

¹² *Sheehy v. Duffy*, 89 Wis. 6, 61 N. W. 295.

¹³ *Middleton v. Quigley*, 12 N. J. L. 352.

c. By venire de novo.—It is only where a special verdict is defective in form, as distinguished from substance, that it will be remedied by venire de novo, which is a process by which the verdict is sent back to the same jury for re-examination and correction.¹ And a motion for a venire de novo will not be sustained except where there is some defect, uncertainty, or ambiguity upon the face of the verdict, rendering it so defective that judgment cannot be rendered upon it.² So, a verdict which finds the substance of the issues, and is free from uncertainty and ambiguity, and assesses damages, and is not so defective as to prevent the rendition of judgment thereon, is not subject to a venire de novo.³ But where a special verdict is so ambiguous or uncertain that the court cannot say for what party judgment ought to be given, a venire de novo ought to be awarded.⁴ And this is so although there is sufficient evidence to establish the facts not distinctly found.⁵ And a motion for a venire de novo is proper where there is a failure to assess damages,⁶ or where the special verdict omits to find the facts,⁷ or where the finding was of less than the whole matter put in issue.⁸ And where the facts found show that there were other facts touching which there was evidence, the proof of which is not negatived by the finding, the court should award a venire de novo.⁹ So, if, instead of the facts which ought to have been found by special verdict, it states only matters of evidence in relation thereto, the remedy is by motion for a venire de novo.¹⁰

A jury cannot be required to reconsider a verdict, however, when the one offered was a plain and explicit response upon the issues submitted.¹¹ And this is so though the finding embraces more than is necessary.¹² So, that a special verdict contains no finding upon particular matters of fact in issue is not sufficient ground for a venire de novo.¹³

¹ *Citizens' Bank v. Bolen*, 121 Ind. 301, 23 N. E. 146; *Reeves v. Grotten-dick*, 131 Ind. 107, 30 N. E. 889.

² *Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 582; *Hadley v. Lake Erie & W. R. Co.* 21 Ind. App. 675, 51 N. E. 337; *Heckelman v. Rupp*, 85 Ind. 286; *Central Union Teleph. Co. v. Fehring*, 146 Ind. 189, 45 N. E. 64; *Bartley v. Phillips*, 114 Ind. 189, 16 N. E. 508; *Brown v. Ralston*, 4 Rand. (Va.) 504.

³ *Hershman v. Hershman*, 63 Ind. 451; *Louisville, N. A. & C. R. Co. v.*

- Flanagan, 113 Ind. 488, 3 Am. St. Rep. 674, 14 N. E. 370; Wabash County v. Pearson, 120 Ind. 426, 16 Am. St. Rep. 325, 22 N. E. 134.
- ⁴ Bellows v. Hallowell & A. Bank, 2 Mason, 31, Fed. Cas. No. 1,279; Ward v. Cochran, 150 U. S. 597, 37 L. ed. 1195, 14 Sup. Ct. Rep. 230; Stodder v. Powell, 1 Stew. (Ala.) 287; Spraker v. Armstrong, 79 Ind. 577; Bosseker v. Cramer, 18 Ind. 44; Cincinnati & C. R. Co. v. Washburn, 25 Ind. 259; Graham v. Bayne, 18 How. 60, 15 L. ed. 265; Prentice v. Zane, 8 How. 484, 12 L. ed. 1166; Barnes v. Williams, 11 Wheat. 415, 6 L. ed. 508.
- ⁵ Ward v. Cochran, 150 U. S. 597, 37 L. ed. 1195, 14 Sup. Ct. Rep. 230; Barnes v. Williams, 11 Wheat. 415, 6 L. ed. 508.
- ⁶ Brickley v. Weghorn, 71 Ind. 497; Bosseker v. Cramer, 18 Ind. 44; Smith v. Jeffries, 25 Ind. 378; Whitworth v. Ballard, 56 Ind. 279.
- ⁷ Seward v. Jackson, 8 Cow. 406.
- ⁸ Bosseker v. Cramer, 18 Ind. 44; Smith v. Jeffries, 25 Ind. 378; Housworth v. Bloomhuff, 54 Ind. 487; Whitworth v. Ballard, 56 Ind. 279; Jenkins v. Parkhill, 25 Ind. 473.
- ⁹ Sewall v. Glidden, 1 Ala. 52.
- ¹⁰ Jones v. Baird, 76 Ind. 164; Dixon v. Duke, 85 Ind. 434; Parker v. Hubble, 75 Ind. 580; Boyer v. Robertson, 144 Ind. 604, 43 N. E. 879; Cherry v. Slade, 7 N. C. (3 Murph.) 82; Graham v. Bayne, 18 How. 60, 15 L. ed. 265.
- ¹¹ State v. Arrington, 7 N. C. (3 Murph.) 571.
- ¹² Dehority v. Nelson, 56 Ind. 414.
- ¹³ Evansville & T. H. R. Co. v. Taft, 2 Ind. App. 237, 28 N. E. 443.

d. By new trial.—The proper practice when a special verdict is insufficient, insensible, or in violent antagonism to the evidence, is to set it aside and grant a new trial.¹ So, where a special verdict or finding does not cover all the issues in a case, or all the facts involved in any of the issues, the remedy is by a motion for a new trial,² and not by motion for a venire de novo.³ And the same rule applies where the verdict finds facts not within the issues,⁴ or facts not established by the evidence.⁵ If a special verdict ought to have found facts which are not found, the remedy is by motion for new trial, on the ground that the verdict is contrary to law.⁶ And a trial judge who considers that certain special findings are not sustained by the evidence is under duty to set them aside on motion.⁷ And where issues triable by jury were not submitted to the jury in the mode required by law, there is no alternative but to reverse the judgment with directions that a trial be had upon all the material

issues of fact.⁸ A mere defect in a special verdict or finding of the court, however, cannot be reached by a motion for new trial.⁹ Nor can an inconsistency between a general verdict and answers to interrogatories be presented by a motion for new trial.¹⁰ And a new trial for failure to find facts which the evidence tended to prove is properly denied where such facts, if found, would not have changed the result.¹¹

¹ *State v. Blue*, 84 N. C. 807; *Byington v. Merrill*, 112 Wis. 211, 88 N. W. 26.

² *Citizens' Bank v. Bolen*, 121 Ind. 301, 23 N. E. 146; *Louisville, N. A. & C. R. Co. v. Hart*, 119 Ind. 273, 4 L.R.A. 549, 21 N. E. 753; *Vinton v. Baldwin*, 95 Ind. 433; *Crich v. Williamsburg City F. Ins. Co.* 45 Minn. 441, 48 N. W. 198; *Hilliard v. Outlaw*, 92 N. C. 266; *Beare v. Wright*, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 8 A. & E. Ann. Cas. 1057.

³ *Heiney v. Lontz*, 147 Ind. 417, 46 N. E. 665; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Louisville, N. A. & C. R. Co. v. Green*, 120 Ind. 367, 22 N. E. 327; *Ex parte Walls*, 73 Ind. 95.

As to remedy by venire de novo generally, see *supra*.

⁴ *Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 582.

⁵ *Louisville, N. A. & C. R. Co. v. Green*, 120 Ind. 367, 22 N. E. 327; *Indiana, B. & W. R. Co. v. Finnell*, 116 Ind. 414, 19 N. E. 204.

⁶ *Lafayette v. Allen*, 81 Ind. 166; *Aydelotte v. Billings*, 8 Cal. App. 673, 97 Pac. 698.

⁷ *Casey-Swasey Co. v. Manchester Fire Ins. Co.* 32 Tex. Civ. App. 158, 73 S. W. 864.

⁸ *Hodges v. Easton*, 106 U. S. 408, 27 L. ed. 169, 1 Sup. Ct. Rep. 309.

⁹ *Smith v. Jeffries*, 25 Ind. 378.

¹⁰ *Brickley v. Weghorn*, 71 Ind. 497.

¹¹ *Ft. Wayne v. Durnell*, 13 Ind. App. 669, 42 N. E. 242. For correction of special verdict, see also note in 24 L.R.A.(N.S.) 72.

B. SPECIAL QUESTIONS AND FINDINGS.

9. Power of court to put special questions.

The court has power, unless otherwise provided by statute, to require a jury on rendering a general verdict to find specially upon any questions of fact in the issues submitted to them.¹ So doing is in the discretion of the judge,² in respect to the num-

ber, form, character, and substance of the questions,³ unless made matter of right by the statute.⁴

¹ *McMasters v. Westchester County Mut. Ins. Co.* 25 Wend. 279; *Dyer v. Greene*, 23 Me. 464; *Spaulding v. Robbins*, 42 Vt. 90-93; *Richardson v. Weare*, 62 N. H. 80.

Not error to do so against objection. *Barstow v. Sprague*, 40 N. H. 27, 33. The court may direct the jury to find specially upon the corporate existence of the plaintiff in addition to their general verdict, under Cal. Code Civ. Proc. § 625. *Fresno Canal & Irrig. Co. v. Warner*, 72 Cal. 379, 14 Pac. 37.

In a replevin suit continued as an action for the recovery of money only it is discretionary with the jury, under Civ. Code, § 181, whether they will make special findings. *Meyers v. Hart*, 3 Colo. App. 392, 33 Pac. 647.

The district court of Kansas may of its own motion submit special questions of fact to the jury in a case at law as well as in equity. *Man-
nen v. Stebbins*, 1 Kan. App. 261, 40 Pac. 1085; *Waggoner v. Oursler*, 54 Kan. 141, 37 Pac. 973.

The court may demand a special finding concerning any subject upon which it may properly instruct the jury. *Gourley v. St. Louis & S. F. R. Co.* 25 Mo. App. 144.

The jury can be instructed, under the Oklahoma Code of Civil Procedure, to make special findings only when they render a general verdict. *Atchison, T. & S. F. R. Co. v. Johnson*, 3 Okla. 41, 41 Pac. 641.

In an action to recover for services in procuring a purchaser for land the court may, under Wis. Rev. Stat. § 2558, submit the case for a general verdict and for answers to special questions. *Oliver v. Morawetz*, 97 Wis. 332, 72 N. W. 877.

Requested interrogatories are properly refused where the request is absolute, and not qualified by the condition that they are to be answered in the event a general verdict is returned. *Sun Oil Co. v. Ohio Farmers' Ins. Co.* 15 Ohio C. C. 355, 8 Ohio C. D. 145.

Statutes requiring instructions to be in writing do not necessarily apply to a direction to find specially. *McCallister v. Mount*, 73 Ind. 559, 567.

² This is the rule under the New York Code of Civil Procedure, § 1187; also in California.

St. Louis & S. F. R. Co. v. Jones, 59 Ark. 105, 26 S. W. 595; *Denver Consol. Electric Co. v. Simpson*, 21 Colo. 371, 31 L.R.A. 566, 41 Pac. 499; *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb. 356, 58 N. W. 968 (citing *Cob-
bey's Consol. Stat.* 1893, § 4813); *Floaten v. Ferrell*, 24 Neb. 347, 38 N. W. 732 (Neb. Code, § 293); *Davis v. Guardian Assur. Co.* 87 Hun, 414, 34 N. Y. Supp. 334 (N. Y. Code Civ. Proc. 1187); *Wild v. Oregon Short Line & U. N. R. Co.* 21 Or. 159, 27 Pac. 954; *Enos v. St. Paul*

F. & M. Ins. Co. 4 S. D. 639, 57 N. W. 919 (Comp. Laws, § 5061); Columbia & S. R. Co. v. Hawthorne, 3 Wash. Terr. 353, 19 Pac. 25; Walker v. McNeill, 17 Wash. 582, 50 Pac. 518 (under Wash. Code); Pencil v. Home Ins. Co. 3 Wash. 485, 28 Pac. 1031 (Code, § 242); Kerr v. Lunsford, 31 W. Va. 659, 2 L.R.A. 668, 8 S. E. 493 (2 Comp. Laws, § 6026); McGrath v. Bloomer, 73 Wis. 29, 40 N. W. 585; McDougall v. Ashland Sulphite-Fire Co. 97 Wis. 382, 73 N. W. 327 (Sanborn & B. Anno. Stat. § 2858).

A Federal court is not bound to direct special findings by a clause in a state Code in regard to the duties of courts. Dwyer v. St. Louis & S. F. R. Co. 52 Fed. 87.

It is the duty of the court, under the Kansas statutes, upon request of either party, to require the jury to make special findings of material facts. Bickford v. Champlin, 3 Kan. App. 681, 44 Pac. 901.

The court may, in its discretion, under Utah Comp. Laws 1888, § 3374, refuse to direct the jury to make special findings in an action for personal injuries. Mangum v. Bullion, B. & C. Min. Co. 15 Utah, 534, 50 Pac. 834.

It is optional with the court to submit or refuse particular questions of fact to the jury, under Cal. Code Civ. Proc. § 625, in an action for the recovery of money only. Olmstead v. Dauphiny, 104 Cal. 635, 38 Pac. 505.

It is discretionary with the trial court, in an action for negligently causing the death of plaintiff's intestate, to instruct the jury to make special findings of questions of fact, under 2 Utah Comp. Laws 1888, § 3374. Webb v. Denver & R. G. W. R. Co. 7 Utah, 17, 24 Pac. 616.

The court may, in its discretion, submit special findings in addition to those which the parties had requested. Norton v. Volzke, 158 Ill. 402, 41 N. E. 1085.

³ Hackford v. New York C. & H. R. R. Co. 53 N. Y. 654; Forrest v. Forrest, 6 Duer, 102, s. c. 3 Abb. Pr. 144; American Co. v. Bradford, 27 Cal. 365.

Under this statute the judge cannot require it except in connection with a general verdict. La Grange County v. Kromer, 8 Ind. 446, 449 (under statute making questions a matter of right).

Allen v. Davison, 16 Ind. 416; Jacksonville S. E. R. Co. v. Southworth, 32 Ill. App. 307, affirmed in 135 Ill. 250, 25 N. E. 1093; Chicago & N. W. R. Co. v. Bouck, 33 Ill. App. 123; Toledo, St. L. & K. C. R. Co. v. Kid, 29 Ill. App. 353; Powell v. Chittick, 89 Iowa, 513, 56 N. W. 652; Gardner v. Meeker, 169 Ill. 40, 48 N. E. 307.

⁴ A state statute making it matter of right does not apply in the courts of the United States. Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898.

10. When to be put.

In the absence of special provision, the court may fix the time for submitting special questions,¹ and may refuse to receive them if unseasonably put.²

¹ Even where, as in Indiana, the putting of such questions is matter of right. *Malady v. McEnary*, 30 Ind. 273, 277.

² *Malady v. McEnary*, 30 Ind. 273 (holding refusal to receive during charge not error); *Burleson v. Burleson*, 28 Tex. 383, 411 (holding refusal to receive further question after jury had returned with their verdict not error); *Lambert v. McFarland*, 7 Nev. 159 (holding refusal to put questions first offered after jury were ready with verdict not error).

A request for a special finding made after the evidence has been partly heard is too late, under Ind. Rev. Stat. 1881, § 551. *Hartlep v. Cole*, 120 Ind. 247, 22 N. E. 130.

Must be presented at least before the commencement of the argument of counsel to the jury, otherwise they cannot be submitted at all. *Caledonian F. Ins. Co. v. Traub*, 86 Md. 86, 37 Atl. 782.

Not too late when presented after the evidence is given and before the argument is commenced. *Kopelke v. Kopelke*, 112 Ind. 435, 13 N. E. 695.

Interrogatories tendered after the beginning of the argument are properly refused. *Hamline v. Engle*, 14 Ind. App. 685, 42 N. E. 760, 43 N. E. 463; *Cleveland Stone Co. v. Monroe County Oolitic Stone Co.* 11 Ind. App. 423, 39 N. E. 172.

Must be submitted, under Ill. Rev. Stat. 1889, chap. 110, § 58a, before the commencement of the argument to the jury, whether the opening and closing arguments for plaintiff are made by the same or different counsel. *McMahon v. Sankey*, 133 Ill. 636, 24 N. E. 1027.

A question as to the plaintiff's corporate existence may be submitted after argument and the giving of instructions. *Fresno Canal & Irrig. Co. v. Warner*, 72 Cal. 379, 14 Pac. 37.

A defendant who has asked for direction of a verdict can have specific questions of fact submitted only by requesting such submission before the case is finally disposed of by the direction of a verdict for plaintiff. *Robbins v. Springfield F. & M. Ins. Co.* 79 Hun, 117, 29 N. Y. Supp. 513.

That special interrogatories propounded to the jury were sealed in an envelope, and thus delivered to the jury with an instruction not to open the envelope until they had agreed upon a general verdict, is not available error, as the statute provides that interrogatories are only to be answered after a general verdict has been agreed to. *Summers v. Tarney*, 123 Ind. 560, 24 N. E. 678.

11. Nature and form of questions.

The judge should not put to the jury an immaterial question,¹ or one not based on the evidence,² or which calls for evidence,³ or a conclusion of law,⁴ or one an answer to which, if contrary to the general verdict, would not control the same and be conclusive of the issue,⁵ nor should a question leading in form be submitted.⁶

Questions are properly refused when embraced in interrogatories previously submitted,⁷ or pertaining to matters not controverted.⁸ All material issues necessarily determined by the jury in arriving at their verdict should be submitted,⁹ but the submission need not cover all the issues,¹⁰ nor those involved in the general verdict,¹¹ nor need every detail of the case be made a distinct issue.¹² It rests largely in the sound discretion of the trial court as to how generally or how particularly the question of fact submitted shall be stated.¹³

¹ *Hanewacker v. Ferman*, 47 Ill. App. 17; *Maxwell v. Boyne*, 36 Ind. 120; *Louisville, N. A. & C. R. Co. v. Hubbard*, 116 Ind. 193, 18 N. E. 611; *Aurelius v. Lake Erie & W. R. Co.* 19 Ind. App. 584, 49 N. E. 857; *Hatfield v. Lockwood*, 18 Iowa, 296; *Weir v. Herbert*, 6 Kan. App. 596, 51 Pac. 582; *Burr v. Honeywell*, 6 Kan. App. 783, 51 Pac. 235; *Crane v. Reeder*, 25 Mich. 303; *Sun Oil Co. v. Ohio Farmers' Ins. Co.* 15 Ohio C. C. 355; 8 Ohio C. D. 145; *Wheeling Bridge Co. v. Wheeling & B. Bridge Co.* 34 W. Va. 155, 11 S. E. 1009; *Bentley v. Standard F. Ins. Co.* 40 W. Va. 729, 23 S. E. 584.

Interrogatories which ask for a material fact to be determined may be submitted to the jury, although not calling for the determination of an ultimate fact. *Manatt v. Scott*, 106 Iowa, 203, 76 N. W. 717.

² *Leroy & W. R. Co. v. Anderson*, 41 Kan. 528, 21 Pac. 588; *Caledonian F. Ins. Co. v. Traub*, 86 Md. 86, 37 Atl. 782.

The court may revise and modify interrogatories offered by the parties, to correspond with the facts involved. *Taylor v. Wootan*, 1 Ind. App. 188, 27 N. E. 502; *Terre Haute & I. R. Co. v. Voelker*, 31 Ill. App. 314.

³ *Lake Erie & W. R. Co. v. Morain*, 140 Ill. 117, 29 N. E. 869; *Chicago, R. I. & P. R. Co. v. Clough*, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184; *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572; *Gates v. Scott*, 123 Ind. 459, 24 N. E. 257; *Huntington County Comrs. v. Bonebrake*, 146 Ind. 311, 45 N. E. 470; *Lauter v. Duckworth*, 19 Ind. App. 535, 48 N. E. 864; *Hatfield v. Lockwood*, 18 Iowa, 296; *Aultman & T. Co. v. Shelton*, 90 Iowa, 288, 57 N. W. 857; *Runkle v. Hartford Ins. Co.* 99 Iowa, 414, 68 N. W. 712; *Adams v. Louisville & N. R. Co.* 6 Ky. L. Rep. 687.

⁴ *Chicago & E. I. R. Co. v. Ostrander*, 116 Ind. 259, 15 N. E. 227, 19 N. E. 110.

An interrogatory whether there was any consideration for the note sued on is not objectionable on the ground that it calls for a legal conclusion, where the jury has been charged that if goods sold were utterly worthless when delivered there was a failure of consideration for the note given for the purchase price. *Toledo Sav. Bank v. Rathmann*, 78 Iowa, 288, 43 N. W. 193.

⁵ *Firemen's Ins. Co. v. Appleton Paper & P. Co.* 161 Ill. 9, 43 N. E. 713; *Chicago & A. R. Co. v. Reilly*, 75 Ill. App. 125; *Falkenau v. Abrahamson*, 66 Ill. App. 352; *Ohio & M. R. Co. v. Trapp*, 4 Ind. App. 69, 30 N. E. 812; *Van Horn v. Overman*, 75 Iowa, 421, 39 N. W. 679; *Whalen v. Chicago, R. I. & P. R. Co.* 75 Iowa, 563, 39 N. W. 894; *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa, 530, 70 N. W. 769; *Power v. Harlow*, 57 Mich. 107, 23 N. W. 606; *Hemenway v. Burnham*, 90 Mich. 227, 51 N. W. 276; *First Nat. Bank v. Miltonberger*, 33 Neb. 847, 51 N. W. 232; *Kerr v. Lunsford*, 31 W. Va. 659, 2 L.R.A. 668, 8 S. E. 493; *Ilseley v. Wilson*, 42 W. Va. 757, 26 S. E. 551.

⁶ *Atchison, T. & S. F. R. Co. v. Ayers*, 56 Kan. 176, 42 Pac. 722; *Atchison, T. & S. F. R. Co. v. Butler*, 56 Kan. 433, 43 Pac. 767; *Benton v. St. Louis & S. F. R. Co.* 25 Mo. App. 155; *Anderson v. McPike*, 41 Mo. App. 328.

Special interrogatories are not improperly leading and suggestive merely because their form indicates to the jury how to find in order to authorize a judgment for one party or the other. *Louisville & N. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. 706; *Rice v. Rice*, 6 Ind. 101.

⁷ *Chicago City R. Co. v. Taylor*, 170 Ill. 49, 48 N. E. 831; *Louisville, N. A. & C. R. Co. v. Hubbard*, 116 Ind. 193, 18 N. E. 611; *Powell v. Chittick*, 89 Iowa, 513, 56 N. W. 652; *Atchison, T. & S. F. R. Co. v. Hamilton*, 6 Kan. App. 447, 50 Pac. 102.

⁸ *Powell v. Chittick*, 89 Iowa, 513, 56 N. W. 652.

⁹ *Read v. State Ins. Co.* 103 Iowa, 307, 72 N. W. 665; *Rouse v. Osborne*, 3 Kan. App. 139, 42 Pac. 843.

¹⁰ *Carroll v. Chicago, B. & N. R. Co.* 99 Wis. 399, 75 N. W. 176.

¹¹ *McCullough v. Martin*, — Ind. App. —, 35 N. E. 719; *Inghram v. National Union*, 103 Iowa, 395, 72 N. W. 559; *O'Leary v. German American Ins. Co.* 100 Iowa, 390, 69 N. W. 686.

¹² *McKinney v. Nunn*, 82 Tex. 44, 17 S. W. 516.

¹³ *Southern K. R. Co. v. Walsh*, 45 Kan. 653, 26 Pac. 45.

Each interrogatory should be so formed as to present distinctly a single material fact. *Atchison, T. & S. F. R. Co. v. Aderhold*, 58 Kan. 293, 49 Pac. 83; *L. Wolff Mfg. Co. v. Wilson*, 152 Ill. 9, 26 L.R.A. 229, 38 N. E. 694.

A question should be refused unless it calls for a direct answer. *Wilkie v. Chandon*, 1 Wash. 355, 25 Pac. 464. Or if too general. *Guthrie v.*

Shaffer, 7 Okla. 459, 54 Pac. 698, Whalen v. Chicago, R. I. & P. R. Co. 75 Iowa, 563, 39 N. W. 894.

But it is not error to refuse to put as a question whether there are any allegations in the complaint which are not true, and if so, what. *Morse v. Morse*, 25 Ind. 156.

12. Inspection and objection.

The court has power to require each party to submit his proposed questions to the other.¹ Objection to a question is too late after it has been answered.²

¹ This point seems to have been involved in *Malady v. McEnary*, 30 Ind. 273, 277, and it is the better opinion that a party has a right to see the questions proposed by his adversary, at any rate unless they are excluded by the judge.

The court may properly refuse to submit special interrogatories to the jury where they have not been submitted to counsel on the other side as required by Iowa Code, § 2808. *Barnes v. Marcus*, 96 Iowa, 675, 65 N. W. 984.

Also, when not shown to the opposing counsel until after the beginning of the argument. *McMahon v. Sankey*, 35 Ill. App. 341.

The requirement of Iowa Code, § 2808, that questions be submitted to the attorneys of the adverse party, is limited to questions requested by the parties, and does not extend to those submitted on the court's own motion. *Clark v. Ralls*, 71 Iowa, 189, 32 N. W. 327.

It is only when one of the parties requests the court to submit special interrogatories to the jury under the Illinois statute that the opposite party is entitled to examine them before the commencement of the argument. *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113.

In a chancery case brought to contest the probate of a will special interrogatories requiring findings whether the instrument is the will of the testator, whether he was of sound mind and memory, and whether he was unduly influenced, are not within the Illinois statute requiring special interrogatories to be submitted to the adverse party before argument. *Ibid.*

Pertinent questions of fact stated in writing and handed to the court at the close of the testimony must be submitted to the jury, although the attention of the other counsel was not called to them until after his opening argument. *Topeka v. Boutwell*, 53 Kan. 20, 27 L.R.A. 593, 35 Pac. 819.

² *Brooker v. Weber*, 41 Ind. 426.

13. Withdrawing.

Where the power of the judge to put special questions is dis-
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cretionary, he may, in his discretion, withdraw them before they have been answered.¹ Where it is matter of right he cannot withdraw a proper question against objection of the party at whose instance it was regularly put.²

¹ Taylor v. Ketchum, 5 Robt. 507; Moss v. Priest, 19 Abb. Pr. 314, 316 (*dictum*); National Refining Co. v. Miller, 1 S. D. 548, 47 N. W. 962.

² Otter Creek Block Coal Co. v. Raney, 34 Ind. 329.

Material questions offered and submitted after argument and the giving of instructions cannot be withdrawn from the jury against the objection of the party who offered them as having been offered too late, where the jury have been deliberating upon them for some time. McKelvey v. Chesapeake & O. R. Co. 35 W. Va. 500, 14 S. E. 261.

Interrogatories to the jury cannot be withdrawn by the proposing party after the return of a general verdict, but the other party may insist that the court shall require an answer to them. Duesterberg v. State, ex rel. Vincennes, 116 Ind. 144, 17 N. E. 624.

14. Insisting on answers to special questions.

Where the statute makes the putting of special questions a matter of right it is error for the court, against the objection of a party at whose request proper special questions have been put, to receive a general verdict without requiring answers to such questions.¹

¹ Maxwell v. Boyne, 36 Ind. 120; Rathbun v. Parker, 113 Mich. 594, 72 N. W. 31. It is error to instruct the jury that they need not answer such questions if in doubt; because, upon every material question one party or the other holds the affirmative, and if he fails to make out his case upon it by the evidence the finding should be against him upon it. Crane v. Reeder, 25 Mich. 303. And that the jury on returning a general verdict declare their inability to agree upon an answer to a material special question does not justify the court in directing them to answer the question by saying that they do not agree; they should be required to give a proper answer. Clark v. Weir, 37 Kan. 98, 14 Pac. 533. But a jury need not answer special questions submitted to them, where no evidence is introduced upon which answers could be given. Ft. Scott, W. & W. R. Co. v. Karracker, 46 Kan. 511, 26 Pac. 1027.

Whether it is error to do so where the putting of such questions is discretionary is disputed. Affirmative—Doom v. Walker, 15 Neb. 339, 18 N. W. 138. Where such questions are material. Sandwich Enterprise Co. v. West, 42 Neb. 722, 60 N. W. 1012. Negative—Moss v. Priest, 19 Abb. Pr. 314.

But it is not error to refuse to require answers to special questions, where answers in favor of the party asking them would not affect the general result. *Dyer v. Taylor*, 50 Ark. 314, 7 S. W. 258; *Ohio & M. R. Co. v. Ramey*, 39 Ill. App. 409, affirmed in 139 Ill. 9, 28 N. E. 1087; *Johnson v. Continental Ins. Co.* 39 Mich. 33; *McClary v. Stull*, 44 Neb. 175, 62 N. W. 501; *Schneider v. Chicago, B. & N. R. Co.* 42 Minn. 68, 43 N. W. 783.

15. Sufficiency of answer.

Special findings should be sufficient to enable the court to enter proper judgment.¹ They should substantially cover all the issues.² A statement of the opinion or impression of the jury is not enough as an answer to a special question. The finding should be positive.³

The jury at the request of either party should be required to give full and responsive answers to the particular questions of fact put to them.⁴ It is error for the court to direct the jury what answers they shall make if they find the general verdict in a certain way.⁵

¹ *Finley v. Meadows*, 134 Ky. 70, 119 S. W. 216.

² *Aydelotte v. Billing*, 8 Cal. App. 673, 97 Pac. 698.

³ *Hopkins v. Stanley*, 43 Ind. 553, 559, and cases cited.

⁴ *McPheeters v. Birk*, 48 Kan. 784, 30 Pac. 127; *Atchison, T. & S. F. R. Co. v. Cone*, 37 Kan. 567, 15 Pac. 499; *Jordan v. Johnston*, 1 Kan. App. 656, 42 Pac. 415; *Cleveland, C. C. & St. L. R. Co. v. Doerr*, 41 Ill. App. 530; *American Cent. Ins. Co. v. Hathaway*, 43 Kan. 399, 23 Pac. 428; *Albany Land Co. v. Rickel*, 162 Ind. 222, 70 N. E. 158; *Nicholson v. Maine C. R. Co.* 100 Me. 342, 61 Atl. 834; *Hildman v. Phillips*, 106 Wis. 611, 82 N. W. 566; *Galveston, H. & S. A. R. Co. v. Botts*, 22 Tex. Civ. App. 609, 55 S. W. 514.

The court's refusal to compel the jury to answer special questions is in effect a withdrawal of them and the same as though the court had refused to submit them in the first instance. *Burr v. Honeywell*, 6 Kan. App. 783, 51 Pac. 235.

Special questions cannot be withdrawn because the jury are unable to agree as to the answers thereto, and a general verdict be accepted, where the right to recover depends upon the answers to such questions. *Ermentraut v. Providence-Washington Ins. Co.* 67 Minn. 451, 70 N. W. 572; *Sun Mut. Ins. Co. v. Dudley*, 65 Ark. 240, 45 S. W. 539.

It is erroneous to instruct the jury that they are not obliged to answer absolutely, or if there is a want of evidence. *Crane v. Reeder*, 25 Mich. 303 (Cooley, J.).

The jury must answer if there is evidence on the subject. *Maxwell v. Boyne*, 36 Ind. 120. But there is a *dictum* that where there is no evidence the jury may say they cannot answer.

A refusal to require the jury to give a more definite answer to an interrogatory is proper where that interrogatory is fully covered by answers to other interrogatories. *Louisville, N. A. & C. R. Co. v. Kane*, 120 Ind. 140, 22 N. E. 80.

A finding of the jury, in answer to an interrogatory whether plaintiff received anything for securities surrendered, simply that plaintiff did receive something, warrants a further interrogatory as to the value of what he received. *Bank of Monroe v. Gifford*, 79 Iowa, 300, 44 N. W. 558.

The jury may properly be instructed that they may give their recollection of the facts proved in answering the interrogatory. *Heiney v. Garretson*, 1 Ind. App. 548, 27 N. E. 989.

An interrogatory to the jury answerable only by men skilled in the science to which it pertains is properly withdrawn. *Continental L. Ins. Co. v. Yung*, 113 Ind. 159, 15 N. E. 220.

⁵ *Beecher v. Galvin*, 71 Mich. 391, 39 N. W. 469 (citing the Mich. statute).

But counsel in his argument may state that the general and special verdict should be consistent and what the findings should be to support a general verdict. *Powell v. Chittick*, 89 Iowa, 513, 56 N. W. 652.

It is error for the court to tell the jury that they need not answer certain questions in relation to the purchase and destruction of disputed articles claimed under a mortgage if they find that no property was taken that was not covered by the mortgage. *International Wrecking & Transp. Co. v. McMorran*, 73 Mich. 467, 41 N. W. 510.

The court may instruct the jury that if they answer an intermediate question of the series in a special verdict in a certain way they need not consider the subsequent questions,—especially when cautioned to answer the questions according to the evidence, regardless of the result. *Chopin v. Badger Paper Co.* 83 Wis. 192, 53 N. W. 452.

16. Failure or refusal to find.

If the jury fail to agree on an answer to a special question, this is equivalent to a finding inconsistent with the general verdict, provided the fact is indispensable to support such a verdict.¹ Otherwise, if the verdict can be supported on any other hypothesis within the scope of the evidence before the jury.²

And the verdict is not vitiated by inability to agree on which of two alternatives they rely on, if each would alone support the verdict.³

- ¹ Ebersole v. Northern C. R. Co. 23 Hun, 114; Arkansas Midland R. Co. v. Canman, 52 Ark. 517, 13 S. W. 280, *dictum*.

It is error to enter judgment upon a general verdict where the jury report their inability to agree upon an answer to a question propounded to them for a special finding which embraces the controlling issue in the cause. *Tourtelotte v. Brown*, 1 Colo. App. 408, 29 Pac. 130. Failure to agree upon answers to material questions will be construed as equivalent to findings against the party having the burden of proof, notwithstanding a general verdict in his favor. *Nichols v. Wadsworth*, 40 Minn. 547, 42 N. W. 541.

- ² Kellow v. Central Iowa R. Co. 68 Iowa, 470, 23 N. W. 745, 27 N. W. 466; *Andrews v. Mason City & Ft. D. R. Co.* 77 Iowa, 669, 42 N. W. 513; *Dyer v. Taylor*, 50 Ark. 314, 7 S. W. 258.

- ³ *Murray v. New York L. Ins. Co.* 96 N. Y. 614, 48 Am. Rep. 658; *dictum* in *Arkansas Midland R. Co. v. Canman*, 52 Ark. 517, 13 S. W. 280.

17. Insisting on general verdict when special questions are answered.

Where special questions are answered the party has a right to have a general verdict rendered, unless a proper special verdict is made.¹

- ¹ *Hodges v. Easton*, 106 U. S. 408, 27 L. ed. 169, 1 Sup. Ct. Rep. 307; *Casey v. Dwyre*, 15 Hun, 153; *Eudaly v. Eudaly*, 37 Ind. 440; *Taft v. Baker*, 2 Kan. App. 600, 42 Pac. 502.

Interrogatories with their answers constitute a special verdict within this rule only where they embrace and cover all the issues in the cause. *Pea v. Pea*, 35 Ind. 387; *Coleman v. St. Paul, M. & M. R. Co.* 38 Minn. 260, 36 N. W. 638. But a party waives his right to a general verdict by stipulating that certain questions of fact be submitted to the jury and that the other questions be reserved and decided by the court and by failing to object when the answers of the jury are returned. *State Ins. Co. v. Gray*, 44 Kan. 731, 25 Pac. 197.

It is reversible error for the court to interfere with the statutory discretion of the jury to "render a general or special verdict" and prevent them from returning a general verdict (*Shadbolt & B. Iron Co. v. Camp*, 80 Iowa, 539, 45 N. W. 1062) where the special findings do not fully cover the cause. *Riley v. Mitchell*, 36 Minn. 3, 29 N. W. 588. But the reception by the court of special findings alone by a jury who have been directed to return both a general and special verdict is not available error,—especially when no exception is taken when the findings are returned. *National Horse Importing Co. v. Novak*, 95 Iowa, 596, 64 N. W. 616.

18. Findings inconsistent with general verdict.

Answers to special questions submitted to the jury, if inconsistent with the general verdict, control the latter, and the court may give judgment accordingly,¹ and this is to be entered without setting aside the general verdict.²

A finding is not inconsistent with the general verdict within this rule if any other hypothesis of fact capable of being supported by the evidence before the jury might supply its place.³

¹ *McDermott v. Higby*, 23 Cal. 489; *Rio Grande Southern R. Co. v. Deasey*, 3 Colo. App. 196, 32 Pac. 725; *Everett v. Buchanan*, 2 Dak. 249, 6 N. W. 439, 8 N. W. 31 (citing Dak. Code Civ. Proc. § 261, but holding that the special findings were not inconsistent with the general verdict); *Gwin v. Gwin* (Idaho) 48 Pac. 295 (citing Idaho Rev. Stat. § 4397); *Nelson v. Neely*, 63 Ind. 194; *Korrady v. Lake Shore & M. S. R. Co.* 131 Ind. 261, 29 N. E. 1069; *Lake Shore & M. S. R. Co. v. Brown*, 41 Ind. App. 435, 84 N. E. 25; *Nickols v. Weaver*, 7 Kan. 373 (citing Kan. Gen. Stat. 684, § 287); *Tobie v. Brown County Comrs.* 20 Kan. 14; *School Dist. No. 46 v. Lund*, 51 Kan. 731, 33 Pac. 595; *Stanley v. Atchison, T. & S. F. R. Co.* 78 Kan. 87, 96 Pac. 34; *Baird v. Chicago, R. I. & P. R. Co.* 55 Iowa, 121, 7 N. W. 460; *Maceman v. Equitable Life Assur. Soc.* 69 Minn. 285, 72 N. W. 111; *Rand v. Grubbs*, 26 Mo. App. 591; *Neimick v. American Ins. Co.* 16 Mont. 318, 40 Pac. 597; *Ogg v. Shehan*, 17 Neb. 323, 22 N. W. 556; *Berry v. Equitable Gold Min. Co.* 29 Nev. 451, 91 Pac. 537; *Richardson v. Weare*, 62 N. H. 80; *Fraschieris v. Henriques*, 6 Abb. Pr. N. S. 251, 263 (per Brady, J.); *Dempsey v. New York*, 10 Daly, 417 (citing N. Y. Code Civ. Proc. § 1188); *Blevins v. Atchison, T. & S. F. R. Co.* 3 Okla. 512, 41 Pac. 92; *Choctaw, O. & W. R. Co. v. Castanien*, 23 Okla. 735, 102 Pac. 88; *Loewenberg v. Rosenthal*, 18 Or. 178, 22 Pac. 601; *Hogan v. Chicago, M. & St. P. R. Co.* 59 Wis. 139, 17 N. W. 632; *Grant v. Spokane Traction Co.* 47 Wash. 112, 91 Pac. 553. And see note to *Jordan v. St. Paul, M. & M. R. Co.* 6 L.R.A. 574. To the same effect are *Bess v. Chesapeake & O. R. Co.* 35 W. Va. 492, 14 S. E. 234; *Culbertson Irrig. & Water Power Co. v. Olander*, 51 Neb. 539, 71 N. W. 298; *Pepperall v. City Park Transit Co.* 15 Wash. 176, 46 Pac. 407, 45 Pac. 743, and *Lease v. Clark*, 20 Cal. 387 (judgment reversed for error in refusing to enter judgment on special findings); *Bremmerman v. Jennings*, 61 Ind. 334 (where upon a general verdict for a defendant, who had set up fraud and failure of consideration in an action on a promissory note, held error to refuse to enter judgment for plaintiff upon the special findings that he bought the note for value before maturity and without notice).

All reasonable presumptions will be indulged in favor of the general verdict, while nothing will be presumed in aid of the special findings of

fact. *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15; *Chicago & E. I. R. Co. v. Hedges*, 118 Ind. 5, 20 N. E. 530. Thus, all questions in the case not covered by the special findings are to be considered as having been found in favor of and covered by the general verdict. *Johnson v. Miller*, 82 Iowa, 693, 47 N. W. 903, 48 N. W. 1081; *Matchett v. Cincinnati, W. & M. R. Co.* 132 Ind. 334, 31 N. E. 792.

The general verdict will stand unless the inconsistency between it and the special findings is manifest (*Case v. Chicago, M. & St. P. R. Co.* 100 Iowa, 487, 69 N. W. 538; *Bevins v. Smith*, 42 Kan. 250, 21 Pac. 1064), and the facts found by the answers to the interrogatories entitle the party in whose favor they are to a judgment. *Louisville & N. R. Co. v. Crunk*, 119 Ind. 542, 21 N. E. 31. And the inconsistency must be irreconcilable. *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15; *Chicago, St. L. & P. R. Co. v. Spilker*, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; *Stringer v. Frost*, 116 Ind. 447, 2 L.R.A. 614, 19 N. E. 331; *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. 210; *Graham v. Payne*, 122 Ind. 403, 24 N. E. 216; *Gates v. Chicago, M. & St. P. R. Co.* 2 S. D. 422, 50 N. W. 907. And where the special findings and general verdict can be harmonized by taking into consideration the entire record of the case and construing the same liberally for that purpose, it is the duty of the court so to harmonize them. *Bevins v. Smith*, 42 Kan. 250, 21 Pac. 1064. The inconsistency is material only where the fact found is an ultimate fact, or one from which the existence or nonexistence of such ultimate fact necessarily follows. *Ebsery v. Chicago City R. Co.* 164 Ill. 518, 45 N. E. 1017. But a finding of probative facts from which the court is enabled to say that an ultimate fact necessarily results is sufficient ground upon which to set aside a general verdict rendered by the jury in opposition to such fact. *Severy v. Chicago, R. I. & P. R. Co.* 6 Okla. 153, 50 Pac. 162, and cases cited.

² *Dempsey v. New York*, 10 Daly, 417. See, however, *Neimick v. American Ins. Co.* 16 Mont. 318, 40 Pac. 597 and *Blevins v. Atchison, T. & S. F. R. Co.* 3 Okla. 512, 41 Pac. 92 (judgment setting aside general verdict and rendering judgment on special findings affirmed). And see *Omaha & R. Valley R. Co. v. Hall*, 33 Neb. 229, 50 N. W. 10, which it was held error to refuse to set aside a general verdict inconsistent and in conflict with a special finding of fact.

³ *McMurray v. Boyd*, 58 Ark. 504, 25 S. W. 505; *Cleveland, C. C. & St. L. R. Co. v. Johnson*, 7 Ind. App. 441, 33 N. E. 1004; *Kellow v. Central Iowa R. Co.* 68 Iowa, 470, 23 N. W. 740, 27 N. W. 466.

The true test as to whether special findings by the jury are inconsistent and contradictory, either in themselves or with the general verdict, is whether they would warrant a different judgment from the one entered. *Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 295.

19. Inconsistency between special findings.

The general verdict controls as between special findings inconsistent with themselves.¹

¹ *Dickey v. Shirk*, 128 Ind. 278, 27 N. E. 733; *Gates v. Scott*, 123 Ind. 459, 24 N. E. 257; *Smith v. Heller*, 119 Ind. 212, 21 N. E. 657; *Parke County Comrs. v. Wagner*, 138 Ind. 609, 38 N. E. 171; *Inland Steel Co. v. Smith*, 168 Ind. 237, 80 N. E. 538; *Williams v. Eikenberry*, 22 Neb. 210, 34 N. W. 373. Contra, in Kansas, where inconsistency of answers to special interrogatories with each other, as well as with the general verdict, precludes the entry of any judgment and requires a new trial. *Kansas City v. Brady*, 53 Kan. 312, 36 Pac. 726; *Shoemaker v. St. Louis & S. F. R. Co.* 30 Kan. 359, 2 Pac. 517; *St. Louis & S. F. R. Co. v. Shoemaker*, 38 Kan. 723, 17 Pac. 584.

20. Indirect finding.

A special finding to the effect that there is not sufficient evidence of the existence of the fact concerning which the question was asked is equivalent to a finding against it,¹ and will control a general verdict which requires proof of the existence of such fact to support it.²

¹ *McLimans v. Lancaster*, 63 Wis. 596, 23 N. W. 689.

The answer "We do not know" amounts simply to a finding that adequate proof of the existence of the fact concerning which the question was proposed has not been produced and is equivalent to a finding against the party holding the affirmative upon such fact. *Atchison, T. & S. F. R. Co. v. Johnson*, 3 Okla. 41, 41 Pac. 641; *Morrow v. Saline County Comrs.* 21 Kan. 484; *Union P. R. Co. v. Shannon*, 38 Kan. 476, 16 Pac. 836. See, however, *Elgin, J. & E. R. Co. v. Raymond*, 148 Ill. 241, 35 N. E. 729, holding that such an answer fails to establish the fact inquired about either one way or the other, and *Hawley v. Atlantic*, 92 Iowa, 172, 60 N. W. 519, in which the answer "Can't say" was held equivalent to no answer at all.

² *Atchison, T. & S. F. R. Co. v. Swarts*, 58 Kan. 235, 48 Pac. 953; *Hayman v. Simmons*, 4 Kan. App. 1, 45 Pac. 728; *Mechanics' Bank v. Barnes*, 86 Mich. 632, 49 N. W. 475. But such a finding is immaterial unless the case as made by the pleadings and evidence is so circumstanced that no recovery can be had so long as the question is unsettled. *Chicago & E. I. R. Co. v. Goyette*, 133 Ill. 21, 24 N. E. 549.

XXVIII.—RECORDING THE VERDICT AND ENTERING JUDGMENT.

1. Recording of the verdict.
2. Necessity of entering and recording the judgment.
3. Authority and duty to enter judgment.
4. Books for entry or record.
5. The judgment and what it must show.
6. Minutes, judgment-roll, and record.
7. Signing and dating.
- 8 Time for entry and record.
9. Nunc pro tunc entry.
10. Compelling or preventing entry.

[The question whether judgment is complete by entry and record presents many aspects dependent on purpose or occasion for which the judgment is to be relied on. Thus, for purpose of an appeal or writ of error a degree of formality in the written evidence of the judgment is required that, for the mere purpose of the determination of the action between the parties, is not requisite. The same may be said where the judgment is pleaded as an estoppel of record, or where it is sought to determine or adjust liens involving third persons, or in other instances where the use made of the judgment is in a collateral proceeding or in another than the trial court. The sufficiency of the record for these purposes presents questions more properly pertaining to the scope of works on Appeal and Error or Judgments than to this work; and this is to be kept in mind in consulting the following pages. For similar reasons the cases dealing with the entering and recording of judgments after a trial by the court, or of decrees in equitable proceedings, have been generally passed over. In so far as they have general application they are oftener pertinent to the subjects of Appeal and Error or Judgments, as just mentioned. In so far as they are authoritative on trial practice, they are of doubtful value on the practice in Civil Jury Trials. These distinctions are to be made by the reader in using the matter in this chapter.]

1. Recording of the verdict.

When the verdict has been received, and the issues are disposed of,¹ it is then the duty of the clerk to make such record or entry of it as the statute or the practice prescribes,² or embody it in the *postea*.³

¹ See ante, chapter XXVI.

Under some statutes, judgment may be entered on a general verdict, though one of the special counts was not proved, and the verdict was not amended. *Hopkins v. Orr*, 124 U. S. 510, 31 L. ed. 523, 8 Sup. Ct. Rep. 590.

² The verdict should be announced or read before recording, but assent of jury thereto, on reading the record, and failure to object, made the verdict good. *Blum v. Pate*, 20 Cal. 70. The usual practice is to hear the verdict announced by the foreman or read by the clerk, if it be a sealed one or one rendered in writing, in the latter case calling on the jury to listen to their verdict as it has "been recorded," or entered on the minutes. Upon this being assented to by the jury as their verdict, it becomes a finality, and, as soon as the state of the business of the court permits, the clerk will extend it on the record from the rough minutes. *Warner v. New York C. R. Co.* 52 N. Y. 437, 11 Am. Rep. 724.

On collateral attack it is a mere irregularity that the verdict was not recorded. *Gunn v. Plant*, 94 U. S. 664, 24 L. ed. 304. Upon receiving a verdict, an entry must be made by the clerk in the minutes of the court, specifying the time of trial, the names of the jurors and witnesses, and setting out the verdict at length; and when a special verdict is found, either the judgment rendered thereon, or, if the case be reserved for argument or further consideration, the order thus reserving it (Cal. Code Civ. Proc. § 628), is properly recorded by filing as part of the judgment roll. *Goldman v. Rogers*, 85 Cal. 574, 24 Pac. 782.

To be a bar, verdict must be entered on the record; and the payment of the jury fee and entry on the lien docket will not suffice. *Ferguson v. Staver*, 40 Pa. 213.

It need not show that the jury were sworn. *Waddell v. Magee*, 53 Miss. 687.

Where, on a proper issue, the verdict established a will, it was the clerk's duty in recording the verdict to set out the will, and, having failed therein, the court had power to amend it accordingly. *Freeman v. Morris*, 44 N. C. (Busbee, L.) 287.

The verdict copied in the judgment need not contain the signature of the foreman. *Missouri, K. & T. R. Co. v. Walden*, — Tex. Civ. App. —, 46 S. W. 87; *McKinnon v. Reliance Lumber Co.* 63 Tex. 30.

³ At common law this was part of the *postea*. See 3 Bl. Com. 386.

The verdict to be recorded is that which the jury finally agree on and render into court,¹ and the recorded one controls.²

¹ Until the verdict is "recorded" in the legal sense, it is within the power of the jury under the court's instructions; and consequently where the jury returned a sealed verdict which, according to the appeal book, was "entered on the record of the court," but in fact was only noted in the rough minutes, it was proper to permit the jury to take the case again. In this situation the verdict finally returned was the verdict to be recorded formally in the record proper. *Warner v. New York C. R. Co.* 52 N. Y. 437, 11 Am. Rep. 724.

² Hence a suggestion that the dollar mark found in the recorded verdict was not in the one returned was ignored. *Leftwich v. Day*, 32 Minn. 512, 21 N. W. 731.

In *Lambert v. Borden*, 10 Ill. App. 648, it was held on appeal that a recorded verdict against defendant was the legal verdict, and prevailed over the actual one, which was against "defendants." See also *Brewer & H. Brewing Co. v. Hermann*, 88 Ill. App. 285.

After verdict is recorded it will not be amended on jurors' affidavits that it meant a different amount from that expressed. *Dean v. New York*, 29 App. Div. 350, 51 N. Y. Supp. 536.

The duty of recordation, like the other entries leading to the judgment, is a ministerial one, and the clerk's failure does not deprive the parties of the benefit of the verdict, which may be entered at a later time;¹ the omission properly to record the verdict is an irregularity only.²

¹ *Holt v. Holt*, 107 Cal. 258, 40 Pac. 390 (divorce action tried to a jury).

The court may subsequently divert the entry of any verdict found on the record to be the one rendered. *Gross v. Sloan*, 58 Ill. App. 302; *O'Keefe v. Kellogg*, 15 Ill. 347.

² *Gunn v. Plant*, 94 U. S. 664, 24 L. ed. 304; *State v. Levy*, 24 Minn. 362 (where entry of verdict after discharge of jury was held not to impair the verdict, where, before their discharge, it was read to them, and they were asked if it was their verdict, and they assented to it, even though a statute substantially required the clerk to immediately record the verdict and then read it to the jury before their discharge). As to what properly constitutes a recording, see *Warner v. New York C. R. Co.* 52 N. Y. 437, 443, 11 Am. Rep. 724 (per Folger J.).

2. Necessity of entering and recording the judgment.

Speaking generally, and keeping in mind the variant techni-

cal terms made by statutes, it is requisite to a technical judgment that there shall be an entry of it in some permanent book or record.¹

The judgment is the declaration made by the judge when he decides the case, while the entry of it is the official memorial thereof;² but there must, in any event, be some record to prove the judgment.³

¹ *Gunn v. Plant*, 94 U. S. 664, 24 L. ed. 304; *Green v. Van Buskerk*, 3 Wall. 448, 18 L. ed. 245; *Boker v. Bronson*, 5 Blatchf. 5, Fed. Cas. No. 1,606; *Sprigg v. Wells*, 5 Mart. N. S. 104; *Case v. Plato*, 54 Iowa, 64, 6 N. W. 128; *Raymond v. Smith*, 1 Met. (Ky.) 65, 71 Am. Dec. 458; *Schenectady & S. Pl. Road Co. v. Thatcher*, 6 How. Pr. 226.

Under statutes providing for the entry of the "judgment in the judgment book," the entry is essential; and a paper prepared by the judge in the form of a judgment and filed with the clerk may be an order for judgment, but is not the judgment itself. *Locke v. Hubbard*, 9 S. D. 364, 69 N. W. 588; *Maurin v. Carnes*, 71 Minn. 308, 74 N. W. 139; *Rockwood v. Davenport*, 37 Minn. 533, 5 Am. St. Rep. 872, 35 N. W. 377, citing cases; *Re Weber*, 4 N. D. 119, 28 L.R.A. 621, 59 N. W. 523; *Knapp v. Roche*, 82 N. Y. 366; *Bowman v. Tallman*, 28 How. Pr. 482.

The docketing and filing of the judgment roll will not supply the want of entry in the book. *Rockwood v. Davenport*, 37 Minn. 533, 5 Am. St. Rep. 872, 35 N. W. 377.

Entire failure to make up a record would not defeat rights of parties. The record is but evidence of the judgment. *Newman v. Cincinnati*, 18 Ohio, 323. Not final till recorded, though announced. *Condee v. Barton*, 62 Cal. 1.

For a general discussion and collation of cases on what is necessary to complete the judgment by entry or record for all purposes, see note to 28 L.R.A. 621.

Recording the verdict, see ante, § 1.

² Every interlocutory or final judgment shall be signed by the clerk and filed in his office, and such signing and filing shall constitute the entry of the judgment. N. Y. Code Civ. Proc. § 1236.

Rendition and entry distinguished. *Gray v. Palmer*, 28 Cal. 416; *Fred Miller Brewing Co. v. Capital Ins. Co.* 111 Iowa, 590, 82 Am. St. Rep. 529, 82 N. W. 1023.

In *Davis v. Shaver*, 61 N. C. (Phill. L.) 18, 91 Am. Dec. 92, this was brought out by the court, which explained that since a *nunc pro tunc* entry presupposes that a judgment was in fact previously entered, it must follow that the entry is a mere memorial of the judgment, and not the very judgment. See also *Bauman v. New York C. R. Co.* 10 How. Pr. 218; *Grant v. Root*, 3 Cow. 354; *Sieber v. Frink*, 7 Colo.

148, 2 Pac. 901; *Lick v. Stockdale*, 18 Cal. 223; *Casement v. Ringgold*, 28 Cal. 335.

For a full discussion of the nature and purpose of the entering and recording of the acts of the court under the California Code, and the manner in which they are to be done, see *Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109.

³ See cases cited in note to 28 L.R.A. 635, wherein it is shown that an order for judgment is not admissible as a judgment.

For an explanation of the reason and policy of the practice of announcing the judgment, and then recording the same under the signature of the judge in a public record, see *Montgomery v. Viers*, 130 Ky. 694, 114 S. W. 251.

3. Authority and duty to enter judgment.

The rendition of the judgment is an act of the court, which none but the judge can perform, while the entry of it, that is to say, the ministerial act, is the office of the clerk; but the authority to make the entry must come either from the judge's special direction, or from a stage in the proceedings wherein it is made the clerk's duty, without further order, to enter the judgment, which, under the law must follow the verdict.¹

Where a jury issue is made up out of another court, the judgment is to be entered by the court which has the case, and not by the one which tries the issue.² The judge's duties may be ministerial in so far as they involve only the manual writing of the legal result.³

¹ *Lacoste v. Eastland*, 117 Cal. 673, 49 Pac. 1046. But the action of the clerk in entering the judgment erroneously is the act of the court, when the same is assailed. *Dillon v. Porter*, 36 Minn. 341, 31 N. W. 56.

Entry and docketing are ministerial acts: one to measure the time of the judgment, and the other for purpose of lien. *Los Angeles County Bank v. Raynor*, 61 Cal. 145.

The ministerial entry must rest on judicial authority, and is void if a legal judgment be lacking. *Stearns v. Aguirre*, 7 Cal. 443.

And where the entry was not under the general authority of the court rules as to the entry of judgments on certain days, an entry by the clerk without the special authority of the judge was void. *Washington Nat. Bank v. Williams*, 188 Mass. 103, 74 N. E. 470.

Dictum that the clerk, in entering the judgment in the judgment book, performs a merely clerical act and therein exercises the authority of the court. *Locke v. Hubbard*, 9 S. D. 364, 69 N. W. 588.

Where it is the duty of the clerk to make entry, it is immaterial that he

was requested thereto by one not a party. *Re Cook*, 77 Cal. 220, 1 L.R.A. 567, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431.

Clerk cannot in judge's absence enter judgment, even on written order. *Aspden's Appeal*, 24 Pa. 182.

Docket entries made in the clerk's office by a deputy, and not in the court room, are valid. *Johns v. Fritchey*, 39 Md. 258.

That giving two orders for judgment do not impair the judgment, see *Carolina Grocery Co. v. Moore*, 63 S. C. 184, 41 S. E. 88.

Where the practice is to receive the verdict in writing and file it, judgment thereon can be entered clerically without further minute entry; otherwise as to verdicts received orally, for there a minute entry is essential. *Gunn v. Plant*, 94 U. S. 664, 24 L. ed. 304.

The clerk cannot make up in the record a judgment not judicially entered. *Cloughton v. Block*, 24 Miss. 185.

Entry by the clerk on a verdict that is in law a nullity will be taken for nothing. *Pressed Steel Car Co. v. Steel Car Forge Co.* 79 C. C. A. 130, 149 Fed. 182.

² When a law issue is sent over from orphans' court in Maryland, the verdict should be certified back, and the amount of costs and the judgment should be entered by the orphans' court. *Levy v. Levy*, 28 Md. 25.

³ Under the Texas statutes when a general verdict is received, and all motions are disposed of, there remains nothing for the judge but the ministerial act of entering the judgment which legally follows. *Carwill v. William M. Cameron & Co.* 102 Tex. 171, 114 S. W. 100.

Under the statutes in some of the states it is the duty of counsel for the party in whose behalf the judgment is taken to prepare the judgment roll;¹ at least where there is any doubt, under the terms of the statute, whether or what particular papers are part of it.² Ordinarily it is a ministerial duty of the clerk.³

¹ *Knapp v. Roche*, 82 N. Y. 366.

The court may direct that, if plaintiff does not enter his judgment, defendant may do so. *Wilson v. Simpson*, 84 N. Y. 674.

The judgment roll must be prepared and furnished to the clerk by the attorney for the party at whose instance the final judgment is entered, except that the clerk must attach thereto the necessary original papers on file. But the clerk may, at his option, make up the entire judgment roll. N. Y. Code Civ. Proc. § 1238.

² As to provision for defendant's arrest in *postea*, see *Bacon v. Grossmann*, 90 App. Div. 204, 86 N. Y. Supp. 66.

³ The failure of the clerk to make up the judgment roll formally because

after entry of judgment and record, the papers had been removed from the clerk's possession, was a ministerial omission. *Connor v. McCoy*, 83 S. C. 165, 65 S. E. 257 (collateral attack on judicial sale).

Notice to enter the judgment is not usually required, unless by terms of the statutes or by a stage of the case which absolves the parties or their counsel from taking notice of all proceedings in the case,¹ but under a statute requiring the giving of notice to substitute an attorney when one dies, is suspended, or removed, it is error, without such procedure, to go on and enter up the judgment.²

¹ For the purpose of fixing the time to move for new trial under the Montana statutes, it is essential that there be notice given to the defeated party of the entry of the judgment. *State ex rel. Cohn v. District Ct.* 38 Mont. 119, 99 Pac. 139.

Under the North Dakota practice and statutes the order for judgment may be made *ex parte*, and orders made in another district by the judge thereof, who, however, had acted in the case, were upheld. *Gould v. Duluth & D. Elev. Co.* 3 N. D. 96, 54 N. W. 316.

² No subsequent proceeding, whether or not it ordinarily requires a notice, can be taken till after the thirty days required by statute to elapse after the notice to substitute; hence it was not sufficient to send the bill of costs with a letter stating that it was sent to the party for the reason that his former attorney was no longer entitled to act. *Commercial Bank v. Foltz*, 13 App. Div. 603, 43 N. Y. Supp. 985.

4. Books for entry or record.

The record must be in the record book of the court or in the particular book which the statute prescribes for the keeping of judgments;¹ but it does not follow that entry in a book not usually devoted to the recording of the judgment proper or to the recording of the particular kind of judgments will invalidate the judgment.²

After the record of the judgment a docketing or indexing or both are essential to the creation of a lien on the debtor's property or to the enforcement of the judgment.³ These matters have not been considered as pertinent to the scope of the present book.

¹ The clerk shall, in addition to the docket books required to be kept by law, keep a book styled the "judgment book," in which he shall record all judgments entered in his office. N. Y. Code Civ. Proc. § 1236.

Clerk must keep a "judgment book," in which judgments must be entered.
Cal. Code Civ. Proc. § 668.

Under statutes requiring a judgment book, see *Maurin v. Carnes*, 71 Minn. 308, 74 N. W. 139; *Rockwood v. Davenport*, 37 Minn. 533, 5 Am. St. Rep. 872, 35 N. W. 377; *Re Weber*, 4 N. D. 118, 28 L.R.A. 621, 59 N. W. 523; *Locke v. Hubbard*, 9 S. D. 364, 69 N. W. 588. See also note following.

Insufficient to enter in judge's calendar when that is not a court record book. *Traer v. Whitman*, 56 Iowa, 443, 9 N. W. 339.

The writing of the judgments on sheets with a typewriter, which sheets were kept in a case labeled "judgment book" in order, till there were enough to bind into a book in the same order, constitutes a judgment book under the North Dakota statutes. The binding of the sheets was not essential. *Lynch v. Burt*, 67 C. C. A. 305, 132 Fed. 417.

Pending the trial, the clerk keeps the record by short notes or minutes, which are afterwards to be extended into the judgment, but till then his minute book stands as the record. *Pruden v. Allen*, 23 Pick. 184, 34 Am. Dec. 51.

2 Separate books for legal and equitable judgments are not required under a statute calling for a judgment book. *Whitney v. Townsend*, 67 N. Y. 40.

And entry of a judgment in the "decree book" was not fatal where the judgment book was kept in two books, the decree book and the judgment book. *Thompson v. Bickford*, 19 Minn. 17, Gil. 1.

So, where the judgment was entered in the book kept for registry of actions and entry of judgments, though the statute called for a book for each. *Jorgensen v. Griffin*, 14 Minn. 464, Gil. 346.

So, of the entry in the "minute book," so labeled, instead of the one labeled "judgment by the court" (*Wolf v. Great Falls Water Power & Townsite Co.* 15 Mont. 49, 38 Pac. 115); or of the entry in book known as "journal of proceedings," instead of that known as "judgment book" (*Work v. Northern P. R. Co.* 11 Mont. 513, 29 Pac. 280).

In *Carr v. Bosworth*, 72 Iowa, 530, 34 N. W. 317, the statute under consideration required the clerk "to keep the following books" in which the business of the courts shall be entered: "A book containing the entries of the proceedings of the court, which may be known as the 'record book,' and other books named. It was held that this did not require all judgments to be entered in one book called the "record book;" but that the statute was directory in this respect, requiring simply that the proceedings be entered of record in one or more books, according to the needs and discretion of the proper officers of the court. Hence the keeping of a book for a particular kind of decrees was sustainable. Entry in the permanent judgment record in the first instance, without an entry in the minute book or trial docket, is first fatal. *Bond v. Citizens' Nat. Bank*, 65 Md. 498, 4 Atl. 893.

³ See note to 28 L.R.A. 632; *Burns v. Ross*, 7 L.R.A. (N.S.) 415, and note, 215 Pa. 293, 114 Am. St. Rep. 526, 64 Atl. 526.

5. The judgment and what it must show.

The judgment consists simply of the "sentence of the law pronounced by the court upon the matter contained in the record."¹ Accordingly, neither the minute entry nor the order for judgment is the judgment, if the statutes or the practice of the particular jurisdiction look towards a further and formal official memorial of the decision.²

The memorandum of decision, or the opinion of the judge giving his reasons for the judgment, is not a part of the judgment.³

¹ Judgment defined. 3 Bl. Com. 395.

An announcement that plaintiff was entitled to a sum found due by verdict, but adding thereto illegal conditions and denying execution, was not a judgment. *State ex rel. St. Louis, K. & N. W. R. Co. v. Klein*, 140 Mo. 502, 41 S. W. 895.

Where a judgment had been rendered, and counsel had drawn up a journal entry, and the clerk had filed and recorded this, it was the judgment of the court till set aside. *Boynton v. Crockett*, 12 Okla. 57, 69 Pac. 869; and see *Dillon v. Porter*, 36 Minn. 341, 31 N. W. 56.

² *Dean v. Williams*, 1 Chand. (Wis.) 22, 2 Pinney (Wis.) 91; *Murray v. Scribner*, 70 Wis. 228, 35 N. W. 311; *Ah Kle v. McLean*, 3 Idaho, 70, 26 Pac. 937; *Chesterson v. Munson*, 26 Minn. 303, 3 N. W. 695; *Preston v. Hearst*, 54 Cal. 595; *Newbould v. Stewart*, 15 Mich. 155; *Macnevin v. Macnevin*, 63 Cal. 186; *Delaware, L. & W. R. Co. v. Burkard*, 109 N. Y. 648, 16 N. E. 550; *Becker v. Koch*, 104 N. Y. 394, 58 Am. Rep. 517, 10 N. E. 701; *Lentilhon v. New York*, 3 Sandf. 721; *National L. Ins. Co. v. Scheffer*, 131 U. S. C. C. 111, 26 L. ed. 1110; *Bell v. Otts*, 101 Ala. 186, 46 Am. St. Rep. 117, 13 So. 43; *Thomas v. Anderson*, 55 Cal. 43. In these foregoing cases it was held that no judgment existed from which an appeal, writ of error, or other review would lie. See also note 28 L.R.A. 630.

Must be entered and show date of entry, for purpose of taking writ of error. *Pittsburg Steel Co. v. Streety*, 60 Fla. 183, 53 So. 505.

Mere judgment that plaintiff be nonsuited is not judgment supporting appeal. *Goldring v. Reid*, 60 Fla. 78, 53 So. 503.

Entry that judgment is rendered, held a mere clerk's statement that it was rendered. *Wheeler v. Scott*, 3 Wis. 362.

Record of a verdict with order for judgment thereon is not the judgment. *Smith v. Steel*, 81 Mo. 455.

An entry in the "rough minutes" or "blotter," it being a mere clerk's
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memorandum, was held not to make a judgment. *Brownell v. Superior Ct.* 157 Cal. 703, 109 Pac. 91.

The docket entry "judgt" was held to be a regular judgment on which the clerk had the power to enter up the judgment. *Davis v. Shaver*, 61 N. C. (Phill. L.) 18, 91 Am. Dec. 92; *Jacobs v. Burgwyn*, 63 N. C. 193; *Ferrell v. Hales*, 119 N. C. 199, 25 S. E. 821.

Verdict and order of judge on his docket, but none on record, is no judgment. *Edwards v. Evans*, 61 Ill. 492.

³ *Forgotson v. Raubitschek*, 87 N. Y. Supp. 503.

All the adjudicative incidents that follow the decision are a part of the judgment, and should be recorded by the clerk as part thereof. *Thomas v. Thomas*, 98 Me. 184, 56 Atl. 651.

The judgment must show the parties plaintiff and defendant,¹ and which of them prevailed,² especially if there are several parties on the one side,³ and express with certainty the amount or the redress awarded.⁴

¹ The defendants may be described by the reference to the title of the cause, without naming them. *First Nat. Bank v. Garland*, 109 Mich. 515, 33 L.R.A. 83, 63 Am. St. Rep. 597, 67 N. W. 559.

Where it has the style of the case at the head, showing definitely that the parties are the same as those mentioned in the declaration, it suffices without naming them in the body of the judgment. *Taylor v. Branham*, 35 Fla. 297, 39 L.R.A. 362, 48 Am. St. Rep. 249, 17 So. 552.

Judgment on verdict against defendants is good as against all defendants, including those omitted from docket entry by clerical error (*Hendry v. Crandall*, 131 Ind. 42, 30 N. E. 789); for the word "defendants" in judgment is explainable by the whole record (*Bolling v. Speller*, 96 Ala. 269, 11 So. 300).

The words "administrator of estate of" named person, following the name of a defendant, will be treated as mere description, and will not make the judgment one against the estate or against him in his representative capacity. *Rich v. Sowles*, 15 L.R.A. 850, and cases cited in note p. 852.

Under the statutes of Texas the judgment in favor of a minor suing by next friend should be in the name of the next friend for the use of the minor. *Missouri, K. & T. R. Co. v. Walden*, — Tex. Civ. App. —. 46 S. W. 87.

If defendant has two names by which he is known, judgment by either is good. *Isaacs v. Mintz*, 33 N. Y. S. R. 423, 11 N. Y. Supp. 423.

² Must show for whom it was given. *Fuller Watchman's Electrical Detector Co. v. Louis*, 50 Ill. App. 428.

Failure to specify that judgment for plaintiffs was against defendant was immaterial if the record plainly shows it. *Smith v. Kiene*, 231 Mo. 215, 132 S. W. 1052.

"In substance it must show intrinsically and distinctly, and not inferentially, that the matters in the record had been determined in favor of one of the litigants, or that the rights of the parties had been adjudicated;" hence a judgment for costs for one was bad because not disposing of the issues. *Scott v. Burton*, 6 Tex. 322, 55 Am. Dec. 782.

3 Must show which of two plaintiffs or defendants was entitled or bound. *C. Aultman & Co. v. Wirth*, 45 Ill. App. 614.

The singular form of the word may be sufficient to include the plural of plaintiff or defendant. *Roach v. Blakey*, 89 Va. 767, 17 S. E. 228; *Turner v. Houston*, — Tex. Civ. App. —, 43 S. W. 69.

"Plaintiff" held to mean plaintiffs. *Ellis v. Dunn*, 3 Ala. 632.

4 "Four hundred and sixty-one and 53/100 damages" is insufficient to show any money award. *Carpenter v. Sherfy*, 71 Ill. 427.

For the sum of "\$86.83, with interest," is for a sum certain. *Etheridge v. Middleton*, 1 Marv. (Del.) 139, 40 Atl. 714.

If the sum be in blank the judgment is void. *Custer County v. Moon*, 8 Okla. 205, 57 Pac. 161; *Bludworth v. Poole*, 21 Tex. Civ. App. 551, 53 S. W. 717.

The amount of costs, being a part of the judgment, must be adjusted before entry in the judgment book; hence an entry, with a blank for costs, was void for purpose of appeal. *Lentilhon v. New York*, 3 Sandf. 721.

But a judgment for "—— dollars, costs," while deficient for purpose of appeal, may support a lien. *Richardson v. Rogers*, 37 Minn. 461, 35 N. W. 270.

The judgment need not specify how much of damages is punitive and how much compensatory. *Hambly v. Hayden*, 20 R. I. 558, 40 Atl. 417.

If the judgment is on a demand payable in coin, the judgment should sound in coined dollars and parts of dollars, providing that such form of judgment has been duly prayed in the complaint. Note to 29 L.R.A. 593, citing leading case of *Bronson v. Rodes*, 7 Wall. 229, 19 L. ed. 141, and many other cases.

Failure to enter judgment *de bonis testatoris*, as it should have been, was held a clerical error remediable on appeal. *Carrington v. Odom*, 124 Ala. 529, 27 So. 510.

Under statutes in many of the states it is now provided that a judgment may be taken against one or more of several co-defendants, letting the action stand or be dismissed as against the ones not served, or entering it against all, to be enforced against those not served on a motion to show cause. When

a judgment is thus entered it must show which of the defendants are bound.¹

Reference to the verdict may aid the statement of the amount or description of the parties.² If necessary to afford a basis for the judgment, it should refer to the verdict³ or the pleadings.⁴

¹ That judgment may be against one of codefendants and not the others, see N. Y. Code Civ. Proc. § 1204, Cal. Code Civ. Proc. §§ 578, 579.

In New Jersey if one is in court, the plaintiff may, by express provision of statute, proceed to judgment against all defendants. Gen Stat. p. 2336, § 2; United States use of Sayre & F. Co. v. Griefen, 72 N. J. L. 1, 60 Atl. 513.

Under a statute allowing entry against all to be enforced, as to those not served, only against the joint property of all the defendants, it was held not error to enter it against those served only. Dillon v. Porter, 36 Minn. 341, 31 N. W. 56.

And, where the surety, but not the principal, was served in action on a bond, it was held proper to enter judgment against the surety only. Rehm v. Halverson, 197 Ill. 378, 64 N. E. 388, citing Coursen v. Browning 86 Ill. 57.

If entered against all defendants, it is void. Roberts v. Pawley, 50 S. C. 491, 27 S. E. 913.

² "Recover of said defendant the said sum of — dollars, so assessed as aforesaid," sufficiently refers to the sum found by the verdict. Ellis v. Dunn, 3 Ala. 632.

A line of Illinois cases holds that judgment on the verdict must show for whom the judgment was given and for how much, a bare reference to the verdict being insufficient. Sears v. Sears, 8 Ill. 47; Faulk v. Kellums, 54 Ill. 188; Schermerhorn v. Mitchell, 15 Ill. App. 418; Fitzsimmons v. Munch, 74 Ill. App. 259.

Recital in record, "Judgment on verdict for \$3,000, and costs," is insufficient, on appeal, to show that there was a judgment. Martin v. Barnhardt, 39 Ill. 9.

³ A recital in a judgment in an equitable action that the court made its findings "from the verdict of the jury" sufficiently shows that the judgment was based on the verdict. Goldman v. Rogers, 85 Cal. 574, 24 Pac. 782.

⁴ The judgment need not be entered on the foot of the complaint, though that guards against error, but may be on a separate paper. Melchers v. Moore, 62 S. C. 386, 40 S. E. 773.

6. Minutes, judgment-roll, and record.

Pending the making up of the judgment roll¹ or the record,

the clerk's minutes are a temporary record.² They should contain sufficient *data* to make resort to memory unnecessary in later extending the judgment therefrom.³

¹ Duty to make up the judgment roll, see ante, § 3.

² Minutes are temporary record. Read v. Sutton, 2 Cush. 115.

³ It is not a commendable practice for the clerk to take very abridged minutes, such as the single word "judgment," and, from memory of the particulars of the judgment, extend it in formal language on the record. *Montgomery v. Murphy*, 19 Md. 576, 81 Am. Dec. 652.

The want of a minute entry of the verdict does not impair the duly entered judgment. *Gunn v. Plant*, 94 U. S. 664, 24 L. ed. 304.

The judgment roll, as it is known in many states, consists of the material papers in the case leading to the judgment; and the statutes usually prescribe and enumerate what papers are necessary, which ordinarily include the summons, pleadings, other papers or orders showing the continuity of the case towards a judgment, the verdict or *postea*, and the judgment proper.¹ Unless a particular form is required by statute, the collation of the papers into an ordinary parcel, with the proper marks and indorsements, is a sufficient judgment roll.²

¹ Precisely what must be embodied in the record or judgment roll depends very largely on the terms of the statutes in the various states. See the footnotes following.

N. Y. Code Civ. Proc. § 1237, requires that it contain the summons, pleadings or copies thereof, the final judgment and the interlocutory judgment, if any, or copies thereof, and each paper on file or a copy thereof, and a copy of each order, which in any way involves the merits or necessarily affects the judgment. If judgment is taken after a trial, the judgment roll must contain the verdict, report, or decision; each offer, if any, made as prescribed in this act; and the exceptions or case then on file. In jury trials the judgment roll contains "the pleadings, a copy of the verdict of the jury, . . . or findings of court or referee, all bills of exceptions, . . . a copy of any order made on demurrer, or relating to change of the parties, and a copy of the judgment." Cal. Code Civ. Proc. § 670.

At the common law the record was a "history of the most material proceedings in the cause, entered on a parchment roll and continued down to the present time; in which must be stated the original writ and summons, all the pleadings, the declaration, view oroyer prayed, the imparlances, plea, replication, rejoinder, continuances, and whatever further proceedings have been had, all entered *verbatim* on the roll.

and also the issue or demurrer, and rejoinder thereon." 3 Bl. Com. 317.

"There came a jury of ——— and eleven others," suffices to show a lawful jury. *Ellis v. Dunn*, 3 Ala. 632.

On a recital that a jury was had and was sworn, and that it was according to law, all presumptions as to the regularity of the jury are allowable. *Martin v. Barnhardt*, 39 Ill. 9.

Verdict.—*Overton v. National Bank*, 3 N. Y. S. R. 169.

Failure to include the verdict where judgment is entered after death of a party is an error which may be corrected by the court thereafter. *Re Miller*, 70 Hun, 61, 22 N. Y. Supp. 1104.

Where an issue arising in an equitable action is sent to a jury, the verdict is a part of the judgment roll, and it is sufficiently recorded by filing as a part thereof. *Goldman v. Rogers*, 85 Cal. 574, 24 Pac. 782.

The clerk cannot include in the *postea* a recital that the cause is one wherein the body of the defendant may be arrested, under statutes which make the pleading and proof of certain facts essential to such arrest. *Bacon v. Grossmann*, 90 App. Div. 204, 86 N. Y. Supp. 66.

The register of actions is none of the papers specified in Mont. Code Civ. Proc. § 1196, as necessary to make up the judgment roll. *Haupt v. Simington*, 27 Mont. 480, 94 Am. St. Rep. 839, 71 Pac. 672.

² It was held a sufficient enrolment of the judgment to put all the papers in an envelop which was properly indorsed, though the papers were not fastened together. *Melchers v. Moore*, 62 S. C. 386, 40 S. E. 773.

7. Signing and dating.

Provisions for the signing of the record are usually construed to be directory, so that the omission of the signature is not fatal to the judgment.¹

The dating of the judgment is a matter of statutory regulation, and if no other date be given it will ordinarily take the date of the first or the last day of the term.² For the purposes of lien and priority a date is essential, and likewise to reckon the time when the judgment will be dormant or the time when execution may issue thereon.³

¹ *Colony v. Billingsley*, 2 Neb. (Unof.) 670, 89 N. W. 744; *Norwood v. Snell*, 95 Tex. 582, 68 S. W. 773.

In other than jury cases this has been held true. *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074; *Fontaine v. Hudson*, 93 Mo. 62, 3 Am. St. Rep. 515, 5 S. W. 692; *Scott v. Rohman*, 43 Neb. 618, 62 N. W. 46; *Gordon v. Bodwell*, 55 Kan. 131, 39 Pac. 1044; *United States v. Stoller*, 180 Fed. 910 (naturalization proceeding).

Judgment can be signed at a later term. *Knowles v. Savage*, 140 N. C. 372, 52 S. E. 930; *Ferrell v. Hales*, 119 N. C. 199, 25 S. E. 821; *Beitman v. Hopkins*, 109 Ind. 177, 9 N. E. 720; *Childs v. McChesney*, 20 Iowa, 431, 89 Am. Dec. 545.

Not void because entries were not signed till vacation, but questioning if it could be enforced till read in court and signed in term. *Catterlin v. Frankfort*, 87 Ind. 45.

In Iowa the statute calling for signature by the judge to the record was held directory, so that where he did not sign at the term because the entries could not have been made up in time, the judgments were nevertheless valid. *Childs v. McChesney*, 20 Iowa, 431, 89 Am. Dec. 545.

To a like effect, see *Eastman v. Harteau*, 12 Wis. 267; *Secombe v. Steele*, 20 How. 94, 15 L. ed. 833 (construing Minnesota statute).

Under the statutes of North Dakota requiring an order for judgment before any judgment can be entered, it is only necessary, on the coming in of a verdict, for the judge to order judgment entered in the minutes, or to make and sign a subsequent order and file it with the clerk, who will then enter the judgment; it is not necessary that the judge sign the judgment itself. *Gould v. Duluth & D. Elev. Co.* 3 N. D. 96, 54 N. W. 316.

In *Boynton v. Crockett*, 12 Okla. 57, 69 Pac. 869, it is said that statutes which require the court to sign the record apply only to the "complete record," which is usually made up only in land-title cases, and in cases where the clerk has failed to bring up his records, and the court orders them brought up and then approves and subscribes the record when it is brought up; and they do not require the signing of the journal of the proceedings that the clerk keeps daily.

But under a Kentucky statute which requires that the judgment be entered on the order book, and another which requires the proceedings of each day to be drawn up and signed by the presiding judge after reading in open court, it was a fatal error for the regular judge to sign the record of the proceedings had before a special judge; and the inclusion in the record of a signed written judgment by the special judge was not sufficient. *Ewell v. Jackson*, 129 Ky. 214, 110 S. W. 860.

In Louisiana it is required by the code that the judgment be rendered and signed by the judge in open court. *State ex rel. Illinois C. R. Co. v. 4th C. C. A. Judges*, 48 La. Ann. 905, 19 So. 932; *Richardson v. Turner*, 52 La. Ann. 1613, 28 So. 158.

Dictum that the signature of the judge is not necessary to the validity of the judgment, but that it is of service in determining what has been adjudged. *Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211, citing *Crim v. Kessing*, 89 Cal. 489, 23 Am. St. Rep. 491, 26 Pac. 1074.

Omission of the clerk to sign the judgment roll is a mere clerical error (*Van Alstyne v. Cook*, 25 N. Y. 489; *Lythgoe v. Lythgoe*, 75 Hun,

147, 26 N. Y. Supp. 1063); at least when not made necessary by statute (*Goelet v. Spofford*, 55 N. Y. 647).

The judgment is not collaterally assailable by a third person because not signed by the clerk. *Artisans' Bank v. Treadwell*, 34 Barb. 553.

Where it was not necessary that the clerk sign the judgment entry, it was not a ground for impeachment that one signed it as "deputy clerk," though he had never been appointed a deputy. *King v. Belcher*, 30 S. C. 381, 9 S. E. 359.

A distinction is to be noted that, while a signature may not be vital to the judgment record, the proof of the judgment would either be made by producing the record from the proper source, or by producing a properly signed and certified copy of it.

It was immaterial on which side of the page the signatures appeared. *Arrowood v. McKee*, 119 Ga. 623, 46 S. E. 871.

² The clerk must make a minute on the back of each judgment roll filed in his office, of the time of filing it, specifying the year, month, day, hour, and minute. N. Y. Code Civ. Proc. § 1239.

In Massachusetts, by ancient practice, entry was of the last term day unless an earlier entry is made and the time minuted. *Herring v. Polley*, 8 Mass. 113; *Portland Bank v. Maine Bank*, 11 Mass. 204.

So in New Hampshire. *Haynes v. Thom*, 28 N. H. 386.

Under a statute, judgments were dated as of the first day of term, although the court did not sit till later. *Norwood v. Thorp*, 64 N. C. 682.

Omission of the date is a mere irregularity, but it was held that "August, 1900 Term, Saluda, S. C.," was a sufficient date. *Burwell & D. Co. v. Chapman*, 59 S. C. 581, 38 S. E. 222.

Under the Washington statutes the date of the judgment is the date of its filing with the clerk for entering. *Quareles v. Seattle*, 26 Wash. 226, 66 Pac. 389; *Warner v. Miner*, 41 Wash. 98, 82 Pac. 1033.

The clerk's indorsement on the judgment abstract, that it was "duly recorded" and filed on a day stated, raises a presumption that he noted on the record of the judgment the day and hour that is required by Rev. Stat. art. 3157. *Gunter v. Buckler*, — Tex. Civ. App. —, 32 S. W. 229.

³ These matters have been deemed foreign to this work, but see as to them note in 28 L.R.A. 621.

8. Time for entry and record.

Various statutes prescribe the situations and stages in the action when the clerk shall enter judgment,¹ but these statutes are generally directory,² and timely entry is presumed.³

At common law four days were allowed to elapse after verdict, so that motions for new trial or in arrest of the judgment

might be made, but the entry of the judgment before that time, or before the statutory time or before the time allowed by the judge, will not be void.⁴ The entry need not be in term if the rendition was timely.⁵ Unless the statute prevents it, the judge may allow a stay of the entry,⁶ and it will be error for the party to cause entry during such stay.⁷ Acts which are judicial and partake of the decision of the court must be done on a court day,⁸ but clerical acts may be done on other days than juridical ones.⁹ In computing the time required by some statutes to elapse between the reception of the verdict or other act and the entry or docketing of the judgment, the regular rules for inclusion or exclusion of terminal days apply.¹⁰

¹ On entering judgment clerk shall "immediately file the judgment roll." N. Y. Code Civ. Proc. § 1237.

When trial by jury has been had, judgment must be entered by the clerk in conformity to the verdict, within twenty-four hours after rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings. Cal. Code Civ. Proc. § 664.

Under the statutes of California requiring entry within twenty-four hours after verdict, and also providing for dismissal if the successful party fails for six months to have entry made, the court may cause entry to be made at any time short of six months. *Waters v. Dumas*, 75 Cal. 563, 17 Pac. 685.

There is no one "entitled" to have judgment entered, and consequently no neglect till after rendition. *San Jose Ranch Co. v. San Jose Land & Water Co.* 126 Cal. 322, 58 Pac. 824.

The statute requiring entry of judgment on verdict within twenty-four hours, unless it is set aside by the court, is directory; and in any event would not apply to a jury trial wherein there were also questions of a purely equitable nature. *Churchill v. Louie*, 135 Cal. 608, 67 Pac. 1052.

² *First Nat. Bank v. Wolff*, 79 Cal. 69, 21 Pac. 551, 748.

Judgment not void because not entered within time prescribed. *Brown v. Porter*, 7 Wash. 327, 34 Pac. 1105.

Constitutional time for entry held directory. *Koon v. Munro*, 11 S. C. 139.

³ In favor of regularity, it may be presumed that the filing of the order took place during lifetime of a party, so that the entry may be related back thereto, the party having meanwhile died. *Peetsch v. Quinn*, 6 Misc. 50, 26 N. Y. Supp. 728.

After lapse of time for making a complete record, it will be presumed that clerk did his duty. *Jenkins v. Parkhill*, 25 Ind. 473.

⁴ It is not an objection that entry was made before time for moving for new trial had expired, and while it was pending at the same term. *Hasted v. Dodge*, — Iowa, —, 35 N. W. 462.

Not fatal error to enter it pending motions for new trial and in arrest. *Warren v. Chicago, B. & Q. R. Co.* 122 Mo. App. 254, 99 S. W. 16.

Entry of judgment within fifteen days given for stay to move for new trial was not void for prematurity. *Harvey v. McAdams*, 32 Mich. 472.

It was immaterial that entry was not made till ten days after disposing of motion for new trial. *Voorhies v. Hennessy*, 7 Wash. 243, 34 Pac. 931.

⁵ As to the distinction between judgments and decrees in respect to entry, it is said that under the old practice a decree took effect at once, and the enrolment added nothing to its force or competency as evidence; but a judgment was upheld under the Code practice when entered in vacation after announcement in term. *Burke v. Burke*, 142 Iowa, 206, 119 N. W. 129.

A decree on findings by a jury, as modified by the court, was properly entered after term, having been directed within term. *Buckers' Irrig. Mill. & Improv. Co. v. Farmers' Independent Ditch Co.* 31 Colo. 62, 72 Pac. 49.

But where in a court case the judgment, if any, was a mere oral announcement in the judge's private office, with no minute of it, he could not after adjournment make an entry of it. *Lake v. Hood*, 35 Tex. Civ. App. 32, 79 S. W. 323.

It must be rendered within the term. *Smith v. Chichester*, 1 Cal. 409; *Peabody v. Phelps*, 7 Cal. 53.

Judgment pronounced and entry made after term is void. *Austin v. Rodman*, 8 N. C. (1 Hawks) 71.

⁶ In an action for damages, and also for an injunction, it was proper to stay entry of judgment on the verdict till the final disposition of the equitable issues, making the stay begin when a motion for new trial was disposed of. *Auten v. Catawba Power Co.* 54 S. C. 399, 65 S. E. 274, 66 S. E. 180.

⁷ Entry by the party pending a stay is bad. *Gersman v. Levy*, 57 Misc. 156, 108 N. Y. Supp. 1107.

But where the stay was only to operate on the execution and enforcement of the judgment, it does not prevent entry. *Stern v. Wabash R. Co.* 52 Misc. 12, 101 N. Y. Supp. 181.

⁸ If rendered on Sunday, it is void. *Parsons v. Lindsay*, 41 Kan. 336, 3 L.R.A. 658, 13 Am. St. Rep. 290, 21 Pac. 227.

⁹ According to the better rule, the docketing, being a ministerial act, need not be done on a court or judicial day, and is valid though done on a holiday. See note to 19 L.R.A. 318, citing in *Re Worthington*, 7 Biss. 455, 16 Nat. Bankr. Reg. 54, Fed. Cas. No. 18,051 (Christmas);

Perkins v. Jones, 28 Wis. 243 (February 22d); Rice v. Mead, 22 How. Pr. 445 (election day); Bear v. Youngman, 19 Mo. App. 41 (Thanksgiving day); Hamer v. Sears, 81 Ga. 288, 6 S. E. 810 (Fourth of July); and citing contra Hemmens v. Bentley, 32 Mich. 89.

- ¹⁰ Note to 49 L.R.A. 224. Exclusion of first day and also of last where it falls on Sunday (Hodgson v. Banking House, 9 Mo. App. 24); service of application on Wednesday, to be heard on Monday, is five days (Taylor v. Corbiere, 8 How. Pr. 385); but from Wednesday to Monday is not within four days after submission (Bissell v. Bissell, 11 Barb. 96); and statute providing for entry of judgment after the expiration of four days from filing of decision excludes both terminal days (Marvin v. Marvin, 75 N. Y. 240). As to which see also, upon the English rule, Roberts v. Stacey, 13 East, 21. The question of time for entry of judgment may arise on an inquiry whether the period allowable for motions for new trial or in arrest of judgment has expired.

For further illustrations of the computation of the time where the giving or rendition of judgment is one of the terminals, see note to 49 L.R.A. 226, on the computation of the time within which appeal, error, or other form of review must be instituted.

The days given within which to move for a new trial included the day of the verdict under the common law. Lane v. Shreiner, 1 Binn. 292; Burrall v. Du Blois, 2 Dall. 229, 1 L. ed. 360; White v. Crutcher, 1 Bush, 472. But under statutes this has been changed in some states, so that the verdict day is excluded. Hathaway v. Hathaway, 2 Ind. 513; Rogers v. Cherokee Iron & R. Co. 70 Ga. 717.

Juridicial days exclusive of Sunday are meant under some of the statutes. Long v. Hughes, 1 Duv. 387. But statutes excluding Sunday when it is the last day have no application when it is an intermediate day. National Bank of Metropolis v. Williams, 46 Mo. 17.

9. Nunc pro tunc entry.

If the entry or other clerical or memorializing act be not done at the time prescribed, it may afterwards be done *nunc pro tunc*¹ without notice,² but it cannot be done as against the intervening rights of third persons who have acquired them in good faith.³

The death of a party after verdict is not an obstacle to *nunc pro tunc* entry of the judgment thereon.⁴

The rule as generally stated is that the fact of the rendition of the judgment must be shown by record evidence, and must not rest in the memory of the judge or others.⁵

¹ Wood v. Watson, 107 N. C. 52, 10 L.R.A. 541, 12 S. E. 49; Clark & L. Invest. Co. v. Rich, 81 Neb. 321, 15 L.R.A. (N.S.) 682, 115 N. W. 1084

(on ground of accident or mistake); *Day v. Goodwin*, 104 Iowa, 374, 65 Am. St. Rep. 465, 73 N. W. 864 (neglect of clerk); *Phelps v. Wolff*, 74 Neb. 44, 103 N. W. 1062 (an equity case, wherein judgment *nunc pro tunc* was entered on its being held that a former attempted entry was invalid).

In Georgia, when the signing has been postponed by the pendency of an appeal, it may be signed after the appeal is dismissed or disposed of. *Kane v. Hills*, R. M. Charlt. (Ga.) 103; *Perdue v. Bradshaw*, 18 Ga. 287; *Hardee v. Stovall*, 1 Ga. 92.

So, where the entry "judgment" was carried over the term, but no court was held for a year, and the entry was then sustained as of the preceding term. *Jacobs v. Burgwyn*, 63 N. C. 193.

The verdict, when omitted by the clerk's misprision, may be recorded *nunc pro tunc*. *Gunn v. Plant*, 94 U. S. 664, 24 L. ed. 304.

Judgment may be entered on the verdict *nunc pro tunc*, and, as between the parties, it relates back to the time when it should have been entered. *Walden v. Walden*, 128 Ga. 126, 57 S. E. 323.

Where judgment was against two partners sued, but the clerk entered the judgment against one of them and the surety on the appeal bond, it was proper to correct the judgment by striking out the entry as to the surety, no judgment having been rendered as to him. *Kansas City Pump Co. v. Jones*, 126 Mo. App. 536, 104 S. W. 1136.

Where the court directed a verdict for one of two defendants, and as to the other a verdict for plaintiff resulted, it was proper to enter *nunc pro tunc* such correction of the judgment as to dispose of the case as to both defendants. *El Paso & N. E. R. Co. v. Campbell*, 45 Tex. Civ. App. 231, 100 S. W. 170.

The trial court has the power in the first instance to correct the entry to conform to the verdict. *State v. Currie*, 72 Minn. 403, 75 N. W. 742.

The whole theory of *nunc pro tunc* entries is to make the record of the court speak the truth, and if a judgment was in fact rendered, it may be entered long after. *Mays v. Hassell*, 4 Stew. & P. (Ala.) 222, 24 Am. Dec. 750 (three years after verdict); *Murray v. Cooper*, 6 Serg. & R. 126 (eight years); and many other cases cited in note to 20 L.R.A. 144.

But there must have been a judgment actually rendered at a time prior to the entry. *Gray v. Brignardello*, 1 Wall. 627, 17 L. ed. 693.

Signed form of judgment indorsed "Filed" by the clerk is not rendered within meaning of the Iowa statutes. *Callanan v. Votruba*, 104 Iowa, 672, 40 L.R.A. 375, 63 Am. St. Rep. 538, 74 N. W. 13.

The mere announcement of the judgment that the court would render is not a rendition, where the reason for not formally rendering it was the absence of counsel, whom the court desired to have present to

formulate the proper order. *Vance v. Ravenswood, S. & G. R. Co.* 53 W. Va. 338, 44 S. E. 461.

Entry of judgment on verdict at subsequent term is proper where omission to enter was due to oversight; and such is not an opening or vacating of judgment. *Shephard v. Brenton*, 20 Iowa, 41.

It will not be entered *nunc pro tunc* if the omission was due to the negligence of the party; but if he was not in any way a contributor to the delay, it may be entered on a verdict rendered during the party's lifetime, though he die before the entry be made. See full collection of cases in note to 20 L.R.A. 148, and post.

Thus, where notice was given at the time of verdict of intention to move thereon for judgment, and afterwards, pending a motion for a new trial, the other party died, it will, on the disposal of the latter motion, be entered on the verdict. *Hilker v. Kelley*, 130 Ind. 356, 15 L.R.A. 622, 30 N. E. 304.

And the failure of the clerk to make entry after being properly requested to do so by the party entitled will not call in force a statute providing for dismissal if "the party entitled to judgment neglects" to demand judgment. *Gardner v. Tatum*, 77 Cal. 458, 19 Pac. 879.

Successfully moving for the dismissal of an appeal for want of a formal judgment is not an estoppel against the parties' afterwards obtaining the proper judgment. *Metzger v. Morley*, 197 Ill. 208, 94 Am. St. Rep. 158, 64 N. E. 280.

The court may impose conditions, since the granting of the motion is discretionary. *Powers v. Carter Coal & I. Co.* 100 Va. 450, 41 S. E. 867 (an equity case).

Statutes governing the procedure to "open or vacate" a judgment (Neb. Code Civ. Proc. § 609) have no application to a motion to make a *nunc pro tunc* entry, since it does not open or vacate the judgment. *Hyde v. Michelson*, 52 Neb. 680, 66 Am. St. Rep. 533, 72 N. W. 1035.

² *Stokes v. Shannon*, 55 Miss. 583; *Clemens v. Judson*, Minor (Ala.) 395; *Long v. Stafford*, 103 N. Y. 274, 8 N. E. 522.

No notice is requisite between the parties before supplying a ministerial omission. *Selders v. Boyle*, 5 Kan. App. 451, 49 Pac. 320.

The failure to give the statutory notice to the attorneys would be a mere irregularity; hence the defectiveness of the notice was not a fatal vice. *Long v. Stafford*, 103 N. Y. 275, 8 N. E. 522.

It is not necessary to give notice to the fraudulent grantee of the land on which the judgment will be a lien. *Wagner v. Law*, 3 Wash. 500, 15 L.R.A. 784, 28 Am. St. Rep. 561, 28 Pac. 1109, 29 Pac. 927.

Notice of *nunc pro tunc* entry is not necessary when the case is in a stage where it is the duty of parties to take notice of all proceedings. *Smith v. Kiene*, 231 Mo. 215, 132 S. W. 1052.

³ So, where, admitting that eight years' delay was not a bar to *nunc pro*

tunc entry, it was said that it ought not to be allowed as to third persons. *Murray v. Cooper*, 6 Serg. & R. 126.

But it was allowed so as to permit an execution issued without the filing of the judgment to retain its priority. *Chichester v. Cande*, 3 Cow. 39, 15 Am. Dec. 238.

The entry of a judgment *nunc pro tunc* will not be allowed to the prejudice of a third party who has become the owner of the property which will be affected by the order. *Clark & L. Invest. Co. v. Rich*, 15 L.R.A. (N.S.) 682. For other cases on the same point, see note to same case, p. 683.

A dowress whose rights in lands subject to a judgment by confession are enlarged after the confession has no right to be protected against a *nunc pro tunc* entry on such confession. *Davidson v. Richardson*, 50 Or. 323, 17 L.R.A. (N.S.) 319, 126 Am. St. Rep. 738, 89 Pac. 742, 91 Pac. 1080.

But a third person cannot intervene and question the propriety of the judgment. *Hillens v. Brinsfield*, 113 Ala. 304, 21 So. 208.

⁴ The entry may be made after the death of a party for whom judgment was rendered during his lifetime. *Franklin v. Merida*, 50 Cal. 289.

Long v. Stafford, 103 N. Y. 275, 8 N. E. 522, distinguishing *Tuomy v. Dunn*, 77 N. Y. 515, and pointing out that under the provisions of N. Y. Code of Civ. Proc. § 763, the final judgment must be entered in the name of the original defendant party, and under § 1210, that a memorandum of the fact of death must be entered with the judgment in the judgment book, and indorsed on the judgment roll and note on the margin of the docket of the judgment, whereupon such judgment becomes an established debt against the estate of the party, but not a lien on his property.

So even a tort action where motion in arrest was pending when the party died. *Brown v. Wheeler*, 18 Conn. 199. And under the statute in Georgia, entry within four days after the adjournment of the term was likewise proper. *Skidaway Shell-Road Co. v. Brooks*, 77 Ga. 136.

After overruling of exceptions, the judgment was entered as of the day of verdict. *Kelley v. Riley*, 106 Mass. 341, 8 Am. Rep. 336.

Judgment entered in the name of the deceased party was vacated, and the name of the administrator substituted, in *Stickney v. Davis*, 17 Pick. 169; and where a similar correction had been made, but the order for the correction was not signed, it was itself corrected *nunc pro tunc* by adding the proper signature. *Hunt v. Johnston*, 105 Iowa, 311, 75 N. W. 103.

Death of the party before the verdict, or before the determination of the issues, abates the action except as provided by statute, and in any such case a *nunc pro tunc* entry cannot be made. *Jennings v. Ashley*, 5 Ark. 128, and other cases cited in note 20 L.R.A. 149.

⁵ Such an entry is allowable only on proof found in the record that a judgment had been rendered. *Draughan v. Tombeckbee Bank*, 1 Stew. (Ala.) 66, 18 Am. Dec. 38, and other cases cited in note to 20 L.R.A. 145. Or at least on written evidence. *Carter v. McBroom*, 85 Tenn. 377, 2 S. W. 803; *Waldo v. Beckwith*, 1 N. M. 97; *Cadwell v. Dullaghan*, 74 Iowa, 239, 37 N. W. 178; *McClain v. Davis*, 37 W. Va. 330, 18 L.R.A. 634, 16 S. E. 629.

"Trial by jury and verdict for \$1,521.09 and motion for new trial. Motion overruled and judg. on verdict for \$1,521.09," is a sufficient minute entry by the judge, on which the clerk's entry on the record, "And judgment on the verdict for \$1,521.09," afforded record evidence to make *nunc pro tunc* entry of the judgment. *Metzger v. Morley*, 197 Ill. 208, 90 Am. St. Rep. 158, 64 N. E. 280.

The entry of a motion to arrest the judgment is a recital supporting an inference that there was a judgment, and suffices to make an entry of the judgment *nunc pro tunc*. *Sperling v. Stubblefield*, 105 Mo. App. 489, 79 S. W. 1172.

"There must invariably be some [record] to amend by," and an unsigned writing found among the papers of the suit was held insufficient though in form of a decree. *Raymond v. Smith*, 1 Met. (Ky.) 65, 71 Am. Dec. 458 (an equity case).

In *Boynnton v. Crockett*, 12 Okla. 57, 69 Pac. 869, it is said that parol evidence alone is insufficient to prove an order to be entered *nunc pro tunc*, and that, if the record or documentary evidence has been destroyed, the proper practice is to sue under the statute for restoration of destroyed records, and then move on the strength of the restored record to prove the omitted entry. It may be questioned if this is not a circuitous way in which to exercise the inherent power of the court to make its own records correct.

There is, however, a distinction made between the proving of a judgment by parol, and the proving by parol that a judgment was ordered which the clerk omitted to enter; hence, under the Maryland practice, in which the judgment is orally announced in the verdict, whereupon the clerk makes entry of it, it was proper to show orally that it was so rendered, but not entered, and to enter the judgment on the verdict *nunc pro tunc*. *Stern v. Bennington*, 100 Md. 344, 108 Am. St. Rep. 433, 60 Atl. 17.

In California the same result is reached with more apparent logic by treating the pleadings, court minutes, and the verdict as record evidence of a judgment, and thereupon entering it *nunc pro tunc*. *Marshall v. Taylor*, 97 Cal. 422, 32 Pac. 515. But in that state the verdict has the force, by statute, of an order for judgment, and nothing but the ministerial duty of entering it remains for the clerk. *Ibid.*

In North Carolina, under statutes that likewise impose the duty on the clerk to enter judgment on the verdict, if not otherwise directed by the court, it was held that, having received it by consent on the last day

of the term, in such circumstances that the judge was legally present, it was the clerk's duty to enter the judgment; and the clerk having omitted this duty, the court might at the next term cause it to be entered as of the term when the verdict was received. *Ferrell v. Hales*, 119 N. C. 199, 25 S. E. 821.

So, it may be done *nunc pro tunc* on evidence of the verdict returned into court, and the overruling of all motions suspensive of judgment. *Carwile v. William M. Cameron & Co.* 102 Tex. 171, 114 S. W. 100.

So, in Kansas, where the ministerial duty of the clerk to spread the judgment on the journal was omitted, and this duty was imposed on him by the statute on the incoming of the verdict, it was proper at a later time to supply it without notice to the parties. *Selders v. Boyle*, 5 Kan. App. 451, 49 Pac. 320.

10. Compelling or preventing entry.

The entry of judgment upon a verdict may be compelled by mandamus, if there is no adequate ordinary remedy;¹ and if the judgment or its enforcement would be unconscionable, its entry may be enjoined.²

¹ *Texas Tram & Lumber Co. v. Hightower*, 100 Tex. 126, 6 L.R.A. (N.S.) 1046, 123 Am. St. Rep. 794, 96 S. W. 1071, distinguishing *Hume v. Schintz*, 90 Tex. 72, 36 S. W. 429, wherein mandamus was refused on the ground that the verdict therein was pleadable as a full bar to a subsequent action.

It also may be compelled *nunc pro tunc*. *People ex rel. Fitzpatrick v. District Ct.* 33 Colo. 77, 79 Pac. 1014.

Mandamus proper to compel judge to enter the judgment which necessarily follows the verdict. *State ex rel. St. Louis, K. & N. W. R. Co. v. Klein*, 140 Mo. 502, 41 S. W. 895.

See *Corthell v. Mead*, 19 Colo. 386, 35 Pac. 741, where writ was granted to compel entry of judgment on verdict before justice of the peace, he having no discretion to do otherwise than enter it.

Motion to compel entry by clerk is proper, and not mandamus. *First Nat. Bank v. Wolff*, 79 Cal. 69, 21 Pac. 551, 748; *Page v. Superior Ct.* 76 Cal. 372, 18 Pac. 385.

² *Williams v. Neely*, 69 L.R.A. 232, 67 C. C. A. 171, 134 Fed. 1.

XXIX.—APPLICATIONS AFTER VERDICT.

1. Judgment for more than demanded in complaint.
2. Ordering exceptions to the appellate division.
3. Motion for nonsuit.
4. Motion to set aside verdict taken subject, etc.
5. Further questions.
6. Dismissing for want of jurisdiction.
7. Certificate for costs.
8. Certificates of probable or reasonable cause.
9. Additional allowance.

1. Judgment for more than demanded in complaint.

Where the amount of a verdict exceeds the sum demanded in the complaint, the court has no power to amend the complaint by increasing the demand to correspond with the amount of the verdict, unless plaintiff consents to a new trial and pays defendant's costs.¹ But the plaintiff may take judgment for the amount demanded in his complaint, remitting the excess.²

The objection that the amount of recovery exceeds demand is waived unless taken before the entry of judgment.³

And an allegation of damages, as distinguished from a demand in the demand for relief, may, it seems, be amended after a verdict exceeding the amount of the allegation, but not exceeding the demand.⁴

¹ *Corning v. Corning*, 6 N. Y. 97; *Decker v. Parsons*, 11 Hun, 295; *Pharis v. Gere*, 31 Hun, 443; *Excelsior Electric Co. v. Sweet*, 59 N. J. L. 441, 31 Atl. 721. Compare *Knapp v. Roche*, 62 N. Y. 614 (sanctioning amending at trial to conform complaint to proof).

² *Corning v. Corning*, 6 N. Y. 97; *Excelsior Electric Co. v. Sweet*, 59 N. J. L. 441, 31 Atl. 721; *Callanan v. Shaw*, 24 Iowa, 441; *Crabb v. Nashville Bank*, 6 Yerg. 332; *Tarbell v. Tarbell*, 60 Vt. 486, 15 Atl. 104. Compare *Lewis v. Cooke*, 1 Harr. & M'H. 159, where, on the return of a writ of inquiry for damages, a release was entered for that portion of the damages assessed by the inquisition in excess of those laid in the declaration, and judgment entered for the balance. And this right may be exercised at a subsequent term (*Hemmenway v. Hickes*, 4 Pick. 497) and even after error brought. *Furry v. Stone*, 1 Yeates, 186; *Crabb v. Nashville Bank*, 6 Yerg. 332.

But a remittitur should not be allowed unless the amount of the excess in the verdict clearly appears; otherwise the verdict should be set aside. *Tarbell v. Tarbell*, 60 Vt. 486, 15 Atl. 104.

³ *Brown v. Schoonmaker* (N. Y.) 10 Rep. 745.

⁴ *Schultz v. Third Ave. R. Co.* 89 N. Y. 242, 247 (per Earl, J.). Where a complaint has been improperly amended after verdict by increasing the demand it seems that the irregularity in the verdict should be taken advantage of by motion, and not by an exception. *Diossy v. Morgan*, 74 N. Y. 11, 14.

2. Ordering exceptions to the appellate division.

In New York a party who has taken an exception may move before the trial judge at any time during the same term, that the exceptions be heard in the first instance by the appellate division of the supreme court (formerly the general term), and that judgment be suspended in the meantime. It is in the discretion of the judge to grant or deny the motion.¹

¹ New York Code Civ. Proc. § 1000. If granted, the proceeding at the appellate division is treated as a motion for a new trial, and may be brought on by either party. *Ibid*.

This may be done in case of a nonsuit. Code Civ. Proc. § 1000, as amended in 1882, superseding *Seely v. New York C. & H. R. R. Co.* 25 Hun, 280. So, under the corresponding section of the Code of Procedure (§ 265), exceptions could be had at general term in case of a nonsuit. *Lake v. Artisans' Bank*, 3 Abb. App. Dec. 10, 3 Abb. Pr. N. S. 209, 3 Keyes, 276, Reversing 17 Abb. Pr. 232; *Moloney v. Dows*, 9 Abb. Pr. 86, 18 How. Pr. 27; *Brown v. Conger*, 8 Hun, 625. And plaintiff's exception to a nonsuit could be ordered to be heard at general term. *Mason v. Breslin*, 9 Abb. Pr. N. S. 427, 40 How. Pr. 436, 2 Sweeny, 386. In *Johnson v. New York, O. & W. R. Co.* 30 Hun, 166, a case arising under Code Civ. Proc. § 1000, it seems to be assumed that exceptions could be heard at general term in case of a nonsuit, but the point was not raised or discussed because the court held that the general term of the supreme court had no jurisdiction of exceptions taken in a county court.

This motion, however, cannot be availed of in a county court, because it has no general term, and the general term of the supreme court has no jurisdiction in such a motion made in the county court. *Johnson v. New York, O. & W. R. Co.* 30 Hun, 166.

This motion may be granted even though a motion on the minutes for a new trial is denied. *Garner v. Mangan*, 14 Jones & S. 365. But not where the motion on the minutes for a new trial was founded on exceptions, since it is obvious that exceptions cannot be heard in the first instance at the general term if they have already been heard and de-

terminated by the trial judge. *Schram v. Werner*, 81 Hun, 561; *Byrnes v. Delaware & H. C. Co.* 7 N. Y. Week. Dig. 549.

The special term cannot entertain and dispose of the motion for a new trial while an order continues in force sending the exceptions in the first instance to the general term. *Price v. Keyes*, 1 Hun, 177, reversed on other grounds in 62 N. Y. 378.

An oral direction by the court appearing in the record, that exceptions be heard in the first instance by the general term is not a sufficient compliance with the statute and cannot be effectuated by a direction in writing after the close of the term. *Fifth Ave. Bank v. Forty-second Street & G. Street Ferry R. Co.* 6 App. Div. 567, 40 N. Y. Supp. 219. But the minutes of trial signed by the clerk containing a statement that exceptions are to be heard in the appellate division in the first instance, entry of judgment to be suspended in the meantime, are a sufficient certification of the entry of the necessary order for the hearing of the exceptions in this way. *Sedgwick v. Macy*, 24 App. Div. 1, 49 N. Y. Supp. 154.

The order sending exceptions to the general term does not of itself, it seems, suspend the entry of judgment, and should therefore expressly provide for the suspension of judgment upon the verdict. *Douglas v. Habestro*, 10 Abb. N. C. 6, 62 How. Pr. 29.

An application to vacate and suspend judgment pending the determination of exceptions directed to be heard in the first instance by the general term is a motion within the meaning of the Code provision that a motion upon notice in an action in the supreme court must be made within the judicial district in which the action is triable, or in the county adjoining that in which it is triable, except that where it is triable in the first district the motion must be made in that district. *Thompson v. Thompson*, 52 Hun, 117, 4 N. Y. Supp. 842. But the provision that the order may be revoked or modified in court or out of court by the judge who made it, should be construed as a limitation upon the power of a judge out of court, and not as a limitation upon the power of the court; and such order may be modified at any special term held by any judge. *Long v. Stafford*, 103 N. Y. 274, 8 N. E. 522.

Only the exceptions are sent to the general term (appellate division). The only function of the latter court is to grant or deny a motion for a new trial made upon the exceptions and to order judgment accordingly; it cannot go further and dismiss the complaint upon the merits. *Matthews v. American Cent. Ins. Co.* 154 N. Y. 449, 39 L.R.A. 433, 48 N. E. 751. The evidence cannot be reviewed in order to set aside the verdict as excessive or against evidence. *Post v. Hathorn*, 54 N. Y. 147; *Metropolitan Nat. Bank v. Sirret*, 97 N. Y. 320; *Ross v. Harden*, 10 Jones & S. 427; *Quinn v. Carr*, 4 Hun, 259; *Hoxie v. Greene*, 37 How. Pr. 97; *Amy v. Stein*, 16 Jones & S. 512; *Sheridan v. New York*, 12 Misc. 47, 33 N. Y. Supp. 71. But where there has been an exception taken to a refusal to direct a verdict in favor of a party against whom a verdict has been directed, the general term may consider

whether there was such an absence of evidence to support a material finding that the court cannot determine as matter of law that the fact found was not proved. *Metropolitan Nat. Bank v. Sirret*, 97 N. Y. 320 (per Andrews, J.).

The words "subject to the opinion of the court at general term" in an order directing a verdict and ordering exceptions to be heard in the first instance at general term, do not deprive the unsuccessful party of the benefit of the exceptions, as such words will be regarded as surplusage. *Durant v. Abendroth*, 69 N. Y. 148, 25 Am. Rep. 158. But if a verdict is ordered subject to the opinion of the general term without a qualification, exceptions cannot be heard and the only question before the general term is, Which party is entitled to final judgment on the uncontroverted facts? *Ibid.*; *Byrnes v. Cohoes*, 67 N. Y. 204.

No appeal lies from the general term order denying a motion for a new trial made on the exceptions and directing the judgment to be entered on a verdict. Judgment should be entered as ordered and an appeal taken from the judgment. *Delaware, L. & W. R. Co. v. Burkhard*, 109 N. Y. 648, 16 N. E. 550. And an appeal from the judgment so entered lies directly to the court of appeals, and not to the general term which should not be required to hear an appeal from its own decision, notwithstanding a Code provision that upon denial of a motion for a new trial "judgment may be taken as if a motion for a new trial had not been." *Martin v. Platt*, 131 N. Y. 641, 30 N. E. 565. A judgment entered on an order by the appellate division overruling the exceptions denying a motion for a new trial based thereon and ordering judgment on the verdict is "a judgment of affirmance" within the meaning of a Code provision providing that no appeal lies to the court of appeals from a judgment of affirmance in an action to recover damages for injuries resulting in death, where the decision of the appellate division is unanimous. *Huda v. American Glucose Co.* 151 N. Y. 549, 45 N. E. 942.

3. Motion for nonsuit.

A motion for a nonsuit cannot be made after verdict, but only renewed when it was previously made, and leave to renew was reserved.¹

¹ *Downing v. Mann*, 3 E. D. Smith, 36, 9 How. Pr. 204; *Hendrick v. Stewart*, 1 Overt. 476. And see *Onondaga County Mut. Ins. Co. v. Minard*, 2 N. Y. 98. A voluntary nonsuit cannot be taken after verdict and judgment. *Brown v. King*, 107 N. C. 313, 12 S. E. 137. Nor after the court had directed a verdict which has been written out and is being signed by the jurors. *Ritchie v. Arnold*, 79 Ill. App. 406. Compare *Lockett v. Ft. Worth & R. G. R. Co.* 78 Tex. 211, 14 S. W. 564, holding that a voluntary nonsuit may be taken after the court has

withdrawn the case from the jury and has peremptorily directed the verdict.

The court is expressly authorized by statute in New York to reserve its decision on a motion for nonsuit pending the assessment of damages by the jury or their determination of any question of fact submitted to them. *Caspers v. Dry Dock, E. B. & B. R. Co.* 22 App. Div. 156, 47 N. Y. Supp. 961.

4. Motion to set aside verdict taken subject, etc.

Where a verdict is directed subject to the opinion of the court, the trial judge may at the same term set it aside and direct judgment for either party.¹

¹New York Code Civ. Proc. § 1185. In such case the other party can except § 994, and have the judgment reviewed thereon by appeal. But in the absence of an exception to the direction of the verdict, or of an appeal from the order denying the motion for a new trial, the correctness of the determination of the court in directing the verdict cannot be reviewed. *McCarthy v. Hiller*, 26 App. Div. 588, 50 N. Y. Supp. 626.

5. Further questions.

After verdict in a cause tried by jury, it is irregular to proceed to determine further questions involved in the issues by the findings of the judge¹ or by a reference.²

¹*Parker v. Laney*, 58 N. Y. 469, reversing 1 Thomp. & C. 590; *National Horse Importing Co. v. Novak*, 95 Iowa, 596, 64 N. W. 616. But where no objection appears the proceeding, though irregular, will be presumed to have been adopted by consent. *Shepherd v. Jones*, 71 Cal. 223, 16 Pac. 711.

Nor can the court decide the case upon the evidence after the disagreement and discharge of the jury. *Murray v. Hauser*, 21 Mont. 120, 53 Pac. 99.

²See ante, chapter XXI., § 23.

6. Dismissing for want of jurisdiction.

Under the act of Congress of March 3, 1875,¹ a circuit court of the United States may, even after verdict, entertain a motion to dismiss for want of jurisdiction.²

¹1 U. S. Rev. Stat. Supp. p. 83, § 5.

²*Hartog v. Memory*, 23 Fed. 835, reversed in 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521, on the ground that the evidence on which the

circuit court acted in dismissing the suit was irrelevant and wholly immaterial to the issues and that no opportunity was afforded the adverse party to be heard upon the motion and to rebut such evidence.

7. Certificate for costs.

Where the title to real property comes in question or any fact appears whereby either party becomes entitled to costs or to increased costs as prescribed by law, the judge may, upon the application of the party to be benefited thereby, either before or after the verdict is rendered, make a certificate stating the fact.¹

¹Such a certificate is a proper mode of ascertaining the fact, though there be no statute authorizing it. *Farrington v. Rennie*, 2 Cal. Cas. 220; *Jackson v. Randall*, 11 Johns. 405. By the New York, statute, the judge is required to make it. Code Civ. Proc. § 3248.

It relates only to facts appearing upon the trial. *Willey v. Shaver*, 1 Thomp. & C. 324; *Baine v. Rochester*, 85 N. Y. 523, *dicta*.

It is not needed in reference to an extrinsic fact, such as plaintiff's omission to present his claim against a municipal corporation to its chief fiscal officer before suing. *Baine v. Rochester*, 85 N. Y. 523. Nor can a party complain of the absence of the certificate where he is exempted from the payment of the costs personally by the order imposing them. *Meltzger v. Doll*, 91 N. Y. 365.

Where the statute expressly refers the question to the determination of the judge, a finding of the jury upon it is not necessarily conclusive upon him. *Hunt v. Leon*, 3 Johns. Cas. 140. So, by New York Code Civ. Proc. § 3248, the certificate may be made before or after verdict.

8. Certificates of probable or reasonable cause.

Circumstances which warrant suspicion¹ or reasonable doubt as to the construction of a statute² may be probable or reasonable cause under the United States statutes respecting certificates.³

Reasonable cause and probable cause mean the same thing.⁴

An application for a certificate of probable cause is so far distinct from the trial that the court has power to entertain it after the trial, and may hear evidence not taken at the trial.⁵

¹The *Gala Plaid*, 1 Brown Adm. 1, Fed. Cas. No. 5,183 (probable cause for seizure); *The George*, 1 Mason, 24, Fed. Cas. No. 5,328; *The Thompson* (*The Isabella Thompson v. United States*) 3 Wall. 155, 13 L. ed. 55; *Locke v. United States*, 7 Cranch, 339, 3 L. ed. 364; *The Olinde Rodrigues*, 174 U. S. 510, 43 L. ed. 1065, 19 Sup. Ct. Rep. 851; *United States v. Mexico*, 25 Fed. 924.

- ² *United States v. Riddle*, 5 Cranch, 311, 3 L. ed. 110; *The Friendship*, 1 Gall. 111, Fed. Cas. No. 5,125. Seizure made under a construction of a statute adopted by the secretary of the treasury in conformity with the opinion of the attorney general is made upon probable cause. *United States v. Recorder*, 2 Blatchf. 119, Fed. Cas. No. 16,130.
- ³ U. S. Rev. Stat. §§ 970, 989, U. S. Comp. Stat. 1901, pp. 702, 708.
- ⁴ *United States v. One Sorrel Horse*, 22 Vt. 655; *United States v. The City of Mexico*, 25 Fed. 924.
- ⁵ *The Gala Plaid*, 1 Brown, Adm. 1, Fed. Cas. No. 5,183 (§ 970); *United States v. Abatoir Place*, 106 U. S. 160, 27 L. ed. 128, 1 Sup. Ct. Rep. 169. An application may be made after execution issued on a judgment and need not necessarily be made before the judge who tried the cause. *Cox v. Barney*, 14 Blatchf. 289, Fed. Cas. No. 3,300.

9. Additional allowance.

Applications for an additional allowance can only be made to the court before which the trial is had, or the judgment rendered, and must in all cases be made before final costs are adjusted.¹

- ¹ New York general rule 45 (1896). But in the New York first judicial district this rule does not authorize the application to be made out of that district, even before the same judge who tried the case. *Hun v. Salter*, 92 N. Y. 651, citing Code Civ. Proc. § 769, as controlling the rule. Failure to promptly object to the making of a motion for extra allowance before a judge who did not preside at the trial is a waiver of the irregularity (*Wiley v. Long Island R. Co.* 88 Hun, 177, 34 N. Y. Supp. 415),—especially where the judge before whom the motion was made is nearly as well informed as to the nature of the issue as the judge who presided. *Wilber v. Williams*, 4 App. Div. 444, 38 N. Y. Supp. 893.

Special term and trial term not the same court within this rule. *Toch v. Toch*, 9 App. Div. 501, 41 N. Y. Supp. 353.

The "final costs" contemplated by this rule are the costs which are inserted in the final judgment rendered in the trial court. *Winne v. Fanning*, 19 Misc. 410, 44 N. Y. Supp. 262.

The effect of an adjustment of costs upon a motion for an additional allowance is not changed because other costs awarded on an application to open a default still remain to be adjusted. *Jones v. Wakefield*, 21 N. Y. Week. Dig. 287.

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